

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Merrily McCabe & Robert R. Coe, Editors

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VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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CLAIM NO. C 286853

October 2, 1980

EMROY G. FLETCHER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 19, 1971, claimant suffered a compensable injury to his right knee for which this claim was established. The claim was closed and claimant's aggravation rights have expired.

The SAIF Corporation (SAIF), on September 18, 1980, forwarded to the Board various medical reports which indicated claimant had been hospitalized on August 25, 1980 for an arthroscopy and valgus producing high tibial osteotomy on claimant's right knee. Dr. Graham related the need for this treatment to claimant's 1971 injury and requested this claim be reopened. The SAIF indicated it did not oppose this request.

The Board, after examining the material submitted to it, finds the evidence is sufficient to warrant a reopening of this claim effective August 25, 1980 for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. A 42 CC 146562 RG

October 2, 1980

VIOLA H. MAGDEN (STERN), CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

The Board issued its Own Motion Determination in the above entitled matter on September 19, 1980. It has since been advised that it made an error in sending a copy of the order to the SAIF Corporation. The order should be amended to show that Aetna Casualty and Surety Company is the carrier for the employer at the time of claimant's 1972 industrial injury and is responsible for the award granted to claimant.

IT IS SO ORDERED.

CLAIM NO. C 407286

October 2, 1980.

ROBERT C. PARROTT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 26, 1980, the SAIF Corporation (SAIF) forwarded to the Board copies of certain parts of this claim file. SAIF advised the Board claimant had originally suffered a compensable injury on August 15, 1972 and his aggravation rights had expired.

Dr. Armbrust, on August 18, 1980, hospitalized claimant for low back and left leg pain. On August 22, 1980, claimant underwent an extension of the L4-5 laminotomy and excision of a herniated disc with an extruded fragment.

SAIF advised the Board it did not oppose an Own Motion Order reopening this claim for this additional surgery.

The Board, after reviewing the material submitted to it, finds the evidence sufficient to warrant reopening of this claim effective August 18, 1980 for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. 87-CN 17170 S

October 2, 1980

ROMELIA GONZALEZ SANCHEZ, CLAIMANT
January Roeschlaub, Claimant's Atty.
Noreen Saltveit, Employer's Atty.
Own Motion Order

In April 1979, claimant requested, by and through her attorney, the Board exercise its own motion jurisdiction and reopen this claim. Claimant had originally suffered a September 3, 1970 injury and her claim was initially closed by a Determination Order, dated August 5, 1971. Her aggravation rights have expired. Attached to claimant's request was a report from Dr. Charles Fagan. In that report, Dr. Fagan stated that claimant had marked decreased function of her extremities. He could not state whether this related to her old herniated intervertebral disc or an intervening neurological difficulty. Dr. Fagan also was not sure how much of claimant's problems were psychogenic. He asked that her claim be reopened. The employer, through its carrier, indicated that it opposed the reopening of the claim. The Board deferred reopening this claim until additional medical reports were forwarded to it.

In February 1980, Dr. J. K. Olson-Garewal reported that claimant had severe L4-5 radiculopathy which had been confirmed by a myelogram. He related this condition to claimant's original injury of 1970. Copies of this report were forwarded to the employer and its carrier.

In September 1980, the carrier advised the Board it still opposed reopening of this claim under the Board's own motion jurisdiction. It was their opinion that Dr. Fagan should be given more weight than Dr. Olson-Garewal.

There is also pending in the Hearings Division a case concerning claimant's appeal of the carrier's refusal to pay the various medical expenses according to ORS 656.245. (WCB Case No. 79-9700).

The Board, after reviewing all the material in this file, finds it would be in the best interest of the parties that this case be referred to the Hearings Division to schedule a hearing in the own motion claim to be consolidated with WCB Case No. 79-9700. The Referee shall determine if claimant's current back condition, which has been diagnosed as severe L4-5 radiculopathy, is related to her 1970 injury and represents a worsening thereof since the last award or arrangement of compensation in that case. Upon conclusion of the hearing, the Referee shall make a recommendation and forward that recommendation along with the transcript of the proceedings and other exhibits introduced at the hearing to the Board. The Referee shall also enter an appealable order in WCB Case No. 79-9700.

WCB CASE NO. 79-4245

October 2, 1980

DELORES M. TYLER, CLAIMANT
A.C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Board on claimant's request the Board review the Referee's order which approved the SAIF Corporation's (SAIF) denial of responsibility for her headaches and left arm problems. Claimant contends the Referee erred in doing so. The Board finds the Referee correctly recited the facts in this case, except for an error in indicating Dr. Stephen Stolzberg is a psychiatrist when, in fact, he is a neurologist.

The Board, after de novo review, modifies the Referee's approval of SAIF's denial. The lay testimony establishes the claimant's job involved stress and pressure. Drs. Hongo and Hill, who have been involved in treating claimant, are of the opinion that it is reasonably probable, medically, that the stress, pressure and tension of claimant's job with this employer was a material contributing factor, among others, which produced her condition of headaches for which they had treated claimant. The Board finds the opinions of the treating physicians to be more persuasive than that of Dr. Deanna Stolzberg, who examined claimant and was not involved in treating her. Therefore, the Board reverses that portion of the Referee's order which affirmed SAIF's March 9, 1979 denial of claimant's headaches. The evidence does not establish that claimant's left arm pain, whatever its cause, is related to her employment. Therefore, the Board affirms the denial of that condition. The Board remands that claim to SAIF for acceptance and payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.268. Claimant's attorney is entitled to a fee for prevailing in overcoming SAIF's denial.

The Board affirms the remainder of the Referee's order.

ORDER

The order of the Referee, dated December 24, 1979, is modified.

The SAIF Corporation's denial of March 9, 1979 of claimant's claim for her headache condition is set aside. This claim is remanded to it for acceptance and payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.268.

Claimant's attorney is hereby entitled to an attorney's fee for his services both at the Hearings level and at Board level equal to \$1,100, payable by SAIF Corporation.

The remainder of the Referee's order is affirmed.

KARL JO ANNEN, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

This case is before the Workers' Compensation Board on claimant's request that the Board review the Referee's order which affirmed the employer's denial of his claim. Claimant contends that he has proven that his claim is compensable and that the denial entered by the employer was late and he is entitled to penalties and attorney's fees because of the late denial. The Board finds that the Referee correctly recited the facts in his order.

After de novo review of the record in this case, the Board reaches a somewhat different conclusion than that reached by the Referee. The Board does concur with the Referee on finding that this claim is not compensable. The greater weight of the evidence does not support claimant's contention that this claim is compensable. Therefore, the Board would affirm the Referee's affirmation of the employer's denial.

However, the Board finds that penalties and attorney's fees must be assessed against the employer and its carrier for its late denial of claimant's claim. The employer, on or about July 17, 1979, had notice of this claim. However, a denial was not issued until September 26, 1979, two days late. The Board would assess a penalty equal to 15% of the compensation payable to the claimant from September 18, 1979 to September 26, 1979 and assesses an attorney's fee payable to claimant's attorney in the sum of \$100 for this late denial.

The Referee's order, dated April 1, 1980, is modified.

Claimant is hereby awarded an amount equal to 15% of the compensation for the period from September 18, 1979 to September 26, 1979. Claimant's attorney is hereby awarded an attorney's fee in the sum of \$100 for the employer-carrier's late denial of this claim.

The remainder of the Referee's order is affirmed.

October 6, 1980

GEORGE COOPER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim for a November 21, 1967 compensable left leg injury was referred for a consolidated hearing with another case which was pending in the Hearings Division. The claim had been originally closed by a Determination Order, dated May 21, 1968, which awarded claimant temporary total disability compensation and compensation equal to 10% loss of his left leg and 10% unscheduled disability.

Claimant, by and through his attorney, in July 1977, requested the Board reopen this claim under its own motion jurisdiction. Claimant's aggravation rights had expired. The Board, finding that claimant had also been involved in a compensable injury in 1976, referred this matter to the Hearings Division to resolve the issue of whether claimant's condition at that time was related to his 1967 injury and represented a worsening thereof since the last arrangement and award of compensation or is a result of his 1976 injury. After the hearing, the Referee found that claimant's current left leg problems are a direct result of the 1967 injury. He was unable, however, to rate the permanent disability claimant has due to the wide range of medical considerations and lack of specificity in claimant's testimony. The Board forwarded this file to the Evaluation Division for a recommendation with respect to claimant's loss of function of the left leg.

The Evaluation Division advised the Board that in 1968 claimant had a full range of motion of the left leg and had no instability. The only objective finding at that time was a 1/2-inch shrinkage of the left thigh. Dr. Snell reported that claimant had only minimal residuals in his left leg. Obvious atrophy of the distal quadriceps and biceps musculature was found. There was also a diminished sensation of the lateral left calf. Right knee reflex was more active than the left. Based on all the evidence submitted to it, the Evaluation Division recommended that claimant be granted additional award of 15% loss of his left leg, making a total award of compensation equal to 25% of the loss of the left leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation equal to 22.5 degrees for 15% loss of the left leg. This award is in addition to the previous award he has been granted for this injury.

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 \$3,000.

WCB CASE NO. 80-8104 October 6, 1980

JEFFERY L. DAWLEY, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Schwabe, Willaimson, Wyatt, Moore
& Roberts, Employer's Attys.
Own Motion Order

On September 5, 1980, claimant filed a request for hearing in WCB Case No. 80-8104. The date of injury involved in that case was April 24, 1975. Claimant recited the issue as being the denial of his claim issued on August 19, 1980, attorney fees, failure to reclassify the claim as disabling, payment of all causally related medical expenses and penalties and attorney fees.

On the same date, claimant also requested the Board to exercise its own motion jurisdiction and open the claim for the April 24, 1975 injury. Claimant's injury occurred when he ingested a small amount of Vanisol while working for Mack Trucks, Inc. This injury was classified as a non-disabling injury. Claimant recited in his request that since April 26, 1975 he had sought continuous treatment due to this injury. It was indicated that claimant continues to have chest pain, difficulty in breathing and swallowing, constant post-nasal drainage, nervousness and sleeplessness. Claimant, by and through his attorney, requested that the Board issue an order which would reopen this claim for the payment of all benefits provided by law, reclassify this claim as disabling, provided temporary total disability benefits from May 31, 1975 until terminated pursuant to ORS 656.278, order the payment of all current and accruing causally related medical expenses and award claimant's attorney a fee. In the alternative, claimant requested this claim be referred to the Hearings Division for a recommendation from the Referee after a hearing was held in tandem with the other pending case.

The Board, after reviewing all the evidence submitted to it, and claimant's request, finds it would be in the best interests of the parties if claimant's request for own

motion relief was remanded to the Hearings Division to be set for a hearing with the case currently pending in the Hearings Division. The Referee shall determine if the Board should exercise its own motion jurisdiction and reopen this claim for payment of all benefits and compensation provided for by law, if this claim should be reclassified as disabling, if claimant is entitled to temporary total disability compensation from May 31, 1975, and if claimant is entitled to have all accrued and occurring causally related medical expenses paid for by the employer. The Referee, at the termination of the hearing, shall cause a transcript of the proceedings to be prepared and forwarded along with his recommendation on the above issues and all the evidence introduced at the hearing to be forwarded to the Board for its consideration.

IT IS SO ORDERED.

CLAIM NO. ZD 307161

October 6, 1980

DORA E. DENSBERGER, CLAIMANT
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 19, 1980, claimant, by and through her attorney, requested the Board exercise its own motion jurisdiction and reopen this claim for the June 4, 1978 injuries to her neck, back and hands. Attached to this request were various documents. This claim was closed by a February 9, 1979 Determination Order which granted claimant an award of temporary total disability compensation and compensation equal to 16° for 5% for her low and mid back injury. This claim was reopened for treatment to her thumbs and closed by a July 10, 1979 order which granted no additional permanent partial disability. Claimant's aggravation rights have not expired. Claimant requested a hearing on the July 19, 1979 Determination Order. On August 16, 1979, claimant entered into a stipulation which gave her an additional award of compensation for back and forearms. The requests for hearing were dismissed.

The Board, after reviewing the material submitted to it along with claimant's request, finds the evidence is not sufficient to warrant the reopening of this claim at this time. Claimant had the opportunity prior to entering into the stipulation of contesting the adequacy of the awards of compensation, but failed to do so. The Board does not find the facts in this case warrant the reopening of this claim under its own motion jurisdiction.

ORDER

Claimant's request for own motion relief is denied.

CLAIM NO. ZA 865987 October 6, 1980

JOHN HENRY ELWELL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim was reopened by an Own Motion Order, dated September 28, 1979, effective as of the date claimant was hospitalized for surgery recommended by Dr. Waldram. Dr. J. Betts, on November 14, 1979, hospitalized claimant and on the next day operated on both of his eyes.

The Orthopaedic Consultants, in January 1980, reported claimant's left knee condition was not stationary. They felt claimant had advanced progressive traumatic and degenerative arthritis of the left knee, which was related to claimant's 1961 injury. Dr. Sirounian was treating claimant for this problem.

Dr. Betts, on February 28, 1980, again operated on claimant. This surgery was on claimant's left eye and consisted of a bone graft from the illiac fossa to the orbital floor of the left eye and reinsertion of the inferior rectus and recession of the superior rectus of the eye.

In May 1980, Dr. Hamel, O.D., reported claimant had been fitted with glasses. Dr. Betts reported claimant had 20/20 vision minus two in the distance and in the near 20/30.

On August 15, 1980, Dr. Sirounian opined claimant's condition was medically stationary. He felt claimant would need additional palliative treatment and possibly a total knee replacement in the future.

On September 2, 1980, the SAIF Corporation requested a determination of claimant's disability be made. The Evaluation Division of the Workers' Compensation Department, on September 18, 1980, recommended claimant be awarded additional temporary total disability compensation from November 14, 1979 through August 15, 1980 and recommended no additional permanent partial disability for loss of vision.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from November 14, 1979 through August 15, 1980, less time worked. The record indicates that this award has already been paid to claimant.

CLAIM NO. GC 449993

October 6, 1980

DELBERT D. GRAY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 12, 1980, the Board entered an Own Motion Order ordering this claim be reopened as of the date claimant entered the Northwest Pain Clinic program. Claimant entered this program on July 22, 1980. Dr. Seres reported that he was discharged on August 8, 1980. The final diagnosis was chronic mechanical low back pain with no evidence of nerve root compression and status post-operative laminectomy and foraminotomy. Dr. Seres did not feel that claimant was motivated to return to work. On September 18, 1980, SAIF Corporation requested that a determination be issued in this case since claimant's condition was now medically stationary. SAIF forwarded to the Board the entire file in this case. SAIF indicated that it had paid claimant temporary total disability compensation for the period from July 22, 1980 through September 5, 1980. The Board, after reviewing the material in this file, finds that claimant is entitled to an award of additional temporary total disability compensation for the period of July 22, 1980 through August 8, 1980, but is not entitled to any additional award of permanent partial disability. SAIF is to be given credit for the temporary total disability compensation it paid claimant. The Board feels that in this case claimant should be referred to the Field Services Division for intensive effort to place him in employment which he is capable of performing.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 22, 1980 through August 8, 1980, less time worked. The evidence indicates that SAIF Corporation has already paid this award to claimant.

WCB CASE NO. 79-8769

October 6, 1980

ROBERT H. KLINEBOUGH, CLAIMANT
Robert H. Grant, Claimant's Atty.
Thomas E. McDermott, Employer's 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 Referee is final by operation of law.

CLAIM NO. 76768

October 6, 1980

JAMES A. POELWIJK, CLAIMANT
Richard E. Fowlks, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Own Motion Order

On September 16, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen this claim for his August 7, 1973 injury. This claim was initially closed by a Determination Order, dated February 28, 1974, and claimant's aggravation rights have expired. It was indicated that claimant injured his back while returning from his place of employment on May 10, 1980. Claimant had fallen and as a result of this fall his fusion, which had been done for his 1973 injury was fractured. Claimant was operated on September 5, 1980 and the fracture was surgically repaired.

On September 18, 1980, the employer advised the Board that it had received a copy of claimant's request for own motion relief. It strenuously opposed any order reopening this case at this time. The employer noted that claimant's most recent treatment was due to an intervening injury which occurred off his job.

The Board, after reviewing the evidence submitted to it, finds the evidence does not warrant a reopening of this claim under its own motion jurisdiction at this time. This is based on the fact that there was no medical support furnished by claimant to support his request. Further, that the evidence before the Board indicates that claimant has suffered an intervening injury for which he obtained additional treatment.

ORDER

Claimant's request that the Board exercise its own motion jurisdiction and reopen his claim is denied.

WCB CASE NO. 79-9562 October 6, 1980

RICHARD M. SPILLERS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order Denying Motion

The Board is in receipt of a motion to dismiss claimant's request for review. SAIF Corporation found no basis for claimant's appeal and recommended the case be dismissed. The Board finds that claimant has appeal rights from the final order of the Presiding Referee, dated April 18, 1980. The Board will proceed to review the sole issue in this case which is the propriety of the Referee's order. Any issues raised at the earlier hearing cannot be considered in this Board review.

The employer's motion to dismiss claimant's request for review should be denied.

IT IS SO ORDERED.

October 8, 1980

JOHN BARROWS, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

This case is before the Workers' Compensation Board on claimant's request it review the Referee's order which affirmed the permanent partial disability awards claimant had previously received. Claimant contends he is entitled to an award of compensation equal to 80-85% unscheduled disability for his 1971 injury. The Board finds the Referee correctly recited the facts in his order.

After a de novo review of the record in this case, the Board reaches a different result than that of the Referee. The last award of compensation in this case was made by the July 30, 1979 Determination Order. The only subsequent medical report is the February 5, 1980 report of Dr. Mason. He reported claimant had marked limitation of cervical movement and marked limitation of movement of the back. It was Dr. Mason's opinion claimant has significant spondylosis of the cervical and lumbar spine and significant disability. The Board, after reviewing this case, comparing the facts in it with other cases, finds claimant is entitled to an increase in his award of compensation. The Board finds claimant is entitled to an award of compensation equal to 112° for 35% unscheduled disability for his November 15, 1977 upper and low back injury.

ORDER

The Referee's order, dated March 17, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 112° for 35% unscheduled disability for his upper and low back injury. This is in lieu of any previous awards of unscheduled disability for this 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 \$3,000.

October 8, 1980

LINDA LEE HARRY, CLAIMANT
Evelyn Scott Harris, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Of Remand

On September 23, 1980, claimant, by and through her attorney, requested the Board to remand this case to Referee Seifert to consider additional information. Attached to this request was an affidavit of claimant's attorney and various medical reports. Claimant's attorney stated new medical evidence which was not available at the time of the hearing with respect to the clinical testing of claimant and the diagnosis and treatment of claimant had been discovered. Further, claimant was now able to travel to be examined by the SAIF Corporation's doctors, where as before she could not. SAIF Corporation indicated it opposed any order remanding this case to the Referee.

The Board, after being fully advised in this case, finds the best interests of justice would be best served by remanding this case to Referee Seifert to consider the new additional evidence claimant has discovered which was not available at the time of the hearing.

IT IS SO ORDERED.

October 9, 1980

CHARLES F. ANDREWS, CLAIMANT
C.H. Seagraves, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Workers' Compensation Board on the SAIF Corporation's (SAIF) request the Board review the Referee's order which affirmed the award of permanent partial disability granted by the November 24, 1978 administrative Determination Order, ordered temporary total disability compensation from October 31, 1978 until such compensation is terminated and awarded an attorney fee. SAIF contends the awarding of temporary total disability compensation is an error on the Referee's part and the temporary total disability compensation should commence as of January 9, 1979.

The Board finds the Referee correctly recited the facts in his order.

After a de novo review of this case, the Board reaches a different conclusion than that of the Referee. The evidence indicates claimant was discharged from the Callahan Center for his non-cooperation. Then this claim was closed as of that date by an administrative Determination Order issued by the Evaluation Division of the Workers' Compensation Department. The Board finds claimant's condition was not medically stationary and, therefore, no award of compensation for permanent partial disability should have been granted. Further, the closing of this claim was a punitive act for claimant's non-cooperation. To award claimant temporary total disability compensation from the date of this closure until he again was under medical care and treatment would render such action a nullity.

The Board finds the administrative Determination Order correctly terminated temporary total disability compensation. It should not have awarded any permanent partial disability compensation. Further, the Referee erred in ordering temporary total disability compensation from October 31, 1978 to December 5, 1978. The temporary total disability compensation should commence as of December 5, 1978, the date claimant was again under medical treatment. The Board finds the Director of the Workers' Compensation Department does have the authority to suspend payment of compensation in cases such as this.

ORDER

The Referee's order, dated November 5, 1979, as re-issued on December 3, 1979, is modified.

The administrative Determination Order, dated November 24, 1978, is modified by setting aside the award of permanent partial disability. The carrier is entitled to credit the payment of that award against any temporary total disability compensation.

It is further ordered that temporary total disability compensation be paid to claimant from December 5, 1978 until this claim is closed pursuant to ORS 656.268.

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 from December 5, 1978, payable out of said compensation as paid, not to exceed \$750.

October 9, 1980

CHESTER E. BURLESON, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

This case is before the Workers' Compensation Board on claimant's request that the Board review the Referee's order which granted him an award of compensation equal to 320° for 100% unscheduled disability for his low back injury in lieu of any previous awards. Claimant had previously been granted an award of compensation equal to 112° for 35% unscheduled disability by the February 7, 1979 Determination Order. Claimant contends that he is permanently and totally disabled. The Board finds the facts recited by the Referee in his order are correct.

After a de novo review of the record in this case, the Board finds that claimant is permanently and totally disabled. Claimant is 47 years old and has approximately three years of education. He reads at the first grade level. Claimant was classified by Dr. Ackerman as being functionally illiterate. Dr. McGee felt that claimant could be expected to perform light work if he was able to work within the following restrictions: no heavy lifting greater than 25 pounds, avoidance of repetitive bending, twisting with regards to the lumbar spine, avoidance of standing or sitting for prolonged periods of time, and avoidance of prolonged standing, sitting or driving. Dr. McGee felt that with claimant's obviously marked limitations, previous educational experiences, i.e., his lack of reading ability, prognosis for claimant's returning to meaningful work was extremely guarded. Dr. McGee was hesitant to state that claimant was totally and permanently disabled from any type of employment on a regular basis. Claimant has attempted to improve his reading ability, but has not gotten past the primer reading stage. Dr. Ackerman felt that claimant would need vocational counseling and rehabilitation in order to become employable. However, based on claimant's past educational history, his age, his illiteracy and borderline intellectual ability, and his history of non-successful educational efforts, Dr. Ackerman felt the feasibility for re-employment was extremely marginal. He felt that claimant would qualify only for light, unskilled and sedentary labor for no more than one or two hours per day. Dr. Ackerman could not conceive of any employer who would employ a worker with such restrictions.

Claimant's prior work experience consists of mainly manual heavy types of employment. Besides working as a truck mechanic he has worked hauling trash, as a laborer in a sawmill, loading box cars and performed various other jobs in sawmills and on farms. Dr. Martins, in April 1979, opined that after reviewing Dr. Ackerman's report, claimant was not apt to return to any gainful or suitable employment because of his disability. He based this opinion on claimant's prior work experiences, his attempts from the past to return to obtain more education and retraining and his lack of success in doing so.

The Board finds that the preponderance of the evidence in this case supports claimant's contention that he is permanently and totally disabled. Both medical reports and opinions indicate that claimant is unable to perform, on a regular basis, any gainful and suitable occupation. It is obvious from the reports in this file that any attempt at vocational rehabilitation for this claimant because of his illiteracy, age, and past failures in trying to further his education would be futile. After this injury, claimant did attempt on more than one occasion to return to his previous employment, but he was unable to perform that work. It appears that the consensus of the medical reports is that claimant can do only a limited number of hours of work per day, in the range at most two to three hours per day. This would prohibit him from being hired by any employer. The Board finds that the greater weight of the evidence in this case establishes that claimant is permanently and totally disabled. Therefore, the Board would grant claimant an award of permanent total disability effective the date of the Referee's order.

ORDER

The Referee's order, dated March 31, 1980, is modified.

Claimant is hereby granted an award of permanent and total disability effective the date of the Referee's 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, payable out of said compensation as paid, not to exceed \$3,000.

October 9, 1980

CAROL J. FELLOWS, CLAIMANT
John Patrick Cooney, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF) request the Board review the Referee's order which granted claimant an award of compensation equal to 37.5 degrees for 25% loss function of his right leg. The SAIF contends this award is excessive.

The Board finds the Referee correctly recited the facts in his order.

The Board, after de novo review, reverses the Referee's decision in this case. Dr. McIntosh, in December 1978, reported claimant had some symptoms and would have to learn to live with them. No additional surgery was suggested. Claimant does have laxity of the medical collateral and anterior cruciate ligaments. She was granted an award of compensation equal to 22.5 degrees for 15% loss of function of her leg. The medical evidence in this case does not support the increased compensation granted by the Referee.

Further, claimant had not lost weight to reduce the disability she suffers due to this injury. Claimant has been described as grossly overweight. It has been suggested that she lost weight, but has not done so. If claimant lost weight, her knee would be placed under less stress. This would result in the reduction of the symptoms claimant experiences in her knee and reduce the amount of disability claimant has in her leg.

The Board does not find the totality of the evidence supports an increase in claimant's award of compensation. It finds claimant has been correctly compensated by the Determination Orders in this claim. Therefore, the Board reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated December 28, 1979, and Order of Reconsideration, dated March 31, 1980, are reversed in their entirety.

The February 9, 1979 Determination Order is restored and affirmed.

October 9, 1980

BILLY JOE HARRISON, CLAIMANT
Lawrence L. Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Workers' Compensation Board on claimant's request that the Board review the Referee's order which granted claimant compensation for temporary total disability, a penalty equal to 25% of the temporary total disability compensation to claimant for the period of February 16, 1979 through March 6, 1979, reversed the SAIF Corporation's (SAIF) denial of claimant's aggravation and granted claimant an award of compensation equal to 95 degrees for 30% unscheduled disability. Claimant contends his condition is not medically stationary, he is entitled to an additional award of temporary total disability compensation or, in the alternative, if his condition is stationary, he is entitled to additional compensation for his permanent partial disability.

Claimant, a 27-year-old truck driver, on October 26, 1975, suffered multiple injuries when his vehicle turned over on an icy road in Idaho. This injury resulted in claimant suffering compression fractures of D11-12, T12-L1, fracture of his left clavicle and the fracture of four ribs. After this injury, claimant also developed a condition which was diagnosed as positional vertigo which was related to his injury. Dr. James Baldwin released claimant for regular work on April 18, 1976.

The Orthopedic Consultant, in July 1976, diagnosed healed compression fractures D11 and D12 with continuing residual radicular pain, healed left clavicle fracture, healed multiple rib fractures and mild tendinitis in the right shoulder. It was their opinion claimant was unable to return to his previous employment as a truck driver. They recommend that he change jobs to a more sedentary type of occupation. Dr. Cherry concurred with the Orthopedic Consultants that claimant would be unable to return to his job as a truck driver.

Claimant has a 12th grade education plus approximately 1-2/3 years of police science study in a community college. His sole occupation has been that of a truck driver.

In September 1976, Dr. Mason, the medical examiner of the disability Prevention Center opined that claimant could return to work as a truck driver after a period of adequate physical rehabilitation. However, he felt it was advisable that claimant do no excessive lifting, bending, and twisting at the beginning of his employment.

In February 1977, Dr. Pasquesi reported that claimant's condition was stationary. He reported that claimant continued to have chronic dorsolumbar pain. He rated claimant's impairment as 19% of the whole man.

In October 1976, claimant was referred for vocational assistance. However, in March 1977, he was found to be ineligible because claimant had decided to engage in a business of his own.

A Determination Order, dated March 25, 1977, awarded claimant temporary total disability compensation from October 26, 1975 through March 14, 1977 and granted claimant compensation equal to 32 degrees for 10% unscheduled disability for his head and back injuries. A Stipulation was entered into on September 11, 1977 which provided that claimant agreed to accept additional compensation equal to 10% unscheduled disability for which he would dismiss his request for hearing in which he claimed additional medical, vocational, and temporary total disability compensation as well as additional permanent partial disability than that he has been awarded by the March 25, 1977 Determination Order.

In April 1978, claimant was referred for vocational assistance again. He had been working as a truck driver, but had developed difficulty in performing that job and sought lighter work.

In February 1979, Dr. Cherry reported that claimant had been involved in an automobile accident on January 18, 1979 and had difficulty with his neck after that injury. He indicated that claimant also had aggravated his low back condition. Dr. Cherry prescribed Darvon and physical therapy for claimant. He felt that this claim should be reopened for treatment and that claimant should be retrained for another occupation. Dr. Cherry diagnosed healed fracture of the clavicle, healed fractured ribs, right shoulder sprain, residuals of fractures of T11 and 12 and low back strain, all related to claimant's original injury. He felt due to the January 1979 injury, claimant experienced an aggravation of his low back strain with pain in the right lower extremity. He expected that with treatment, claimant's condition would return to that which it had been previous to the January 1979 injury.

Dr. Pasquesi, in March 1979, again examined claimant. He felt that claimant's condition was stationary and that treatment claimant was receiving at that time was palliative rather than curative. Dr. Pasquesi felt that claimant should be assisted in obtaining work which did not require repetitive bending, stooping, twisting, not require him to have to lift more than 50 pounds, and not requiring him to sit or stand through an entire eight hour shift without being able to change his positions as he felt necessary. It was his opinion that claimant's back problems had become worse as they would have been as a result of his original injury. However, he did not feel that claimant had any greater impairment than that which he had previously. Dr. Pasquesi felt that claimant's condition was basically the same as he was willing "to pay the price in pain." Dr. Pasquesi felt that claimant's continuing to drive a truck would aggravate his back condition.

On April 10, 1979, SAIF denied claimant's aggravation claim.

In May 1979, Dr. Cherry indicated that he felt claimant's claim should be reopened on the basis of an aggravation. He felt that claimant's back condition had aggravated before the automobile accident in January 1979.

In October 1979, a vocational counselor reported that claimant's work experience had been basically that as a truck driver. The counselor reported that he had spoken to Dr. Cherry who had placed a 10-pound lifting restriction on claimant and indicated that Dr. Cherry had released claimant for light work. It was noted that claimant had not been seen by Dr. Cherry since June 1979. Dr. Cherry advised the counselor that he felt claimant should limit his bending and should be able to stand part of the time of any job. Claimant was sent on various job leads, but was unable to obtain any employment. He attempted to obtain employment as a dispatcher for a trucking firm as well as a heavy equipment salesperson.

The Referee set aside the denial of claimant's aggravation claim. He ordered SAIF to pay a penalty of 25% of the amount of the first installment of temporary total disability compensation that had not been paid within 14 days and granted claimant an award of compensation equal to 32 degrees for 10% unscheduled disability, making a total award in this case equal to 9 degrees for 30% unscheduled disability. The Referee further granted claimant's attorney a fee out of this increased compensation.

The Board, after de novo review, affirms the Referee's order. The Board finds that the preponderance of the medical evidence indicates that claimant's condition is medically stationary and that he is not entitled to any additional temporary total disability compensation. Further, the Board finds that based on all the evidence in this case, the Referee correctly assessed the loss of wage earning capacity claimant has experienced due to this injury and that his award of compensation compensates claimant accordingly for this loss of wage earning capacity. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated January 23, 1980, as corrected on January 25, 1980, is affirmed.

WCB CASE NO. 77-7327

October 9, 1980

SAMUEL G. HENTHORNE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Atty.
Request for Review by Claimant
Cross-appeal by Employer

This case is before the Workers' Compensation Board on the claimant's and the employer's request that the Board review the Referee's order entered in this case. Claimant contends that he is entitled to additional temporary total disability compensation and an additional award of permanent partial disability. The employer contends that the award of temporary total disability granted by the Referee is incorrect and that claimant did not sustain any permanent partial disability due to this injury.

The Board finds that the Referee correctly recited the facts in his order.

After de novo review of the record in this case, the Board comes to a different conclusion than that reached by the Referee. The Board does not find that claimant is entitled to additional temporary total disability compensation beyond the August 4, 1977 date as granted by the Referee. The Orthopaedic Consultants, in July 1977, reported that claimant's condition was stationary. They felt that claimant could return to the same occupation without limitation or to some other occupation. They rated the loss of function of claimant's back as none. Dr. Hoyt, on August 4, 1977, reported that he felt the Orthopaedic Consultants' work-up was excellent. He noted that claimant's low back problem was one of a chronic recurring condition. It was deemed advisable to change claimant's treatment to include some thoracic and cervical segments. Dr. Hoyt noted that at the time of June 1977 to

late July 1977, claimant's back pain decreased. He felt that claimant would be able to do light work but should have time to strengthen his spine along with "Chiropractic reconstruction". He felt this would take approximately three months. The Determination Order, dated November 10, 1977, terminated temporary total disability compensation effective August 4, 1977. In April 1978, Dr. Hoyt reported that claimant would continue to require palliative care and that this would be necessary even without modified work. He felt that claimant was restricted to a limited amount of lifting, stooping, bending, and twisting type modified employment. He noted that claimant had worked towards stabilization of his condition but this had not been completely accomplished. The Board finds that the medical evidence indicates that claimant's condition was medically stationary and the claim was correctly closed with the termination of temporary total disability as of August 4, 1977. The treatment suggested by Dr. Hoyt could have been provided under the provisions of CRS 656.245. Therefore, the Board reverses this portion of the Referee's order.

Further, the Board does not agree with the Referee's award of permanent partial disability in this case. In 1976, Dr. Neumann felt that claimant would not have any permanent impairment due to this injury. The Orthopaedic Consultants, likewise, concluded that claimant had no loss of function to his back due to this injury. However, Dr. Martens and Dr. Llewellyn both agreed that claimant should not return to his former employment as a millwright. They noted that claimant continued to have pain in his neck and low back after bending, stooping, twisting and heavy lifting. Claimant is in his mid-30's, has a high school education and approximately 10 to 15 hours of work at a community college. Dr. Llewellyn felt that claimant would have to guard against heavy lifting, strenuous lifting, repetitive forward flexion, repetitive twisting, lateral flexation, squatting, and reaching. Additionally, he felt that claimant would have to avoid prolonged standing in a forward flexion position. Claimant has worked at a number of jobs that could be classified as manual labor, including ranching, various occupations in a lumber mill and at the time of this injury was working as a millwright. Based on all the evidence in this case and considering the relevant factors to be used in determining an injured worker's loss of wage earning capacity, the Board finds that the award granted by the Referee was excessive. Based on these same factors, the Board finds that claimant is entitled to an award of compensation equal to 48° for 15% unscheduled disability for this low back injury. This award is in lieu of the award granted by the Referee.

ORDER

The Referee's order, dated February 26, 1978, is modified.

The Referee's award of additional temporary total disability benefits, in addition to those granted by the Determination Order, for the period from August 5, 1977 through November 4, 1977, is reversed.

Claimant is hereby granted an award of compensation equal to 48° for 15% unscheduled disability for his back injury. This award is in lieu of any previous awards of unscheduled disability granted for this injury. The remainder of the Referee's order is affirmed.

October 9, 1980

DALE D. KUNTZ, CLAIMANT
Fitzgibbon & Morrell, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which granted claimant an award of compensation equal to 48% for 15% unscheduled disability for his low back injury. The employer contends the award granted by the Referee is excessive.

The Board finds that the Referee correctly recited the facts of this case in her order.

After de novo review of the record in this case, the Board reaches a different conclusion than that reached by the Referee. Drs. McCoy and Hale opined that claimant had no permanent impairment due to this injury. Dr. Stevens felt that claimant had a possible arthritis or subluxation. Since this injury, claimant has returned to his regular employment and is able to perform his normal work. He indicated that he has lost no strength due to this injury. Further, claimant testified that he has no difficulty doing his off-the-job activities since his injury. He did indicate that after performing strenuous activities such as chopping firewood his shoulder aches. Claimant previously has performed work in the construction field and also work as a barber for a period of time. Claimant also testified that when he lifts heavy objects or engages in activities which require a lot of use of the shoulder he develops pain in the shoulder. Further, he stated that if he is required to work in awkward positions and pull with his arm it also causes pain. Claimant also has difficulty performing work in which his arm is in an overhead position. He feels his arm is stiffer since this injury and continues to complain of pain in the shoulder area. The Board finds that the greater weight of the evidence establishes that claimant has a minimal loss of wage earning capacity due to this injury. It feels that the award granted by the Referee was excessive. The Board finds that claimant is entitled to an award of compensation equal to 16% for 5% unscheduled disability for this injury.

ORDER

The Referee's order, dated January 29, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 16% for 5% unscheduled disability for his shoulder injury. This is in lieu of any previous awards of unscheduled disability for this injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-10,172 October 9, 1980
WCB CASE NO. 79-10,173

TIMOTHY McCULLOM, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Blair & MacDonald, Employer's Attys.
Request for Reveiw by Employer

This case is before the Workers' Compensation Board on the employer's request the Board review the Referee's order entered in this case. The employer contends it did not unreasonably refuse to pay compensation so as to warrant the imposition of penalties; the award of \$600 attorney fee was excessive; and question whether or not there was misconduct by the carrier so as to justify the Referee's awarding of an additional \$250 attorney's fee and ordering the carrier could not "charge back" this to the employer.

The Board finds the Referee correctly recited the facts in his order.

After a de novo review of the record, the Board reaches a slightly different conclusion than that of the Referee. The carrier's original denial of claimant's aggravation claim was not unreasonable. However, after that denial, Dr. LaFrance, on January 10, 1980 reported claimant's condition was not medically stationary and claimant was unable to work. Dr. LaFrance related this to claimant's August 1978 injury. Later, in January, Dr. McGee prescribed physical therapy for claimant. On February 27, 1980, the Orthopaedic Consultants reported to the carrier they felt claimant's condition had worsened and felt claimant should be in an active physical therapy program. They related claimant's current condition to the August 4, 1978 injury. With all of this information before it, the carrier refused to reopen the claim and pay compensation. The Board finds that from this point forward the carrier unreasonably resisted the payment of compensation. The Board would assess a penalty

equal to 25% of the temporary total disability compensation from February 27, 1980 through March 28, 1980; the date of the Referee's order and awards claimant's attorney a fee of \$150 for the carrier's unreasonable resistance to the payment of compensation. This is in lieu of the award granted by the Referee on this issue. The Referee's order is accordingly modified.

ORDER

The Referee's order, dated March 28, 1980, is modified.

Claimant is hereby granted a sum equal to 25% of the temporary total disability compensation from February 27, 1980 through March 28, 1980 as a penalty for the unreasonable resistance to the payment of compensation. Claimant's attorney is granted a fee equal to \$150 for prevailing on this issue.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to \$150, payable by the carrier.

The remainder of the Referee's order not modified by the Board is affirmed.

WCB CASE NO. 79-8823

October 9, 1980

OSLIDIA SOSA, CLAIMANT

Welch, Bruun & Green, Claimant's Attys.

Schwabe, Williamson, Wyatt, Moore

& Roberts, Employer's Atty.

Request for Review by Employer

This case is before the Workers' Compensation Board on the employer's request the Board review the Referee's order which found the September 4, 1978 Determination Order was premature; set it aside; remanded this claim to the employer to reopen effective July 27, 1979 until closure; and awarded claimant's attorney a fee. The employer contends the Determination Order was correctly entered and claimant's neck and back complaints subsequent to July 28, 1979 are not compensable.

The Board finds the Referee correctly recited the facts in his order.

After a de novo review of the record in this case, the Board disagrees with the Referee's conclusions. Dr. Franks', claimant's treating physician, and the Orthopaedic Consultants' reports prior to the September 4, 1978 Determination Order indicate claimant's condition was medically stationary and this claim was ready for closure. Likewise, these reports support only the awarding of compensation for scheduled disability in claimant's right arm. The Board finds the Determination Order was properly entered and closure was not premature..

The greater weight of the evidence does not support claimant's contention that she is entitled to an award of compensation for her condition diagnosed as "possible seronegative rheumatoid arthritis". Dr. Schoepflin, to whom Dr. Franks deferred on this issue, does not relate this condition to claimant's work. He felt claimant's work temporarily aggravated this underlying condition, but by July 1979 her condition had returned to its pre-injury condition. Dr. Setera, D.C., opined claimant did not have rheumatoid arthritis and treated her for a cervical sprain. The greater weight of the medical evidence does not establish the exact condition claimant has, but does establish that whatever the condition is, it is not related to her work.

The Board finds the Referee erred in setting aside the Determination Order and remanding this claim to the employer. Therefore, the Board reverses the Referee's order in its entirety and orders the Determination Order reinstated and affirms it.

ORDER

The Referee's order, dated March 25, 1980, is reversed in its entirety.

The September 4, 1978 Determination Order is restored and affirmed.

October 9, 1980

STANLEY WALLEY, CLAIMANT

Joel B. Reeder, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by the SAIF

This case is before the Workers' Compensation Board on the SAIF Corporation's (SAIF) request the Board review the order of the Referee which granted claimant 45° for 30% loss of the right forearm and 22.5° for 15% loss of the left forearm. SAIF contends the Referee's award of additional compensation is not supported by the evidence and asks that the Determination Order be reinstated.

The Board finds the Referee's order correctly recited the facts in this case.

After a de novo review of the record in this case, the Board concurs with SAIF. The Determination Order awarded claimant compensation equal to 22.5° for 15% loss of the right forearm and compensation equal to 7.5° for 5% loss of the left forearm. The evidence indicates claimant has cutaneous nerve damage in his right forearm. Dr. Sullivan felt it was unlikely the loss of superficial sensation would return. Claimant has full range of motion in both of his wrists and elbows. Claimant testified he has tenderness in his hand and numbness in both forearms and eye. He is still performing the same job he had at the time of the injury. The Board does not find the evidence supports the increased award of compensation granted by the Referee. Dr. Sullivan reports claimant has nerve damage in his right forearm. The Board finds that the Determination Order correctly compensated claimant for any loss of function he has suffered in his forearms due to this injury. Therefore, the Board reverses the Referee's order in its entirety and restores and affirms the May 4, 1978 Determination Order.

ORDER

The Referee's order, dated March 31, 1980, is reversed in its entirety.

The May 4, 1978 Determination Order is restored and affirmed.

October 13, 1980

NORMAN ANLAUF, CLAIMANT
Malagon, Velure & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Reconsideration

The SAIF Corporation (SAIF), on September 25, 1980, requested the Board reconsider its Order on Review entered in this case. SAIF contends the Board is the appropriate party to review the attorney fee issue. The Board holds that the proper body to determine disputes of attorney fees is that of the circuit court in accordance with the provisions of ORS 656.388. Based on this statute, the Board dismissed SAIF's request for review. The Board sees no reason to reconsider its opinion. Therefore, the Board denies SAIF's request for reconsideration.

IT IS SO ORDERED.

October 13, 1980

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

On June 16, 1980, claimant, by and through his attorney requested the Board exercise its own motion jurisdiction and reopen this claim for claimant's January 7, 1953 injury. Claimant's aggravation rights have expired.

In March 1980, Dr. Chuinard reported claimant was complaining of pain in his neck and right elbow and forearm. He felt claimant's condition had worsened since this claim was closed and claimant had more permanent partial disability in the right upper extremity than the 15% he had been awarded. Dr. Chuinard prescribed a course of treatment for claimant which included physical therapy, heat, and exercise to overcome the weakness of the right upper extremity.

The SAIF Corporation (SAIF), on October 2, 1980, advised the Board this claim was originally established for a fractured right wrist. SAIF indicated claimant had received an award of compensation equal to 30% loss of the right hand. It did not feel it was responsible for claimant's current complaints in the upper extremity, elbow and neck.

The Board, after reviewing the material submitted to it, finds the medical evidence is not sufficient to warrant a reopening of this claim at this time. The Board does not find claimant's complaints regarding his right upper extremity, elbow and neck are related to his original injury and represent a worsening thereof since the last award of compensation in this case. Therefore, the Board denies claimant's request for own motion relief.

IT IS SO ORDERED.

WCB CASE NO. 78-9760

October 13, 1980

ELMER BRAGET, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Workers' Compensation Board on the SAIF Corporation's (SAIF) request that the Board review the Referee's order entered in this case. SAIF contends the Referee erred in finding claimant's claim for a myocardial infarction was compensable.

The Board finds that the Referee correctly recited the facts in his order.

After a de novo review of the record in this case, the Board reaches a different conclusion than that of the Referee. The Board finds that the preponderance of the medical evidence in this case establishes that claimant myocardial infarction which occurred on October 2, 1978 was not related to his work. Dr. Sutherland claimant's treating physician, and Drs. Kloster and Lee all opine that claimant's work the day of his myocardial infarction, although hard, was not a material contributing factor to his myocardial infarction. Dr. Griswold was the sole doctor who found that claimant's work activity was a substantial contributing factor to claimant's myocardial infarction. The Board is persuaded by the opinions of Drs. Sutherland, Kloster and Lee. Dr. Sutherland is a cardiologist and also was the treating physician. Therefore, the Board reverses the Referee's order in its entirety and would affirm SAIF's denial, dated November 30, 1978.

ORDER

The order of the Referee, dated December 10, 1979, is reversed in its entirety.

The SAIF Corporation's denial of November 30, 1978 is reinstated and affirmed.

WCB CASE NO. 79-6818 October 13, 1980
WCB CASE NO. 79-6817

TONNE GANGER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
G. Howard Cliff, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Industrial Indemnity

Industrial Indemnity, carrier for St. Charles Medical Hospital, seeks Board review of the Referee's order which found claimant had sustained a new compensable injury and remanded the matter to it for acceptance and payment of compensation to which she was entitled. It was also directed to make such necessary monetary adjustments with the SAIF Corporation to reimburse it for any compensation it paid to 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.

St. Charles Medical Hospital and its compensation carrier, Industrial Indemnity, requested the Board review the award of attorney fees in this case, as well as the issue of responsibility for claimant's current condition. The Board will not determine the issue of attorney fees. CRS 656.388 provides that if there is a dispute between an attorney and the Referee or Board the proper forum to resolve that dispute is the circuit court in the county in which the claimant resides. It sets forth the procedure to be followed. If the employer and its insurance carrier are persuaded that the award of attorney fees is excessive, the proper forum to resolve that issue is the circuit court.

ORDER

The order of the Referee, dated March 28, 1980, is affirmed.

The claimant's attorney is hereby granted as a reasonable attorney fee for his services at Board review a sum equal to \$100, payable by Industrial Indemnity Company.

WCB CASE NO. 78-4018 October 13, 1980
WCB CASE NO. 77-7564

GERALD HAWKE, CLAIMANT
Malagon, Velure & Yates, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order of Abatement

On October 10, 1980 the Board received a Motion to Reconsider its Order on Review, dated September 24, 1980. In order to maintain jurisdiction while this motion is under consideration, our Order on Review is hereby annulled.

IT IS SO ORDERED.

CLAIM NO. D 15013 October 13, 1980

NORMAN R. JARVIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 29, 1980, the SAIF Corporation (SAIF) advised the Board claimant's aggravation rights had expired in this claim. SAIF attached various medical reports which indicated claimant had been off work from July 6, 1980 through July 10, 1980 for a myelogram. SAIF referred this claim to the Board for own motion consideration and indicated it had no opposition to an Own Motion Order reopening this claim for temporary total disability compensation and treatment as a result of this injury.

The Board, after reviewing the material submitted to it, finds this claim should be reopened effective the date claimant was hospitalized for the July 7, 1980 myelogram for payment of compensation and other benefits through July 10, 1980.

IT IS SO ORDERED.

CLAIM NO. C 269088

October 13, 1980

BETTY MARTIN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 29, 1980, the SAIF Corporation (SAIF) forwarded this file to the Board to consider reopening claimant's claim for her September 23, 1970 injury under the Board's own motion jurisdiction. Claimant's aggravation rights have expired in this claim. SAIF indicated claimant was scheduled for additional surgery on October 15, 1980 and it had no opposition to an Own Motion Order reopening this claim.

The Board, after reviewing the medical reports submitted to it, orders this claim reopened effective the date claimant is hospitalized for the surgery scheduled on October 15, 1980 by Dr. Grewe for payment of compensation and other benefits until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-2666

October 13, 1980

VINCE W. PROWELL, CLAIMANT
Malagon, Velure & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which found his claim was barred because he failed to timely file the claim.

The majority of 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 27, 1980, is affirmed.

Board Member Lewis dissents from the majority opinion of the Board as follows:

I find claimant's claim is compensable as an occupational disease on the basis of repeated trauma. Claimant's symptoms came on gradually and there was no traumatic incident. Claimant testified he informed his supervisor of his problem but didn't know if it was caused by his lifting of the timbers. The supervisor corroborated this part of claimant's testimony and added claimant told him he had no on-the-job injury per se.

Dr. Williams reported on February 5, 1979 that in his opinion claimant's work aggravated his condition; the report of Dr. Young of April 24, 1979 indicated Dr. Young felt that the denial of compensability was wrong and the doctor felt that claimant's problems were job related.

I further find that the claim is not barred pursuant to the requirements of ORS 656.807. Claimant's claim is and was non-disabling.

WCB CASE NO. 79-6167

October 13, 1980

BETTIE L. ROGERS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

SAIF Corporation seeks Board review of the Referee's order which remanded claimant's claim for a psychiatric condition 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 Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

The Board, in response to the SAIF Corporation's argument that claimant has to be present at her hearing, makes the following comment. In a Workers' Compensation case, the claimant has the burden of proving his or her contentions. There is no rule or requirement that the claimant be present at the hearing. If a claimant is not present, that claimant takes the risk that the Referee might not decide the issues in claimant's favor. The decision of the Referee and the other bodies who might be asked to review the Referee's findings is based on the record developed at the hearing level. While the Board feels it would be advisable that claimant have a doctor's excuse explaining claimant's inability to attend the hearing, such an excuse is not required. In this case, claimant was not present at the hearing and the Referee decided this case on the evidence presented to him. The Referee found in claimant's favor. Claimant took the chance, by not being present, of having the Referee decide otherwise.

ORDER

The order of the Referee, dated April 10, 1980, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to \$150, payable by the carrier.

This matter came on for hearing in Portland March 28, 1980. Mrs. Rogers was not present, but was represented by counsel, Peter O. Hansen. The State Accident Insurance Fund was represented by counsel, Robert J. Yanity.

At hearing the issues of extent of disability and request for additional TTD were withdrawn. That left at issue the denial of June 19, 1979 and claimant's request for penalties and attorney fees on the grounds the denial was unreasonable.

The denial concerned claimant's psychiatric condition. Counsel for claimant represented that claimant chose not to attend the hearing due to her emotional condition. Counsel stated claimant desired to submit the matter on the record.

Counsel for SAIF objected to going forward on the grounds that SAIF would be compromised and prejudiced by not being able to cross-examine claimant. Counsel for claimant argued claimant did not have to be present and if SAIF desired to cross-examine her they should have subpoenaed claimant.

The fallacy of this argument is that SAIF would have no way of knowing a subpoena would be necessary without notice from claimant's attorney.

Although normally I would never go forward with a hearing without claimant being present, since the outcome of this case hinged entirely on expert medical opinion I permitted the matter to go forward without claimant's presence.

STATEMENT OF THE CASE

Claimant is about 57 years old and was employed for about two years at the University of Oregon Medical School as a custodial worker in the housekeeping department when she sustained an injury to her low back while pushing heavy carts of linen. The claim was denied by letter of April 26, 1978 on the grounds SAIF was unable to substantiate an industrial injury. A hearing was held and an Opinion and Order issued December 28, 1978 allowing the claim and remanding the matter to SAIF for claims processing.

In addition to working for the hospital claimant also worked evenings and weekends as a cocktail waitress. Following the industrial injury she had to discontinue both employments.

Claimant suffered a "nervous breakdown" when she was about age 30. Some of the documentation indicates this occurred during one of her two divorces. She received some mental health care, recovered, and had no further treatment until subsequent to this industrial injury.

Early in the case Dr. Noall, orthopedic physician, recommended psychological evaluation (Exhibit 4). In April, 1979 claimant was evaluated by the Orthopaedic Consultants who concluded claimant had a functional problem but it had not interfered with the examination. They further concluded claimant should have psychiatric evaluation (Ex. 10). The Orthopaedic Consultants also reported claimant's income level had "dropped dramatically".

In May, 1979 claimant was evaluated by Dr. Edward Colbach, psychiatrist. Dr. Colbach records he reviewed the medical records, that claimant performed adequately on tests of intellectual functioning, and that she appeared to be a "fairly bright individual". Dr. Colbach concluded claimant was suffering from depression, she was not medically stationary, emotionally, and that she should have some kind of psychiatric assistance. Although the evaluation revealed claimant was depressed over a number of things--the loss of her youthful beauty--the "bitter termination" of a love affair, etc.--there was also an employment connection. Dr. Colbach stated in part,

"At the time of this industrial injury, she was in a very vulnerable state. Still it would appear from looking at the records, that the industrial injury did precipitate her current nonfunctional condition.

"Emotionally I don't think she is stationary at this time. I think she needs treatment for her depression. And while there are many factors contributing to her depression, the industrial injury appears to be at least one of them.

"* * * In cases like this it is always hard to determine how much to blame on the industrial injury and how much to blame on predisposing factors" (Exhibit 11).

By letter dated June 19, 1979 SAIF denied claimant's psychiatric condition and any future psychiatric treatment (Exhibit 12).

In December claimant received psychological evaluation from Dr. Vincent Glaudin, clinical psychologist. This was in connection with a vocational rehabilitation program. The effort was discontinued because of claimant's "present situation" in that physically, financially, and psychologically, claimant was not "amenable" to their efforts (Exhibits 21, 22, and 32).

COMPENSABILITY ISSUE

As I view the documentation, the report of Dr. Colbach establishes the compensability of this lady's psychiatric condition. Dr. Colbach concluded the industrial injury did "precipitate" claimant's inability to function. The Oregon Court of Appeals stated in PATITUCCI that it was not necessary for the industrial injury to be the principal cause of the disability-- but it was sufficient if it contributed to the disability (Patitucci v. Boise Cascade Corporation, 8 Or App 503 (1972)). The JAMES and PARESI cases are authority for compensability if the incident precipitates the situation (James v. SAIF, 44 Or App 4; Paresi v. SAIF, 44 Or App 689).

With regard to the matter of claimant not being present at the hearing I believe that in view of Dr. Colbach's conclusion that the industrial injury precipitated claimant's "nonfunctional condition" that this "is not a case which turns upon the accuracy of the claimant's (testimony)" (Wilburn v. SAIF, 43 Or App 611 at 616 (1979)).

After giving consideration to all the evidence, I conclude claimant's psychiatric condition is compensable. The matter will be remanded to the State Accident Insurance Fund with instructions to accept this part of claimant's claim. In this regard, the portion of claimant's claim referring to her mid back was closed by Determination Orders dated July 2 and July 16, 1979.

Those Orders provided compensation for temporary total disability from January 7, 1978 through May 31, 1979 (Exhibits 14 and 15). Since Dr. Colbach's report of May 31, 1979 records claimant was not emotionally stationary at that time, TTD will be ordered commencing June 1, 1979.

ISSUE CONCERNING PENALTIES AND ATTORNEY FEES

Exhibit 24 reveals the first payment of compensation for temporary total disability in this claim was made March 29, 1978 and covered the period January 5 to January 18, 1978. On this basis claimant's counsel requested penalties and attorney fees.

Counsel for SAIF argued the matter was res judicata as it could have been raised during the December, 1978 hearing but was not.

I conclude that any entitlement claimant may have had to penalties and attorney fees in this connection was waived when not raised at the December, 1978 hearing.

Claimant also requests penalties and attorney fees on the grounds the denial of June 19, 1979 was unreasonable. One has only to read the cases involving psychiatric conditions to realize the divergent viewpoints and results. SAIF may have been hasty in its denial but I am not going to fault them for their decision. Particularly when the cases reveal widely differing results at the different levels of review.

However, claimant is entitled to a fee for her attorney at SAIF's expense for having prevailed in a denied claim situation.

ORDER:

That this matter be, and the same hereby is, remanded to the State Accident Insurance Fund with instructions to accept this lady's psychiatric claim. The denial letter of June 19, 1979 is overruled.

IT IS FURTHER HEREBY ORDERED that the State Accident Insurance Fund pay the sum of \$450 to claimant's attorney as and for a reasonable attorney fee, no part of which is to be deducted from compensation due claimant by virtue of this Order.

Claimant's requests for penalties and attorney fees are denied and as to those issues this matter is dismissed.

October 13, 1980

LARRY VANCE, CLAIMANT
Dennis M. Odman, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

This claim was referred by the Board to its Hearing Division on June 25, 1980 to be consolidated with a request for hearing then pending in the Hearings Division. The Referee was directed to make a determination which, if any, carrier is responsible for claimant's current condition. The Referee was directed to make a recommendation to the Board on this issue.

The hearing was held on August 5, 1980. The Referee advised the Board that he had found the SAIF Corporation was responsible for claimant's current condition, including the hospitalization and surgery in August 1978. Based on this finding, the Referee recommended that the Board declined to exercise its own motion jurisdiction. In reaching this conclusion, the Referee found that a preponderance of the evidence indicated the second accident, which occurred on October 1, 1977 and was covered by SAIF, contributed independently to claimant's disability and, under these circumstances, the second insurer, SAIF, was the responsible insurer.

The Board, after reviewing the record in this case, concurs with the Referee's recommendation. The Board denies claimant's request that it exercise its own motion jurisdiction and reopen this claim.

IT IS SO ORDERED.

October 13, 1980

KENNETH WENTZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant has requested the Board exercise its own motion jurisdiction and reopen this claim for his January 26, 1967 injury. Claimant's aggravation rights have expired. Claimant also forwarded various medical reports with his request.

Dr. Vinje, in January 1979, performed a myelogram which revealed a herniated nucleus pulposus at the L5-S1 level on the left side. On January 10, 1979, Dr. Vinje removed this. He noted that it was "calcified" indicating the disc had been ruptured out for a long time.

In August 1980, Dr. Kilzer reported claimant continued to complain of back pain. He felt claimant had advanced degenerative disc disease.

The Board, after reviewing these reports finds that at this time the evidence is insufficient to warrant reopening of this claim. The medical evidence does not indicate whether or not claimant's surgery in January 1979 was related to his old 1967 injury. Dr. Vinje does indicate claimant had an "old" herniated disc, but does not indicate this was caused by the 1967 injury. Therefore, the Board denies claimant's request it reopen this claim under the Board's own motion jurisdiction.

IT IS SO ORDERED.

WCB CASE NO. 78-7834

October 14, 1980

DONALD BLANK, CLAIMANT
Davis, Ainsworth, Pinnock & Davis,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

The SAIF Corporation (SAIF) and the claimant have requested review of the Referee's order. SAIF contends the award of compensation is excessive. The claimant contends he is permanently and totally disabled.

The Board finds the Referee's order correctly recites the facts.

After a de novo review of the record, the Board reaches a different conclusion than that of the Referee. We do not find claimant to be permanently and totally disabled and we further find the award granted by the Referee is excessive. We find the claimant is entitled to an award of 60% unscheduled disability.

In reaching its conclusion, the Board finds the medical evidence alone does not establish permanent and total disability. Dr. Dunn reports claimant should avoid lifting weights in excess of 25 pounds, repetitive twisting, bending or stooping. He does feel claimant is physically precluded from returning to his previous occupation but is not precluded from lighter work.

The Determination Order awarded claimant 20% unscheduled disability and Dr. Dunn opines this award is "unjust". The three physicians who examined and evaluated claimant at the Orthopaedic Consultants opined the award "correctly compensated" claimant. Since it is well settled in Oregon Workers' Compensation law that the determination of permanent disability is an administrative function, the Board considers the comments of the physicians as adjunctive of their evaluation of the claimant's impairment as that impairment relates to his physical capabilities to work. As we have already stated, the medical evidence when taken alone does not establish permanent total disability nor does it support the Referee's award.

The Board, having made its finding on the medical evidence, in its administrative capacity under de novo review authority, must examine other factors bearing on disability determination. In this case, the Board finds the claimant's motivation to return to work and effort to reduce the disabling affects of his injury to be deficient to the extent we are compelled to examine it carefully and weigh it against our previous finding on the medical evidence.

The claimant has not fully cooperated with the vocational rehabilitation personnel in their efforts to provide assistance. Further, claimant failed to take advantage of the Pain Clinic opportunity for additional treatment to attempt to reduce his pain. Dr. Maltby (a psychiatrist) opined the claimant has "compensation neurosis". He felt, because the claimant was able to maintain disability income comparable to his employment income, that "secondary gain" was a factor. Dr. Maltby, therefore, felt that since claimant could maintain his income on disability that claimant found it unnecessary to make an effort to learn a new skill or change occupations. In addition, claimant indicated to one of his vocational counselors he was not going to do anything to "mess up" his Social Security benefits. The Board concludes the above findings on motivation, although no "talismans" to the determination of disability, become persuasive when considered together with the medical evidence and other factors such as age, education, training, trainability, etc.

The Board, in reaching its conclusion on extent of disability, adopts March 21, 1975 as the date of injury. We reach this conclusion after considering, as did the Referee, the discrepancy as to whether claimant's injury occurred March 21, 1975 or approximately March 10, 1975 as well as the June 7, 1976 incident when claimant experienced immediate low back pain.

The Board concludes the claimant is entitled to an award of compensation equal to 192 degrees for 60% unscheduled disability for the injuries sustained in the accident of March 21, 1975.

ORDER

The Referee's order, dated March 31, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 192 degrees for 60% unscheduled disability for his back injury. This is in lieu of any previous awards of unscheduled disability granted for this injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-5777
WCB CASE NO. 80-308

October 14, 1980

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

This case is before the Workers' Compensation Board on the SAIF Corporation's (SAIF) request that the Board review the Referee's order entered in this case which granted an award equal to 240 degrees for 70% unscheduled disability. SAIF contends that the award of compensation granted by the Referee was excessive.

The Board finds that the Referee correctly recited the facts in his order.

After de novo review of the record in this case, the majority of the Board finds that the award granted by the Referee was excessive. Claimant is now in his late 40's and has a high school education with one semester of community college work in accounting, math, communication skills and psychology. Prior to his hearing on a federal claim for asbestosis, claimant's rehabilitation counselor felt that he might be well motivated to return to work if he did not win at that proceeding. The counselor felt that if claimant did win at that proceeding and received a lifetime disability, that claimant was likely to take some of the money and open up his own small business. The counselor and Dr. Lawyer both described various jobs that they felt claimant was capable of performing. Claimant, in late December 1979, advised the vocational counselor that he wanted to postpone any additional efforts awaiting the outcome of the federal hearing. He felt that if the federal hearing resulted in his favor he would not need the assistance of the vocational counselor. Claimant has not worked since September 29, 1978 and has no plans to return to work.

The majority of the Board finds that based on the record developed in this case, including the medical evidence which indicates that claimant is capable of performing several occupations, in the light-work category, his failure to cooperate with the vocational rehabilitation effort, and his lack of motivation to return to work, that he is entitled to an award of compensation equal to 160° for 50% unscheduled disability for this injury. This award is in lieu of any previous awards of unscheduled disability granted claimant for this injury.

ORDER

The Referee's order, dated February 29, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for this injury. This is in lieu of any prior awards of unscheduled disability granted for this injury.

The remainder of the Referee's order is affirmed.

Board Member Lewis dissents as follows:

I would respectfully dissent from the majority opinion of the Board as follows: Based on Dr. Lawyer, a Board Certified Internist, specializing in pulmonary disease, who treated claimant. He testified at claimant's Longshore and Harbor Workers' Compensation hearing. He said claimant was permanently disabled and had only 61% lung capacity, that he was disabled from performing other than light work and could be expected to become short of breath and unable to continue any physical activity if he were to exceed more than light work, i.e., raking leaves slowly.

The Referee states although motivation is a factor to be considered in assessing loss of earning capacity, it is not controlling and should be considered with other factors. Therefore, I would affirm the Referee's order.

CLAIM NO. C 399673 October 16, 1980

JAMES M. BRADFORD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 2, 1980, the Board received a request from claimant to exercise its own motion jurisdiction and reopen his claim for an injury to his thumb sustained on September 30, 1972. He indicated that surgery was recommended to fuse the joint in the thumb. Claimant's aggravation rights have expired.

SAIF Corporation responded on October 3, 1980 indicating it would not oppose reopening the claim for the surgery recommended by Dr. J. Hill in his report of September 3, 1980. Surgery on the thumb has been scheduled for November 20, 1980.

The Board, after thorough consideration of the evidence before it, concludes claimant's claim should be reopened as of the date claimant enters the hospital for the surgery recommended by Dr. Hill and until closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

October 16, 1980

GARY T. CHRISTENSEN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 7, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen his claim for his August 16, 1972 injury. This claim had been initially closed by a July 26, 1973 Determination Order and claimant's aggravation rights have expired. Claimant requested this claim be reopened effective August 7, 1980. Dr. Duff, in a report bearing that date, opined claimant was unable to work due to a worsened back condition. Dr. Duff felt claimant should be evaluated at the Pain Center.

Claimant also had filed a claim for a new injury of January 21, 1980 which was denied by the employer. Claimant asked that the old (1972) injury claim and the new (1980) injury claim be consolidated for a hearing. The own motion case was not referred to the Hearings Division. The Referee, in an Opinion and Order, dated August 7, 1980, found claimant had failed to prove he had suffered a new injury. Claimant has requested the Board review the Referee's order.

In this case, the Board will withhold making a decision in the 1972 injury claim, on which own motion relief is requested, until it can review the record developed at the hearing on the new injury claim.

IT IS SO ORDERED.

WCB CASE NO. 79-5992

October 16, 1980

GREGORY E. COSTA, CLAIMANT
Ringle & Herndon, Claimant's Attys.
Merten & Saltveit, Employer's Attys.
Request for Review by Employer

This case comes before the Workers' Compensation Board on the employer's request that it review the Referee's order which granted claimant an award of compensation equal to 160° for 50% unscheduled disability. The employer contends the award is excessive.

Claimant, then a 38-year-old clerk with this employer, on April 12, 1974, injured his low back the first time while lifting a bag weighing approximately 35 pounds. This injury was originally diagnosed as an acute back strain and herniated disc. Dr. Adlloch, on July 3, 1974, reported claimant's condition was medically stationary and he had no permanent impairment due to this injury. The claim was first closed by a Determination Order, dated October 4, 1974, with an award of temporary total disability compensation only. Claimant returned to work and on December 20, 1976 a heavy laundry bag fell on claimants neck. Claimant never returned to this employ.

In early January, 1977 Dr. Adloch diagnosed a recurrent low back strain and possible disc herniation.

In February 1977, Dr. Tahir reported that he felt claimant had a herniated disc at the L5-S1 level on the right side. A myelogram was performed and revealed a herniated disc at that level. On March 15, 1977, Dr. Tahir performed a hemilaminectomy and discectomy at the L5-S1 level on the right side. Dr. Tahir released claimant for modified work as of April 18, 1977 and advised claimant he was not to lift, push or pull any heavy weight for the remainder of his life.

Claimant was referred for vocational rehabilitation in early June 1977. Claimant entered a rehabilitation program with the goal of becoming an accountant. This program was to run from September 1977 through June 1979.

On July 11, 1977, Dr. Tahir reported claimant's condition was stationary.

Dr. Schmidt, on April 28, 1978, reported that claimant indicated to him that he had again experienced difficulty with back pain one week prior to examination. Dr. Schmidt felt that claimant could have a recurrent disc with compression and irritation of the S1 nerve root on the right side. Claimant began a period of conservative treatment which did not relieve this condition. Claimant was again hospitalized on May 5, 1978 and underwent another myelogram and additional surgery to his back. Dr. Schmidt excised a protruded nucleus pulposus at the L5-S1 level on the right and performed a hemilaminectomy on the S1 level on the right with neurolysis of the S1 and S2 nerve roots. Claimant was discharged from the hospital on May 22, 1978.

On May 31, 1978, Field Services Division terminated claimant's rehabilitation program. This was based on his inability to work towards his vocational goal. The program was later reinstated.

In September 1978, Dr. Schmidt reported that claimant could return to a modified schedule on November 1, 1978. He felt that claimant should lift no objects weighing greater than 10 pounds, engage in any prolonged standing or repetitive stooping.

Dr. Schmidt, on January 30, 1979, reported that claimant's condition was probably medically stationary. He reported that claimant continued to report intermittent back pain and occasionally right lower extremity pain.

The Orthopaedic Consultants, on April 10, 1979, reported that claimant's condition was stationary. They felt that claimant could not return to his previous occupation. It was their opinion that claimant required placement in another occupation that would limit the amount of sustained lifting, bending, stooping, or sitting he would perform. They rated claimant's total loss of function at that time in the moderate degree. However, they felt that there was certainly some degree of pre-existing arthritis and, therefore, rated claimant's loss of function due to this low back injury in the mildly moderate range. They felt claimant would require good medical follow-up. Dr. Schmidt concurred with this report.

The claim was closed again by a Determination Order, dated June 13, 1979, which awarded claimant temporary total disability compensation and compensation equal to 48% for 15% unscheduled disability for his low back injury.

Claimant's Vocational Rehabilitation program terminated June 9, 1979 and he received a general course degree.

In early January 1980, claimant obtained a job working as a bookkeeper for a motel on the Oregon coast. Claimant's supervisor reported that he was working 40 hours per week at this job.

At the hearing, claimant testified that he feels his condition is worse now than it was a few months ago. He complains of pain in the center of his back which radiates down the right leg and foot and occasionally into the left calf. He states this pain is constant. He says that he cannot bend or lift more than 10 pounds at the current time. He has difficulty going up and down stairs, difficulty with walking prolonged distances or on uneven ground. According to claimant, he is depressed and sought counseling to help him deal with the frustration caused by the physical pain and financial difficulties accompanying his injury. He states that he spends approximately 12 hours per day in bed and does use aspirin and Tylenol for relief. Claimant stated he has cut down his outside activities since this injury. Claimant has a high school education and has worked in the laundry business for a number of years. Claimant stated that he had only one term to finish to obtain his associate degree in business.

The Referee, after reviewing all the evidence in this case, found that claimant's disability was greater than that which he had been awarded. Therefore, the Referee granted claimant an award of compensation equal to 160° for 50% unscheduled disability for his low back injury.

After de novo review of the record in this case, the Board modifies the Referee's order. The Board does not find that the award granted by the Referee correctly reflects claimant's loss of wage earning capacity due to this injury. Claimant is 44 years old, has a high school education and lacks one term of having an associate degree. He has worked for a number of years in the laundry business. The evidence indicates he probably could not return to a job which requires heavy lifting, repetitive bending, stooping, prolonged standing. His disability has been rated in the mildly moderate range by both the Orthopaedic Consultants and by Dr. Schmidt, his treating physician. The Board notes that claimant voluntarily has placed himself in his current position in a relatively low-paying job. The Board finds, that based on the evidence in this case, and comparing the facts in this case with other cases, that claimant is entitled to an award of compensation equal to 96° for 30% unscheduled disability for his back injury.

ORDER

The Referee's order, dated April 28, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 96° for 30% unscheduled disability for this back injury. This award is in lieu of any previous awards of unscheduled disability granted for this injury.

The remainder of the Referee's order is affirmed.

October 16, 1980

VIRGIE MAE CROWDER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, on March 3, 1972, suffered various injuries when she was involved in a motor vehicle accident. This claim was initially closed by a Determination Order on April 19, 1974 which awarded claimant temporary total disability compensation and compensation equal to 15 degrees for 10% loss of her left leg due to this injury. Claimant's aggravation rights have expired.

On August 28, 1979, Dr. Bolton performed a total left hip replacement. He requested the claim be reopened. The Board, in an order dated October 31, 1979, ordered this claim reopened effective the date claimant was admitted to the hospital for the surgery performed by Dr. Bolton and until closed pursuant to ORS 656.278.

On July 28, 1980, Dr. Bolton reported that claimant's condition was medically stationary. He noted that claimant continued to walk with a slight limp. Claimant continued to complain of thigh pain which Dr. Bolton felt was the result of her increasing her activity. Claimant also indicated she had difficulty walking on rough terrain.

Claimant indicated that on March 31, 1980 she had returned to work on a part-time basis.

On September 5, 1980, the SAIF Corporation requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on September 25, 1980, recommended the claim be closed with an award of temporary total disability from August 28, 1979 through March 31, 1980, temporary partial disability from April 1, 1980 through July 28, 1980 and an additional award of compensation equal to 30% loss of the left leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 28, 1979 through March 31, 1980 and temporary partial disability from April 1, 1980 through July 28, 1980, less time worked. The record indicates that much of this award has already been paid to claimant.

Claimant is also granted compensation equal to 45 degrees for 30% loss of the left leg. This award is in addition to any previous award he has been granted for the left leg due to this injury.

WCB CASE NO. 76-3579

October 16, 1980

ROBERT D. FARANCE, CLAIMANT
Roll, Roll & Westmoreland,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

This case is before the Workers' Compensation Board on the employer-carrier's request the Board review the Referee's order. The employer-carrier contends that since claimant's aggravation rights had expired the Referee did not have jurisdiction to hear the merits of claimant's aggravation claim and that claimant is not entitled to an award of attorney fees.

The Board finds the Referee correctly recited the facts in his order.

After a de novo review of the record in this case, the Board reaches the same conclusions as did the Referee. The Board finds the Referee has jurisdiction to decide the merits of the claimant's aggravation claim since claimant's aggravation rights had not expired. The Board finds the Referee correctly set aside that portion of the employer carrier's denial based on its contention claimant's aggravation rights had expired. This case can now be heard on the merits.

ORDER

The Referee's order, dated January 3, 1980, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to \$250, payable by the carrier.

October 16, 1980

ALFRED HANDSAKER, CLAIMANT
Malagon, Velure & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On June 9, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen this claim for his June 27, 1972 back injury. Claimant's claim was initially closed and his aggravation rights have expired. Attached to this request was a report from Dr. Smith who indicated that claimant was experiencing progressive degenerative change of the lumbosacral spine and probably had a chronic strain and instability at the L3-4 level above claimant's previous spinal fusion. Dr. Smith noted that claimant had severe cardiovascular disease involving the cerebral casculature as well as the iliofemoral vessels and into the lower extremities. He felt that claimant was permanently and totally disabled. He felt that claimant's disability due to his 1972 injury and subsequent treatment and degenerative changes should be considered moderately severe.

SAIF Corporation (SAIF) requested that claimant be examined by the Orthopaedic Consultants. After examining claimant, at SAIF's request, the Orthopaedic Consultants reported in August 1980 they felt claimant's condition was still stationary and there was no indication for reopening this claim. It was their opinion that claimant had a slight increase in disability relating to his lumbar spine due to progressive degenerative changes above the fusion and that this increase in impairment was only minimally realted to the injury and subsequently required surgery. They felt claimant was incapable of returning to his former occupation in the woods. They rated claimant's total disability at 60% and noted that claimant had previously been awarded 60% disability and that this 50% should be subtracted from the 60%.

In early September 1980, the Board requested the Evaluation Division of the Workers' Compensation Department provide it with a recommendation as to claimant's current disability. On September 25, 1980, the Evaluation Division of the Workers' Compensation Department recommended that based on its examination of the record in this case that claimant was entitled to an additional award of permanent partial disability of 10% unscheduled disability for his low back injury. The Board, after reviewing the record in this case, concurs with this recommendation.

ORDER

Claimant is hereby granted an award equal to 32 degrees for 10% unscheduled disability for injury to his low back on June 27, 1972. This award is in addition to all previous awards claimant has been granted for this 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 \$3,000.

CLAIM NO. C 164188 October 16, 1980

LEO V. JONES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order & Determination

The SAIF Corporation (SAIF), on September 22, 1980, forwarded various information in this claim to the Board. SAIF indicated it did not oppose an Own Motion Order reopening this claim for time loss from July 31 to September 3, 1980. It requested the claim also be closed since claimant's condition was again stationary. This claim had been established for claimant's January 6, 1969 low back injury. This claim was originally closed by a Determination Order, dated August 7, 1969, which awarded claimant a period of temporary total disability compensation which provided no award permanent partial disability. The Second Determination Order, dated August 30, 1972, awarded claimant additional temporary total disability compensation and compensation equal to 64 degrees for 20% unscheduled low back disability. This claim was subsequently reopened by a Board's Own Motion Order and closed with an additional award of compensation equal to 32 degrees for 10% unscheduled disability.

Dr. Joll indicated that claimant was off of work from July 31, 1980 through September 2, 1980. He reported that claimant had been off work for continuing low back pain. On September 15, 1980, Dr. Joll reported that he had examined claimant on September 2, 1980 and felt that his condition was stable and that claimant's overall condition had not changed significantly. He felt that this continuing back pain was related to claimant's original injury and his spinal fusion for it. He rated the claimant's impairment as mildly moderate.

The Board, after reviewing the evidence in this file, finds that it is sufficient to warrant a reopening of the claim. The Board finds that the claimant's condition is again stationary and has been so since September 3, 1980. Therefore, the Board finds that claimant is entitled to an award of Temporary total disability compensation from July 31, 1980 through September 3, 1980. This award of additional temporary total disability compensation is in addition to any previous awards of temporary total disability compensation claimant has been granted.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 31, 1980 through September 3, 1980, less time worked. This award is in addition to all previous awards claimant has been granted in this case.

WCB CASE NO. 79-3851

October 16, 1980

DENNIS C. KEMERY, CLAIMANT
Franklin, Bennett, Ofelt & Martin,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF Corp.

This case is before the Workers' Compensation Board on the SAIF Corporation's (SAIF) request that the Board review the Referee's order entered in it. SAIF contends that the Referee erred in ordering it to pay Dr. Fleming's bills, the Referee erred in granting claimant an increased award of compensation equal to 80 degrees for 25% unscheduled disability for his low back disability, and the Referee erred in granting claimant's attorney a fee for prevailing on the partial denial. The Board finds that the Referee correctly recited the facts in his order.

After de novo review of the record in this case, the Board reaches a different conclusion than that reached by the Referee. Dr. Fleming is a psychologist. Claimant was not specifically referred to Dr. Fleming by any other medical doctor for psychological treatment. Dr. Fleming had assisted the claimant in obtaining modified employment after his shoulder injury. In this case, Dr. Fleming performed the services of vocational counselor and assisted claimant in returning to a different occupation. Dr. Fleming is not a medical servator under Oregon statutes. He is a licensed psychologist who was acting independently and not upon a direct referral from any other physician. Therefore, his services were not covered under ORS 656.245. Therefore, the Board would reverse the Referee's ordering of SAIF to pay Dr. Fleming's bill and his awarding of attorney fee for prevailing upon SAIF's denial of those bills. The Board orders that the denial issued by the Fund, dated August 3, 1979, be reinstated and affirmed.

The denial issued by the SAIF was for responsibility of any psychological treatment. This was based on Dr. Parvaresh's opinion that claimant did not have any significant degree of psychiatric impairment. He did not feel that claimant was in need of any psychiatric care and found no limitation in his ability to be gainfully employed.

As to SAIF's second contention, the Referee's award of compensation in this case was excessive, the Board concurs. Claimant is in his late 30's and has a high school education with approximately one year of community college work. He has worked as a welder and also as a quality control inspector for a steel fabrication company. Due to this injury, claimant did undergo a laminectomy to his back. The consensus of the medical opinion is that claimant should be trained for a lighter type of work and should avoid constant repetitive bending, stooping, twisting and lifting of weights greater than 25 pounds. At the time of the hearing, claimant was working for a different employer as a welding inspector, the same type of job as he had at the time of this injury. Claimant also has a prior shoulder injury which is covered under the Longshore Harbor Workers' Act. Since his back injury, claimant has attempted to work as a welder but feels he cannot do it because of the bending and other motions required. The Board, after considering all the relevant factors in this case to be considered in determining an injured worker's loss of wage earning capacity and the record developed in this case, finds that the award of compensation granted by the Referee is excessive. The Board finds claimant is entitled to an award of compensation equal to 48 degrees for 15% unscheduled disability for this injury. Therefore, the Board modifies the Referee's award of compensation granted in this case.

ORDER

The Referee's order, dated March 10, 1980, is modified.

The Referee's ordering of the SAIF Corporation to pay Dr. Fleming's medical bills and granting claimant's attorney a \$250 fee for prevailing on the partial denial issued by it is reversed.

It is further ordered that claimant is hereby granted an award of compensation equal to 48° for 15% unscheduled disability for this back injury. This is in lieu of any previous awards of unscheduled disability for this injury which claimant has been granted.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-6267 October 16, 1980

LARRY E. MCCOLLAM, CLAIMANT
Jolles, Sokol & Bernstein, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF Corp.

The SAIF Corporation 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.

The majority of 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 14, 1980, 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 SAIF Corporation.

Board Member McCallister dissents as follows:

I disagree with the opinion of the majority.

The majority agrees the Referee properly shifted the burden of proof from the claimant to the employer. The employer was required to disprove the claimant's contentions. It is true the employer stipulated to Young's past practices generally. I believe the claimant still had the burden of proving by a preponderance of the evidence that Young had acted in claimant's case as was stipulated he had acted generally. Two very key witnesses to the claimant's case were within reach of subpoena (Young and Robbins) yet claimant failed to call them.

Assuming, but not agreeing, that the Referee correctly shifted the burden of proof on the question of whether claimant had experienced an on-the-job "accident" in October 1975, the claimant's case must fail because there is no showing that compensable injury occurred as a consequence of that "accident". There is no proof of medical causation and claimant's testimony is not sufficient to establish it. The only medical report in the record is Dr. Davis' of December 26, 1978. In that report, Dr. Davis mentions several incidents which evidently produced injury. But none of the incidents are the claimed injury of October 1975. Dr. Davis had treated claimant before the claimant's October 1975 incident and after yet he states in his December 26, 1978 report:

"There is nothing in our notes which refers this injury to a job related etiology".

In fact, if Young's activities regarding the reporting of on-the-job injury claims were as egregious as the stipulation would indicate, then the union and/or claimant should have brought his activities to the attention of the Board's (now the Director's) Compliance Division for appropriate action under ORS 656.745 which provides for civil penalty for inducing failure to report claims. An additional benefit of such action, on a timely basis, would have cured the problem faced in this case - that is, a timely correction of the problem as opposed to a three-year post fact attempt at equitable disposition.

I would reverse the Referee and reinstate the SAIF Corporation's denial.

CLAIM NO. C 431581

October 16, 1980

DENNIS C. NEVILLE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 6, 1980, the Board received from the SAIF Corporation copies of pertinent medical reports in regard to the above claim. It indicated that claimant's aggravation rights had expired and, based on the enclosed reports, it had no objection to reopening claimant's claim for surgery on November 3, 1980.

On August 7, 1980, Dr. James VanOlst advised SAIF claimant had developed a progressively painful bunionette on his left fifth toe. He related this condition to claimant's March 30, 1973 industrial injury and recommended that surgical excision of the bunionette deformity be done with a possible trimming of the metatarsal head. SAIF's medical consultant, Dr. Norton, agreed with Dr. VanOlst's assessment of claimant's condition. Surgery has been set for November 3, 1980.

The Board, after thorough consideration of the evidence before it, concludes that claimant's claim should be reopened for the surgery recommended by Dr. VanOlst commencing the date he enters the hospital for the surgery and until closed pursuant to the provisions of ORS 656. 278.

IT IS SO ORDERED.

CLAIM NO. C 332143

October 16, 1980

BASIL L. WEATHERS, CLAIMANT
Robert Morgan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 23, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction for his August 9, 1971 injury. This claim was initially closed and claimant's aggravation rights have expired. Attached to claimant's request was a report from Dr. Baldwin who indicated that claimant had experienced a significant reduction in his activity and was entitled to an increased award of permanent impairment.

SAIF Corporation, on September 26, 1980, advised the Board that it opposed reopening this claim as it did not appear that there had been a materially objective worsening of claimant's condition or disability since the last award or arrangement of compensation. Attached to this were various reports, including a report from the Orthopaedic Consultants, who indicated that claimant's condition had not materially changed since December 1977.

The board, after reviewing all the information submitted to it, finds it would be in the best interest of the parties if this claim were referred to the Hearings Division to be scheduled for a hearing. At the conclusion of the hearing the Referee shall first decide whether claimant's current condition is related to his August 9, 1971 injury. Second, if the Referee decides a causal relationship exists, then he shall determine whether a material worsening has occurred since the last award or arrangement of compensation in this case. Upon the conclusion of the hearing, the Referee shall forward a recommendation on this own motion claim together with a transcript of the proceedings and other evidence introduced at the hearing to the Board.

IT IS SO ORDERED.

WCB CASE NO. 79-2180

October 17, 1980

PATRICIA ANDREWS (FIFE), CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Workers' Compensation Board on claimant's request that the board review the Referee's order which affirmed a Determination Order, dated September 14, 1978, which awarded claimant temporary total disability compensation and compensation equal to 32 degrees for 10% unscheduled disability for her May 12, 1978 back injury. Claimant contends that she is permanently and totally disabled.

Claimant, a 51-year-old aide in a retirement home, on May 12, 1978, injured her back when she attempted to prevent a patient from falling in the shower. X-rays taken after this injury revealed that claimant had "spondylosis with spondylolisthesis, L5, with prominent degenerative disk disease in the lower lumbar area."

In late May 1978, Dr. Duff reported that claimant continued to have pain in her low back area. He felt that claimant had suffered an acute lumbosacral ligamentous strain superimposed on her spondylolysis and spondylolisthesis at L5 and her severe degenerative disk disease. At this point, he indicated he did not feel that claimant was a good candidate to return to her former job. A course of treatment to include heat, massage and active back exercises was prescribed for claimant. Claimant was referred to a physician in her local area for this treatment.

In June 1978, claimant came under the treatment of Dr. D. Davies. He hospitalized her for a period of ten days in early June 1978 for a course of traction. He noted that claimant was wearing a lumbosacral support. In late June 1978, he reported that he had advised claimant against returning to her previous occupation.

On August 4, 1978, Dr. Duff reported that claimant's condition was medically stationary and that she had moderate residuals of pain and limitation of motion in the lumbar area. It was his opinion that claimant had permanent and continuing disability to a moderate degree that would prohibit her return to work in a capacity requiring heavy lifting and prolonged bending, such as a nurse's aide. He noted that claimant was eager to return to some type of employment and felt that she was fit for duty within the restrictions he had outlined. Dr. Davies concurred with this opinion.

On September 14, 1978 this claim was initially closed by a Determination Order granting claimant an award of temporary total disability compensation and an award of compensation equal to 32% for 10% unscheduled disability for her back injury.

After the claim was closed, claimant came in contact with a Vocational Rehabilitation Division. However, claimant underwent surgery to her hands for a non-industrial related condition in early 1979, and vocational assistance was temporarily stopped.

In July 1979, Dr. Davies reported that claimant had severe degenerative disc disease of the lumbar spine and spondylolisthesis at the 5th lumbar level. He felt she could not return to her previous occupation and could not do activities that required heavy lifting, stooping, twisting or other such motions. Dr. Davies felt it was doubtful that claimant could hold any job that required a full eight hours of work each day. He noted that she had constant back pain and even household chores increased her pain. Dr. Davies indicated that claimant was required to rest every few hours in doing even light housework and should not attempt to do heavier household chores. In summary, he felt that claimant could not work a full eight hours a day, 40 hours a week. Dr. Davies reported claimant's low back pain was aggravated by prolonged standing, sitting or physical activities. He noted that claimant's condition at times was worse and that at other times was better.

In August 1979, claimant was re-contacted by the Field Services specialist. At that time, claimant declined to further utilize the services of the Field Services Division.

Dr. Duff, in September 1979, reported that he found that claimant's pain also at times was worse and at other times better. Claimant stated that she could not stand for more than about a half an hour and could not sit for more than one or two hours at a time. She reported that she also had a lot of difficulty with heavier household duties. Dr. Duff, after reviewing his previous examination and Dr. Davies' July 1979 report, felt that claimant had a moderately severe continuing disability that made it unlikely that she could even do light work for a full eight-hour day. He felt that her symptoms were compatible with a limited duty for a four-hour day, 20-hour week, if she excluded any heavy lifting and bending and was allowed to work where frequent changes of position were possible and physical activity was available. Dr. Duff concluded that he did not expect any further improvement or deterioration in claimant's condition and that she was medically stationary.

At the time of the hearing, claimant was 53 years old and had an eleventh grade education. All of claimant's work history of jobs which could be classified in a manual labor type of employment. She has performed a number of jobs involving work in a factory and also various nursing jobs. Claimant testified that these jobs required lifting, sweeping and mopping, a lot of standing and other physical activities. She complained that her back still bothers her and that she has cramps in her legs. She indicated that her back pain was constant. She stated that her back injury has affected her walking, her standing, her housework, sitting and riding in automobiles. Claimant testified that she is currently taking medication for her condition. She stated that her husband does all the housework and that she has to lie down during the day and use a heating pad to relieve her back pain. Claimant stated that she went to an employment office to try to find employment but was unsuccessful.

Mr. Wilson Walker testified that he is a certified vocational expert. After interviewing claimant and reviewing the medical reports, he opined that he would have been not able to find any job that claimant would be able to do at this time. He noted that claimant, in addition to her back, also had difficulty with her hands. Claimant described a typical day to him and indicated that she spent at least half of her day lying down in bed. Claimant indicated that she took pain medication which rendered her unable to do anything. Mr. Walker felt that claimant would be unable to keep the job even if she did find one. He felt that if claimant could perform a sedentary type of job it would have to be an entry-level job because she lacked any transferrable skills.

The Referee, after reviewing all the evidence in this case, felt that claimant had failed to prove that her disability was greater than that awarded by the Determination Order. Therefore, the Referee affirmed the Determination Order.

The Board, after de novo review, modifies the Referee's order. Claimant has suffered a lumbosacral strain superimposed upon her spondylolysis and spondylolisthesis at L5 level and has severe degenerative disc disease. Considering the relevant factors in this case such as claimant's age, education, prior work experience, etc., the Board finds that claimant has established that she has suffered a greater loss of wage earning capacity due to this injury than that for which she has been previously compensated. However, the Board does not find claimant is permanently and totally disabled. The Board notes that the evidence indicates that claimant has not established that she is willing to seek regular and gainful employment and that she had not made a reasonable effort to obtain such employment. Based on all the evidence in this case, the Board finds that claimant

is entitled to an award of compensation equal to 160° for 50% unscheduled disability for her back injury. This is an increase of 128° for 40% unscheduled disability for this injury.

ORDER

The Referee's order, dated January 17, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for her back injury. This award is in lieu of any previous awards of unscheduled disability claimant has been granted for her May 17, 1978 back injury.

Claimant's attorney is hereby granted as a reasonable attorney 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 \$3,000.00.

WCB CASE NO. 80-399

October 17, 1980

ELSIE GIBSON, CLAIMANT

Michael V. Johnson, Claimant's Atty.

Schwabe, Williamson, Wyatt, Moore

& Roberts, Employer's Attys.

Order of Dismissal

A request for review was received by the Board on March 28, 1980 from claimant's attorney seeking review of the Referee's order entered in the above-entitled matter.

Although the request for review was timely, a copy of said request was not mailed to all necessary parties within 30 days after the date of the Referee's order as required by ORS 656.295(2).

THEREFORE, claimant's request for Board review is hereby dismissed and the order of the Referee is final by operation of law.

October 17, 1980

LOLA M. HUNT, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF Corp.

This case is before the Workers' Compensation Board on the SAIF Corporation's (SAIF) request that the Board review the order of the Referee. SAIF contends: (1) the Referee disregarded the prior adjudication of claimant's claim which held that her injury was a shoulder problem; (2) he improperly continued the hearing to allow claimant to gain rebuttal evidence which was available prior to the hearing; and (3) assuming claimant had carpal syndrome, it was not work related.

The Referee also found the October 17, 1978 Determination Order was premature and ordered the claim reopened and remanded to SAIF for payment of temporary total disability compensation.

The Board finds the Referee correctly recited the facts in his order.

After a denovo review of this case, the Board modifies the Referee's order. The Board agrees with the Referee that the SAIF's denial of claimant's carpal tunnel syndrome was incorrect. The Board finds the opinions of Drs. Melgard and Shaw persuasive in determining the carpal tunnel syndrome is related to an on-the-job injury.

However, the Board does not agree with the Referee that this claim was prematurely closed. On the date temporary total disability was terminated, Dr. Much reported claimant's condition was medically stationary and the claim was ready for closure. In early 1978, Dr. Yamodis indicated claimant was unable to work and scheduled additional testing. However, in late May, he reported claimant felt her condition had improved and wished to have her "follow-up" in Salem or Portland. When asked if he concurred with Dr. Much, Dr. Yamodis stated claimant needed "follow-up" by a neurosurgeon. The Board finds the preponderance of the evidence indicates claimant's condition was stationary as of September 27, 1978. The treatment suggested by Dr. Yamodis could be handled under the provisions of ORS 656.245.

Finding no premature closure, the next issue to be decided is whether or not claimant's condition has aggravated so as to justify reopening of this claim. The medical evidence indicates claimant needs additional testing and surgery if she has increased difficulty with her carpal tunnel syndrome. Dr. Melgard, on April 18, 1979, reported claimant was having a lot of trouble with her hand and asked this claim be reopened for a myelogram, nerve conduction studies and possibly exploration of the median nerve at the right wrist. Claimant had returned to work as a cook prior to this report. The Orthopaedic Consultants, in May 1979, reported claimant's condition was stationary and the claim need not be reopened. The Board finds the preponderance of the evidence indicates claimant's condition has not aggravated since the last award of compensation. It would appear that if and when claimant does experience increased difficulty with her carpal tunnel syndrome and is hospitalized for additional testing and possibly exploration of the median nerve of the left wrist, this claim should be reopened.

The Board also finds the October 17, 1978 Determination Order is incorrect in its award of 5% loss of claimant's right hand. Claimant's injury was to her arm and not to her hand. Therefore, the Board amends the Determination Order to read "5 percent loss of your right forearm."

ORDER

The Referee's order, dated April 25, 1980, is modified.

The Referee's vacating the October 17, 1978 Determination Order as a premature closure and ordering the claim reopened and remanding it to the SAIF Corporation is reversed. The October 17, 1978 Determination Order is restored, modified by changing the award of permanent partial disability to 5% loss of claimant's right forearm and the Board affirms this modified Determination Order.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-6527 October 17, 1980
WCB CASE NO. 79-3501
WCB CASE NO. 78-7421
WCB CASE NO. 78-7422

JACK MOORE, CLAIMANT
Malagon, Velure & Yates, Claimant's Attys.
G. Howard Cliff, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case comes before the Workers' Compensation Board on claimant's request that the Board review the Referee's order. Claimant contends that his current cervical problems are due to his 1972 and 1973 injuries and that he has suffered more permanent partial disability from his April 8, 1978 low back injury.

The Board finds that the Referee correctly recited the facts in her order.

After de novo review of the record, the board agrees in part with the conclusions reached by the Referee and disagrees in part.

We affirm the conclusions reached in WCB Case No. 79-6527 and WCB Case No. 79-3501 but for different reasons. The claimant was injured August 14, 1972 and March 27, 1973, both of these claimant were non-disabling and required only brief medical treatment. At the time these cases were processed the Board had adopted a policy of "administrative closure" of claims in this classification (medical only). See Administrative Rules of the Board, Article 4.01 (1970). The Board had adopted Article 4.01 as administrative expediency for the purpose of alleviating the "paper work" burden associated with the processing of these cases under ORS 656.268. The administrative ease this procedure accomplished in facilitating the process of these cases ran both to the Board and to the carriers and selfinsurers. Notwithstanding Article 4.01 Sub(B) the understanding, generally accepted, was that these cases would not "legally" be closed until a determination order had been issued and that a determination order would be issued only upon the request of one the parties--therefore absent the issuance of a determination order under ORS 656.268 the statute did not commence to run. Contrary to the above understanding several cases have been adjudicated on the issue before the Board in cases WCB 79-6527 and WCB 79-3501. The controlling case is IN THE MATTER OF THE COMPENSATION OF MAGDALENE WOLFE, Linn County Circuit Court Case #38669 decided by Judge Courtney Johns December 21, 1970. (WCB Case No. 69-2327) In letter opinion dated September 17, 1970, Judge John states:

"ORS 656.268 provides that claims shall not be closed until workman's condition becomes medically stationary. When and if the board makes such a determination, it is required by section (4) to mail a copy thereof to all interested parties. The workman has one year after copies of the determination are mailed in which to request a hearing.

Since the one year limitation doesn't start to run until copies of the determination are mailed, and since copies have never been mailed, claimant's request for a hearing is timely and must be granted, and such will be the order, which her counsel may prepare and I will sign.

It was contended that such a ruling would be contrary to the provisions of ORS 615.319 (1)(b). However, it is again spelled out in ORS 615.319 (2)(b) that copies of the determination should be mailed to the parties.

The board points to administrative problems arising out of a multitude of inconsequential claims, and indicates that such a ruling would open the door to a backlog of 300,000 similar cases, and 80,000 new cases each year. The only answer the Court can think of is, if the Legislature got them into this predicament, maybe it could get them out. in the meantime it has spoken, and we must heed its demand."

The Wolfe (supra) decision is controlling and dispositive of the issues raised by the defense regarding the Department's jurisdiction to the issue determination orders and the Referee's jurisdiction to hear matters relating to those determination orders. We agree with the Referee that the Department had authority to issue the determination orders and the Referee had jurisdiction under ORS 656.272(4)(b) and (c) to hear the legal issues raised concerning the determination orders. These cases are distinguishable from Young case (WCB 79-1007) cited by the Referee. In Young (supra) the claimant was injured June 30, 1977 and claim processing was then controlled by ORS 656.262 (5)(a) and (b) as amended in the 1978 legislative sessions (subsequent to the injury dates in those cases). The 1973 legislature amended ORS 656.262, 263 and 271 to provide different procedures for handling claims for nondisabling and disabling injury claims (see WCB Board Bulletin No. 99 dated November 2, 1973). The legislative change was effective October 4, 1973. In Young (supra), the board found the carrier had failed to "process the claims" as required under 656.262 (as amended). The carrier failed to

notify the claimant in writing that his claim was accepted, that his claim was considered non-disabling and inform claimant of his hearing and aggravation rights. In the cases now before us (WCB 79-6527 and WCB 79-3501) the question is not whether these claims were properly processed because, based on the Board's then policy, they were--rather, the question is whether the claimant was entitled to determination orders under ORS 656.268 and all procedural and substantive rights flowing from those determination orders. The Wolfe case controls and the determination orders herein were properly issued and the Referee properly decided that claimant had failed to prove his current neck condition was causally related to the August 14, 1972 injury and that claimant was not entitled to an award of permanent partial disability as a result of that injury. We further agree with the Referee's findings concerning the March 27, 1973 injury.

In WCB Case No. 78-7422 as it relates to claimant's low back injury and the determination order of October 26, 1979 and November 14, 1979, the Board does not agree with the Referee and modifies that decision. The Board finds the claimant is entitled to an award of 128° for 40% unscheduled disability which is an increase of 64° or 20% unscheduled disability over that awarded by the determination orders of October 26, 1979 and November 14, 1979. In reaching its decision on extent of disability, the Board is persuaded that Dr. Bernson's physical restrictions when weighed against all other relevant evidence support the award as modified.

The Referee's Order is affirmed in all respects except as modified in Case No. 78-7422.

ORDER

The Referee's order, dated March 27, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 128° for 40% unscheduled disability for his April 8, 1978 injury. This is in lieu of any prior awards of unscheduled disability for the April 8, 1978 back injury claimant sustained.

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 \$3,000.

The remainder of the Referee's order is affirmed.

October 17, 1980

STANLEY WADLEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Workers' Compensation Board on claimant's request that the Board review the Referee's order which affirmed a Determination Order, dated August 2, 1978, which granted claimant an award of compensation equal to 128° for 40% unscheduled disability for this injury. Claimant contends the award is inadequate.

The Board finds that the Referee correctly recited the facts of this case in his order.

After de novo review of the record in this case, the Board reaches a different conclusion than that reached by the Referee. Claimant is now 52 years old, has a fourth grade education with low I.Q. scores, and all of his work experience has been in heavy manual labor. Claimant is now precluded from his previous employment due to the possibility of additional injury. Since this injury, claimant has been re-employed in the maintenance field. He indicates that he currently has difficulty lifting over 25 pounds, difficulty sleeping, climbing stairs, twisting, bending and walking for prolonged distances. The Board agrees with the Referee's assessment that claimant can perform light work. However, the Board finds that based on the record in this case and considering all of these relevant factors, we find the claimant has lost more of his wage earning capacity than that for which he has been compensated. The Board finds that claimant is entitled to an award of compensation equal to 160° for 50% unscheduled disability for this injury. This award is in lieu of the previous award of unscheduled disability granted claimant for this injury.

ORDER

The Referee's order, dated January 25, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for his back injury. This award is in lieu of any previous awards of unscheduled disability claimant has been granted for this injury.

CLAIM NO. 21C100369

October 20, 1980

ALDINE KEITH, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Black, Kendall, Tremaine, Booth
& Higgins, Employer's Attys.
Order of Abatement

On September 22, 1980, the Workers' Compensation Board issued an Own Motion Order denying claimant's request to reopen this claim. The employer's attorney has requested the Board to stay this order to allow him time to respond to claimant's Motion for Reconsideration dated September 8, 1980.

Because the appeal time on this claim is due to expire October 22, the Board concludes its Own Motion Order of September 22, 1980 should be abated in order to retain jurisdiction in this matter.

IT IS SO ORDERED.

WCB CASE NO. 78-6918

October 21, 1980

PAUL E. HOLMSTROM, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Workers' Compensation Board on claimant's request the Board review the Referee's order entered in it. Claimant contends he is entitled to an increased award of compensation. The Board finds the Referee correctly recited the facts in his order.

After a de novo review of the record in this case, the Board reaches a different conclusion than that of the Referee. Claimant's original injury was on March 25, 1969 and his aggravation rights expired on April 5, 1975. The SAIF Corporation (SAIF) in November 1975 by stipulation of the parties reopened the claim after claimant's aggravation rights had expired. SAIF did not have the right to do this. The Board, pursuant to ORS 656.278 has the power to reopen claims where the injured worker's aggravation rights have expired. The Board, in an Own Motion Determination dated August 11, 1978, did grant claimant an increased award of compensation. Claimant had no right to appeal this order. ORS 656.278. Claimant, however, requested a hearing on this order contending the Board had erroneously designated its order as non-appealable. Claimant contends he has the right to contest the May 12, 1975 Determination Order and had done so by requesting a hearing on that Determination Order. The Board agrees claimant could contest that Determination Order, but SAIF did not have the power to reopen this claim. That power was vested in the Board. The Board disagrees with the Referee's conclusion the Board's Own Motion Determination was in effect a fourth Determination Order and would grant SAIF's motion to dismiss.

After reviewing this record, the Board sees no reason to modify the award of permanent partial disability granted in the Own Motion Determination in this case. However, the Board finds claimant is entitled to an additional award of temporary total disability compensation from November 20, 1978 through December 8, 1978. Claimant was admitted to the Northwest Pain Center for a course of treatment for low back and leg pain related to his original injury. Therefore, the Board modifies its Own Motion Determination, dated August 11, 1978, as amended on September 19, 1978, and orders claimant to be paid additional temporary total disability compensation from November 20, 1978 through December 8, 1978.

ORDER

The Referee's order, dated November 30, 1979, is modified.

The Referee's redesignation of the Board's Own Motion Determination as a fourth Determination Order is reversed.

The Board's Own Motion Determination of August 11, 1978 as amended on September 19, 1978 is amended and claimant is hereby granted an award of additional temporary total disability from November 20, 1978 through December 8, 1978.

October 21, 1980

DALE T. MACHIN, CLAIMANT
Willner, Bennett, Bobbitt
& Hartman, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 15, 1980, claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction and reopen this claim for claimant's March 12, 1974 left knee injury. Attached to this request were reports from Dr. Case. On June 27, 1980 claimant began missing work due to continuous left knee pain. Dr. Case, on July 10, 1980 hospitalized claimant and performed an arthroscopy of claimant's left knee and a "Maquet procedure, left tibia." The diagnosis was chondromalacia of the left patella. Dr. Case related the additional treatment due to a gradual worsening of claimant's 1974 injury.

Fireman's Fund on October 8, 1980 advised the Board it had no opposition to the Board exercising its own series and reopening this claim.

The Board, after reviewing the evidence submitted to it, finds the evidence is sufficient to warrant reopening of this claim effective July 10, 1980, the date claimant was hospitalized by Dr. Case, for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services at Board review a sum equal to 25% of temporary total disability not to exceed \$300.00.

IT IS SO ORDERED.

October 21, 1980

DON McDONALD, CLAIMANT
Rolf Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The Board's order on review in the above entitled matter was entered on September 26, 1980. On October 9, 1978 the Board received from claimant's attorney a Motion for Reconsideration.

The Motion for Reconsideration had two contentions: That claimant was entitled to compensation for temporary total disability commencing July 26, 1976 and that the Board's award of an attorney fee to claimant's attorney was insufficient.

The Board, after giving full consideration to the above motion, finds its Order on Review is affirmed on the issue of claimant's entitlement to compensation for temporary total disability. The medical evidence at the time of claim closure found claimant's condition to be medically stationary, and the Board finds that the closure of the claim was proper. Thereafter, there is no medical evidence that claimant's condition had worsened nor is there any medical report authorizing claimant time loss until his hospitalization on March 12, 1979.

On the issue of the inappropriateness of the award of attorney fee granted to claimant's attorney, the Board agrees. The attorney fee granted by the Order on Review dated September 26, 1980 was in error and that Order on Review is amended accordingly:

ORDER

Claimant's attorney is hereby granted as and for a reasonable attorney fee for prevailing on the denial of low back and hips the sum of \$850 at the hearing level and \$300 for his participation at the Board level.

The remainder of the Board's Order on Review is hereby reaffirmed and ratified.

CLAIM NO. KC 295681

October 21, 1980

LAWRENCE K. MCKINNIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order & Determination

On March 25, 1971, claimant suffered a compensable injury when a log struck and broke his left ankle. The claim was initially closed by an August 6, 1971 Determination Order which granted claimant temporary total disability compensation only. Claimant's aggravation rights have expired.

On June 15, 1980, claimant was hospitalized, and on the following day an arthrotomy followed by reconstruction of the lateral collateral ligament was performed by Dr. German. The SAIF Corporation (SAIF) commenced payment of temporary total disability compensation as of June 16, 1980. On September 2, 1980 Dr. German released claimant for regular work. He reported claimant was limited by "about 20° of eversion and inversion" of the left ankle.

On September 11, 1980 SAIF requested closure of this claim and a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Division on October 8, 1980 recommended claimant be awarded additional temporary total disability compensation from June 15, 1980 through September 1, 1980 and additional compensation equal to 13.5% for 10% loss of function of the left foot.

The Board concurs with this recommendation. The Board orders this claim reopened for payment of compensation and other benefits from June 15, 1980 through September 1, 1980 and awards claimant additional compensation equal to 13.5% for 10% loss of function of his left foot.

CLAIM NO. A 141676

October 22, 1980

ORIN A. BARLOW, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 15, 1980, the SAIF Corporation (SAIF) advised the Board that claimant's aggravation rights had expired in this claim. This claim had originally been established for claimant's July 12, 1949 injury to his pelvis. The claim had been closed and claimant's aggravation rights have expired. Attached to SAIF's letter were various medical reports.

In September 1980, Dr. Wilson reported that claimant had been scheduled for additional surgery on October 2, 1980. He related the need for this surgery to claimant's 1949 injury. X-rays were interpreted as indicating post traumatic arthritis from a traumatic protrusio acetabuli of his left hip which was a result of claimant's 1949 injury with subsequent post traumatic changes. SAIF indicated it had no opposition to Own Motion Order reopening his claim for this surgery which had been scheduled for October 2, 1980 by Dr. Wilson.

The Board, after reviewing the evidence submitted to it in this case, finds the evidence sufficient to warrant reopening this claim effective the date the claimant was hospitalized for surgery recommended by Dr. Wilson, for payment of compensation and other benefits provided for by law until the claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. GC 49505

October 22, 1980

FRANKLIN D. BARNETTE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim was established for claimant's November 21, 1966 back injury. Claimant's aggravation rights have expired. In October 1979, an Own Motion Determination Order had determined claimant's entitlement to temporary total disability compensation, but did not award claimant any additional unscheduled disability for this injury. The Board in its October 1979 Order had found, that consideration of any award of additional permanent partial disability should be held in abeyance until an additional effort could be made to have the claimant attend the Northwest Pain Center. This finding was based on Dr. Grewe's recommendation that claimant attend the pain center. In addition, Dr. Grewe had not provided sufficient information for disability determination.

In December 1979, the claimant was rehospitalized, complaining of back pain. After a period of concerted treatment, the claimant was discharged from the hospital.

Dr. Michael Crow, a psychologist, in May 1980, reported claimant had obtained a college degree since this injury. He felt that claimant had very limited motivation for further training or for returning to work, limited motivation combined with the fact claimant had not been gainfully employed for 14 years, suggested that claimant would be difficult to rehabilitate. Dr. Crow felt it would be better for claimant to return to one of the jobs for which he was already trained, rather than be provided further training.

Chart notes from Dr. Grewe indicate that in mid-January, 1980 he discussed with claimant possible treatment at the pain clinic but claimant felt he would not gain enough from this program to participate in it.

Dr. Grewe's chart notes from January 1980 through August 1980 indicate that claimant continued to have complaints of low back pain. Dr. Grewe felt that claimant's pain symptoms could be significantly reduced only with a "solid" spinal fusion. He did not feel that claimant was severely disabled from the standpoint of performing any gainful employment. He felt that claimant could work in a sedentary type of occupation, but noted that claimant could probably not do so on a sustained basis.

The Evaluation Division of Workers' Compensation Department, on October 10, 1980 advised the Board of these facts and forwarded their file to the Board for its review. The Evaluation Division recommended that claimant be granted an addition award of 50% loss of the arm by separation for unscheduled disability, based on their belief that claimant had been awarded compensation equal to 30% loss of the arm by separation for unscheduled disability. The Evaluation Division did not feel that claimant was entitled to any additional temporary total disability compensation since he had voluntarily rejected any treatment at the pain clinic. They felt that the claim could be closed and that if any definite medical treatment was offered in the future, the claim could be reopened for it at that time.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an additional award of 50% loss of the arm by separation for unscheduled disability, but no additional temporary total disability compensation will be granted.

WCB CASE NO. 79-9157

October 22, 1980

RAYMOND M. BLACK, CLAIMANT
Maurice V. Engalgau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF Corp.

This case is before the Workers' Compensation Board on the SAIF corporation's (SAIF) request that the Board review the Referee's order entered in this case. SAIF contends that the claimant has not proven that his original injury has aggravated and contends that claimant suffered a new and intervening injury which relieves them of any responsibility for his current condition. The Board finds the Referee correctly recited the facts of this case in his Order.

October 22, 1980

ROSCOE GEMMELL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On January 4, 1962, claimant sustained a compensable injury to his left knee. After a period of treatment to include surgery, this claim was closed. Claimant's aggravation rights have expired.

The Board reopened this claim under its Own Motion jurisdiction on May 11, 1979 and remanded it to the SAIF Corporation (SAIF) for payment of compensation and other benefits until the claim is closed pursuant to ORS 656.378. After this reopening, claimant underwent two knee arthroplasties, one in March 1979 and another in December 1979. Dr. Zimmerman, who performed the last surgery, reported in June 1980 that claimant continued to have difficulty climbing up and down hills, complained of achiness in the joint, and needed a cane to ambulate. He felt claimant's condition was approaching the stationary position.

On August 7, 1980, the Orthopaedic Consultants reported that claimant's condition was stationary. They felt that claimant was employable only in sedentary occupations, but his age "predispose" (sic) gainful employment. They felt the total loss of function as it existed at that time and as related to claimant's industrial injury was moderately severe.

SAIF, on August 20, 1980, requested determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department on October 1, 1980 advised the Board that a hearing had been held in this case on claimant's claim of a new injury. The Referee had found that claimant's left leg problems as well as his current psychiatric condition were related to the 1962 injury and therefore should be considered by the Board in this case under its Own Motion jurisdiction.

Dr. Maltby, a psychiatrist, had examined claimant and reported that "he did not have any significant degree of depression...to cause impairment of function."

The Evaluation committee recommended that since claimant's condition was both medically and psychiatrically stationary, that this claim be closed. The Committee recommended that claimant be awarded additional temporary total disability compensation from March 26, 1979 through August 7, 1980 and compensation for permanent partial disability of 60% loss of function of the left leg in lieu of any prior awards.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional total temporary disability compensation from March 26, 1979 through August 7, 1980, and compensation for permanent partial disability of 60% loss of function of the left leg. The award of compensation for claimant's left leg injury is in lieu of any prior awards of scheduled disability claimant has been granted for that injury.

CLAIM NO. 131 4B 6529

October 22, 1980

ROBERT E. HEFFLIN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On July 16, 1974, claimant sustained a compensable injury to his right wrist. His claim was originally closed by Determination Order dated March 25, 1975 which granted claimant an award of temporary total disability compensation equal to 15% for 10% loss of his right forearm. Claimant's aggravation rights have expired.

This claim was reopened by the carrier as of April 21, 1980 based upon Dr. Button's report that claimant needed additional surgery for improvement of pain in the range of motion in his wrist. Temporary total disability compensation was paid from April 21, 1980 through April 27, 1980 when claimant returned to his regular work. He was paid additional temporary total disability compensation from June 10, 1980 through August 18, 1980 while he was unable to work due to difficulty with his wrist.

Dr. Button, on August 20, 1980, reported that claimant's condition was again medically stationary and recommended closure of this claim. He rated claimant's total combined impairment of function at 20%.

After de novo review of the record in this case, the Board reaches a different conclusion than that reached by the Referee. The Referee noted that there is no question claimant suffered an industrial injury in 1978 and continued to work at his job until August 1978, when he was laid off. His claim was originally accepted as a nondisabling injury. The Board disagrees with the Referee's finding that claimant did not suffer a new injury in August 1979 when he stepped off or jumped off a bank while attending a picnic. The May 7, 1978 injury was diagnosed as a laceration of the right knee. In August 1978, claimant reported he was having continuing pain in his knee after prolonged driving. He also indicated that he had some swelling in the knee. Dr. Adams diagnosed this condition as patellofemoral osteoarthritis or chondromalacia at an early stage and which was mild. Dr. Bert then examined claimant and felt that claimant had a possible derangement of the right knee. A right knee arthrogram was performed and was interpreted as being within the normal limits. Dr. Bert felt that claimant had a moderate medial collateral ligament syndrome which could be controlled with medication. In August 1979, Dr. Bert reported that claimant jumped off a bank three weeks previously and developed a popping discomfort in his right knee. Diagnosis was medial collateral ligament strain. Dr. Bert did not indicate this was related to claimant's work or to his previous knee injury. The Board finds that the preponderance of evidence indicates claimant suffered a new injury in July 1979 when he either stepped off or jumped off the bank of a ditch and injured his knee. Claimant indicated his "knee popped awful bad"

and, after that, he was unable to walk on it. The Board does not find any evidence that prior to this time claimant had any difficulty in walking. The Board also notes that Dr. Bert treated claimant after his initial injury and after the July 1979 incident, and refers to the July 1979 picnic accident as the apparent cause of claimant's knee condition. He did not relate claimant's knee condition to either his employment or to his prior injury. Therefore, the Board finds the preponderance of the evidence indicates that claimant experienced a new and intervening injury in July 1979 which relieves SAIF from any responsibility for his current right knee condition. Accordingly, the Referee's order is reversed in its entirety.

ORDER

The Referee's order, dated April 18, 1980 is reversed in its entirety.

The SAIF Corporation's denial dated October 15, 1979 is restored and affirmed.

October 22, 1980

KENNETH L. DILLON, CLAIMANT
Starr & Vinson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim was reopened by the Board pursuant to the provisions of ORS 656.278. Claimant had suffered a compensable injury to his back on September 17, 1963. The claim was closed by a June 7, 1965 Determination Order which granted claimant permanent partial disability equal to 50-3/4% for 35% loss of function of an arm for unscheduled disability. Claimant's aggravation rights have expired. Claimant had additional surgery on August 8, 1978 for removal of a proliferated bone of the previous fusion which was causing spinal stenoses. Dr. Degge, on November 7, 1978, opined claimant's condition was medically stationary. Dr. Degge, in July 1980, reported claimant had mildly-moderate impairment due to this injury.

A determination of claimant's current disability was requested. On September 25, 1980, the Evaluation Division of the Workers' Compensation Department recommended this claim be closed and claimant be granted an award of additional temporary total disability from August 8, 1978 through November 6, 1978 without an award for additional permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for total temporary disability from August 8, 1978 through November 6, 1978, less time worked. This award is in addition to any previous awards claimant has been granted for this claim.

Claimant's attorney has already been granted a reasonable attorney's fee by the Order dated December 28, 1979 and will not be granted an additional fee.

The carrier, on September 2, 1980 requested determination be made on this case. The Evaluation Division of Workers' Compensation Board on October 13, 1980 recommended this claim be closed with an additional award of temporary total disability compensation from April 21, 1980 through April 27, 1980 and from June 10, 1980 through August 20, 1980, and an additional award of permanent partial disability equal to 15° for 10% loss of the right forearm for a total award of compensation equal to 30° for 20% loss of the right forearm.

The Board concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted an additional award of temporary total disability compensation from April 21, 1980 through April 27, 1980 and from June 10, 1980 through August 20, 1980, and an additional award of permanent partial disability equal to 15° for 10% loss of the right forearm, making a total award of compensation equal to 30° for 20% loss of the right forearm. The record indicates claimant has received temporary total disability compensation from April 21, 1980 through April 27, 1980 and from June 10, 1980 through August 20, 1980.

CLAIM NO. DC 397390

October 22, 1980

ARCHIE D. LAPPING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on September 26, 1972 to his left leg. This claim was initially closed with an award of compensation equal to 30% loss of the left foot. Claimant's aggravation rights have expired.

This claim was reopened by the Board's own motion order dated December 19, 1979 based on Dr. Cherry's report that claimant had quit work as of November 12, 1979 due to his left ankle condition. Dr. Cherry reported the scar on his ankle was tender and tapping on the edge of the scar caused a tingling sensation to go down to the area of the toes. Dr. Cherry requested this claim be reopened and that claimant undergo additional treatment. Claimant was hospitalized on January 7, 1980 and excision of the scar and partial resection of loose bony bodies in the left ankle was performed on January 8, 1980 by Dr. Cherry.

On August 18, 1980 Dr. Marble reported that claimant had significant and progressive post traumatic arthritis in his left ankle. He related this to claimant's original injury. Dr. Marble thought that claimant had a 15% impairment in function of his left ankle and saw no way to improve it. He felt that claimant would eventually need an ankle fusion. Further it was his opinion that claimant needed vocational assistance in returning to work. Dr. Cherry concurred with this report but noted that it would be difficult for claimant to return to work because of his ankle condition.

The SAIF Corporation, on September 12, 1980, requested a determination of disability in this case. The Evaluation Division of the Workers' Compensation Department, on October 15, 1980, recommended that claimant be granted an award of additional temporary total disability compensation from November 12, 1979 through August 13, 1980 and an additional award of permanent partial disability equal to 20% loss of the left foot in addition to that granted by the Determination Order dated April 8, 1974, which granted claimant an award of compensation equal to 30% loss of his left foot.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from November 12, 1979 through August 13, 1980 and an additional award of permanent partial disability equal to 20% loss of the left foot in addition to that granted by the Determination Order dated April 8, 1974.

WCB CASE NO. 79-4817

October 22, 1980

PHYLLIS L. MITCHELL, CLAIMANT
Stunz, Fonda & Pratt, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF Corp.

This case is before the Workers' Compensation Board on the SAIF Corporation's (SAIF) request that the Board review the Referee's order entered in this case. SAIF contends that claimant's cervical, back, and left shoulder problems were not caused by her work and that claimant's claim is barred due to an untimely filing.

Claimant, a 45-year-old cook, was employed at the Charolais Restaurant in Ontario, Oregon from March 1978 until November 7, 1978 when she temporarily left work to attend a sister's funeral. Claimant testified that in late September 1978, while carrying a tray of chickens, she clipped and fell onto the floor while going into or out of a walk-in cooler. She indicated that she fell on two occasions. On the first occasion she fell and skinned her knees. After this incident, claimant continued working and indicated that she advised a co-employee of this event. The co-employee testified that he did not remember any such conversation with claimant. Claimant stated that she again fell while carrying a tray of roast beef and tomatoes and again landed on her bottom. She said this incident occurred on Halloween, October 31, 1978. After these two incidents claimant indicated she did not have any pain or any problems immediately afterwards. However, prior to leaving work in November 1978, she reported that her neck was stiff and as time went on the pain in her neck went from the right shoulder blade up to her right ear. Claimant stated that she never notified the employer of either fall and did not advise the employer that she had been injured.

In late January 1979 or early February 1979, claimant stated that she called the bookkeeper for a Form 801. The bookkeeper testified that she did not recall receiving such a call from claimant. Further, claimant testified that she eventually obtained a Form 801 from the Compliance Division and mailed a certified copy of this to her employer on March 23, 1979. A representative of SAIF went to claimant's home and claimant again filed another 801 on April 26, 1979. Claimant testified that she is now working as a manager in a store in Idaho.

Claimant first received medical treatment on November 29, 1978 from Dr. Carroll. Claimant gave Dr. Carroll a history of being injured in falls at her place of employment in September, October, and on November 1, 1978. Dr. Carroll diagnosed these injuries as a sprain of the dorsal spine. He reported that claimant's condition was medically stationary as of December 18, 1978 and felt that claimant would suffer no permanent impairment due to these injuries.

Dr. Johnson, on February 22, 1980, reported he had seen claimant on February 2, 1979 for back pain. She gave him a history of being injured in November 1978 when, while carrying a tray of chickens, she slipped and fell while working for the Charolais Restaurant. Claimant was complaining of left shoulder pain and pain in the dorsal area of her back. She indicated the pain in her shoulder went down to the elbows and left side. Dr. Johnson interpreted the EMG and nerve conduction studies as being normal. He found no evidence of nerve impingement or explanation for claimant's complaints at that time. In April 1979, Dr. Johnson reported that claimant was complaining of a painful right arm.

SAIF, on May 17, 1979, denied claimant's claim. The basis of its denial was that it did not feel that the evidence indicated claimant had sustained an injury as a result of or within the course and scope of her employment with this employer.

Claimant was released to return to work on May 29, 1979.

In early July 1979, Dr. Johnson reported all of claimant's complaints were entirely subjective. Claimant had no evidence of any objective muscle or nerve root loss from his examination. He felt that it would be difficult to relate claimant's complaints to her alleged injury. He felt that he would have to base any opinion on the history given by claimant and the fact that she was working at the time of the alleged injury. He felt, based on this information, claimant's complaints were compatible with the history given by her.

The Referee found that SAIF's argument regarding the timeliness in filing of this claim was not persuasive and it had not establish if had been prejudiced by the failure of claimant to give notice of this injury. Further, he found the notice was given within one year after the date of the accident and that claimant had established good cause for failure to give notice within 30 days after the accident. Further, the Referee found that claimant had proven by a preponderance of the evidence that she did, in fact, suffer a compensable injury and set aside SAIF's denial of this claim and remanded it back to it for process under the Workers' Compensation laws.

After de novo review of the record in this case, the Board reaches a different conclusion than that reached by the Referee. The Board does not agree with the Referee that the claim was timely filed. The first notice given was a report by Dr. Carroll on December 18, 1978. This was well beyond the 30-day statutory limitation for giving notice of injury. Our courts have held that time limitations are strictly statutory in nature and are strictly adhered to in Workers' Compensation cases. The Board finds that claimant's giving of notice in this case was not timely. In reaching this conclusion, the Board finds that the facts in this case are closely similar to those in the case of Vandre v. Weyerhaeuser Company, 42 Or App 705, _____ P2d _____ (1979). Further, the Board does not find that claimant has shown any good cause for her late filing.

In addition, if the Board had not found that this claim had been untimely filed, the Board would still have reversed the Referee's order. There are inconsistencies between the claimant's testimony and the history she has given the various physicians in this case which cause the Board to have considerable doubts about claimant's credibility. Based on the preponderance of the evidence in this case, the Board does not find that claimant has suffered any compensable injuries.

ORDER

The Referee's order, dated March 12, 1980, is reversed in its entirety.

The SAIF Corporation's denial, dated May 17, 1979, is restored and affirmed.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

October 22, 1980

NORMAN L. WILSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim for claimant's November 17, 1972 injury to his right leg was reopened by the Board under its own motion jurisdiction in May 1979 effective April 25, 1979, the date claimant was hospitalized for additional surgery consisting of compression arthrodesis of the right talocrural joint. Claimant's aggravation rights had expired in this case.

After the April 25, 1979 surgery, claimant was released by his doctor for desk work only as of May 15, 1979. On April 9, 1980, claimant underwent the removal of the right patella. The SAIF Corporation (SAIF) denied responsibility of the surgery and its related time loss from April 9, 1980 through May 19, 1980.

Dr. Martens, claimant's treating physician, on August 6, 1980 order the claimant's condition was medically stationary regarding the right ankle. He felt that claimant required no further treatment for this condition. He reported that claimant had no motion at the talotibial joint because of the fusion. Claimant continued to complain of some aching and swelling, especially along the medial side of the ankle after excessive standing or walking.

On September 2, 1980, claimant was examined by the Orthopaedic Consultants. They diagnosed traumatic arthritis of the right ankle, a postoperative condition due to the open reduction of the fractured right ankle, and post operative arthrodesis of the right ankle. They found various other conditions that were unrelated to this injury. They felt that claimant's condition was medically stationary and he needed no additional treatment. They felt that the permanent impairment of the right ankle was in the moderate category.

SAIF, on August 14, 1980 requested determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on October 15, 1980, recommended that claimant be granted an award of additional temporary total disability compensation from April 25, 1979 through May 15, 1979, an award of temporary partial disability from May 16, 1979 through April 8, 1980 and further be granted an award of temporary partial disability from May 20, 1980 through August 6, 1980 and for one day of temporary total disability compensation on September 2, 1980 and recommended no change in the amount of permanent partial disability claimant had been awarded.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from April 25, 1979 through May 15, 1979, an award of temporary partial disability from May 16, 1979 through April 8, 1980 and an award of temporary partial disability from May 20, 1980 through August 6, 1980 and for one day of temporary total disability compensation on September 2, 1980.

- CLAIM NO. 49292 October 22, 1980

HELEN J. YOUNG, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim was established for claimant's November 19, 1974 compensable injury to her right foot. The claim was initially closed and claimant's aggravation rights have expired. The Board, in its Own Motion Order dated June 19, 1980 reopened this claim under its Own Motion jurisdiction effective the day claimant was hospitalized for surgery which had been recommended by Dr. Long. He had recommended that claimant undergo surgical treatment for a neuroma in the third intermetatarsal space. Dr. Long felt this was related to claimant's original 1974 foot injury. Claimant was hospitalized and surgery was performed on June 11, 1980. Dr. Long released claimant for regular work as of August 4, 1980. He felt that claimant's foot would become symptom free.

The SAIF Corporation on September 3, 1980 requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department on October 15, 1980 recommended closing of this claim with an award of additional temporary total disability compensation from June 11, 1980 through August 3, 1980 and no additional award of permanent partial disability for claimant's right foot.

The Board concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted an award of additional total temporary disability compensation from June 11, 1980 through August 3, 1980 and no additional award of permanent partial disability. The record indicates claimant has already received this award.

claim no. C 414621 October 22, 1980

DARRYL S. ZUCHER, CLAIMANT
Richard Kropp, Claimant's Atty.
Own Motion Determination

This claim was reopened by the Board's own motion order dated May 30, 1980. The claim was reopened effective February 15, 1980, the date claimant was hospitalized for the exploration and arthrotomy of the joint of the left shoulder, debridement of the scar and old suture material, "anterior reconstruction and advancement in the manner of Putt-Platt, utilizing the subscapularis muscle" and transfer of the coracoid process to the anterior surface of the humerus. Claimant has received awards of compensation equalling 60% unscheduled disability for his left shoulder injury.

On July 31, 1980, Dr. Ellison, who had performed surgery in February 1980, found that claimant's condition was medically stationary and the claim could be closed. He felt that claimant did have disability which could be measured principally in terms of the range of motion of claimant's shoulder and the limitation which might be imposed because of discomfort. Dr. Ellison thought claimant might not be able to work for prolonged periods with his arms at or above shoulder level, lift weights in excess of 25 to 50 pounds, or perform activities which required strong abduction or forward flexion of the shoulder, i.e., as in reaching up and reaching out. He felt these were permanent functional limitations.

The SAIF Corporation, on August 11, 1980, requested a determination of claimant's disability be made in this case. The Evaluation Division of the Workers' Compensation Department on October 14, 1980 recommended claimant be awarded additional temporary total disability compensation from February 15, 1980 through July 31, 1980 and the claimant be granted no additional award of permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted additional temporary total disability compensation from February 15, 1980 through July 31, 1980. The record shows that claimant has received this compensation.

Claimant's attorney has already been granted reasonable attorney's fee in the Own Motion Order dated May 30, 1980.

WCB CASE NO. 79-2895

October 24, 1980

RAY BROWN, CLAIMANT
Rolf Olson, Claimant's Atty.
R. Ray Heysell, Employer's Atty.
Request for Review by Employer

This case is before the Workers' Compensation Board on the employer's request that the Board review the original order and amended order of the Referee. The Referee found that claimant's condition had aggravated, ordered his claim reopened as a valid aggravation claim effective February 4 1979 and granted claimant additional compensation in the form of a penalty and granted claimant's attorney a fee. The Board finds the Referee correctly recited the facts of this case in his orders.

After a de novo review of the record in this case, a majority of the Board reaches a different conclusion than that of the Referee. The Board does not find this claim was prematurely closed and does not find that claimant has established that his condition has aggravated since the last arrangement of compensation.

In early January 1979, Dr. Campagna reported claimant's claim could be closed as of December 18, 1978. Dr. Campagna reported that claimant had fallen on ice in early December 1978 and had twisted his back. He noted claimant complained of severe back pain and left anterior thigh pain. In late January 1979, he reported that claimant continued to have "total spine pain." He found that claimant had an old derormity of the right leg. It was his opinion that claimant's condition was stationary and no neurological treatment was indicated. In early February 1979, Dr. Campagna reported that claimant continued to have low back and left leg pain. He stated that claimant appeared to be in pain, but found considerable functional overlay. He felt claimant should be hospitalized for orthopedic consultation.

Dr. Bolten examined claimant while he was hospitalized and felt that claimant needed a weight control program to reduce his large abdomen which aggravated his lumbar lordosis. He felt that claimant's condition was not going to improve without weight loss.

The claim was initially closed by Determination Order dated February 8, 1979 which awarded claimant temporary total disability compensation from October 24, 1977 through December 8, 1978, less time worked. Claimant was hospitalized after this Determination Order was issued for additional testing. The diagnosis did not change. Dr. Campagna continued to report that claimant complained of low back and left hip pain. He felt that claimant should be evaluated at the Callahan Center. The carrier denied the aggravation claim on March 27, 1979 on the basis it had no evidence to indicate claimant's condition had worsened or that this claim should be reopened. Subsequently, Dr. Campagna reported that claimant's condition had remained essentially unchanged throughout the period of time since he began treating him in 1973.

Based on this evidence, the majority of the Board finds the Determination Order was correctly entered and that this claim was not prematurely closed. Further, the majority of the Board finds that there is no evidence that claimant's condition has aggravated, and the claim was properly denied on March 27, 1979. Therefore, there is no basis on which the referee can assess penalties and attorney fees. The majority of the Board orders the denial of the employer restored and affirmed.

On the claimant's alternative contention that he has sustained permanent partial disability due to this injury, the majority of the Board finds that the preponderance of evidence does not establish that claimant has suffered a permanent partial disability due to this injury. The evidence established that claimant has a lumbar strain but does not establish this condition has resulted in claimant experiencing any loss of wage earning capacity. Therefore, the majority of the Board would affirm the Determination Order entered in this case.

ORDER

The Referee's order, dated March 14, 1980, is reversed.

The employer's denial March 27, 1979 is ordered restored and affirmed. Determination Order dated February 8, 1979 is ordered restored and affirmed.

WCB CASE NO. 78-4018
WCB CASE NO. 77-7564

October 24, 1980

GERALD HAWKE, CLAIMANT
Malagon, Velure & Yates, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Treplex

The Board received from defendant's attorney a Motion to Reconsider its Order on Review dated September 24, 1980 in the above entitled case. On October 13, 1980 the Board issued an Order on Abatement.

After a careful re-review of the record, the Board affirms its prior Order on Review.

Although the SAIF Corporation initially denied compensability a .307 order was issued designating SAIF Corporation as the paying agent. Thereafter, no one requested that the .307 order be set aside. Therefore, the Board concludes that the hearing will be set on the issue of who is the responsible party for claimant's condition based on that .307 order.

The Board's order on Review of September 24, 1980 is reissued and reaffirmed in its entirety.

IT IS SO ORDERED.

WCB CASE NO. 79-7286

October 24, 1980

GERALDINE REYNOLDS, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Cheney & Kelley, Employer's 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 saif request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

October 24, 1980

WITOLD WASSING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order of Dismissal

An Order to Show Cause was issued on July 31, 1980 in this case. Claimant failed to respond and on September 12, 1980 this case was dismissed by the Presiding Referee. On September 30, 1980, claimant appealed that order. The Board, on October 7, 1980, advised claimant it could review only the propriety of the order and not decide the issues raised in claimant's request for hearing. The Board advised claimant that if he did not inform the Board within ten days that he wished to proceed, the Board would consider claimant's request for review to be withdrawn. The Board has not been contacted by claimant and considers claimant's request withdrawn and dismisses this request for review.

ORDER

Claimant's request for Board review is dismissed.

October 27, 1980

MICHAEL BARNETT, CLAIMANT
Robert E. Nelson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Review

This case is before the Worker's Compensation Board on claimant's request that the Board review the Referee's order which affirmed the SAIF Corporation's (SAIF) denial of this claim.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of the record in this case, the Board reaches a different conclusion than that of the Referee. The Board does not find claimant to be an unreliable historian. The medical reports and claimant's testimony are consistent on how claimant contends he injured his back. Further, there has been no contrary evidence presented to contradict claimant's testimony. The Board finds the preponderance of the evidence favors claimant's contention. Therefore, the Board reverses SAIF's denial and remands this claim to it for acceptance and payment of compensation and other benefits as provided by law until closure pursuant to ORS 656.268.

ORDER

The Referee's order dated March 28, 1980 is reversed.

The SAIF Corporation's denial dated November 9, 1979 is set aside and this claim is remanded to it for acceptance and payment of compensation and other benefits as provided by law until closure pursuant to ORS 656.268.

Claimant's attorney is granted a reasonable attorney fee for his services at both Hearings and Board level in the sum of \$1,000 payable by SAIF Corporation.

A hearing was held and closed in Portland, Oregon, on March 5, 1980 before Lou L. Williams, Referee. Claimant was present in person and through his attorney, Robert E. Nelson. His employer, Service & Erection Co., and its insurer, State Accident Insurance Fund, were represented by Michael G. Bostwick, Associate Counsel. Claimant appeals a November 9, 1979 denial of a claim for injury to his low back alleged to have been suffered September 11, 1979.

FACTS AND OPINION

Claimant alleges that he was on the job for about the third day for this employer when he was hurt. He had been hired as a hod carrier but at the time was standing on a scaffolding approximately 34 inches in width and unloading six sections of metal scaffolding from a fork lift truck. The shape of the items which he was unloading was approximately that of an inverted "U" and weighed 10 to 15 pounds each. He had one hand on each of the parallel sides of the piece of scaffolding which he was moving and reported that he lost his balance. He stated that he grabbed a piece of reinforcing steel on the building with his left hand and that in so doing one side of the scaffolding piece came loose from his left hand and pivoted. He stated that he was able to grab the reinforcing steel before the scaffolding, which pivoted around, struck the side of the platform. Nevertheless, he characterizes the incident as his being nearly thrown off the scaffolding. It is this incident to which he attributes his later back complaints. He mentioned to one of his fellow employees that he almost fell but he did not mention that he suffered any pain as a result of that incident.

It was, in fact, his impression at the time that he was simply stiff and sore from manual labor to which he was unaccustomed. That night he reported to his domestic associate that he was sore from work and that he had almost fallen. He did not tell her that he had injured himself by slipping. Claimant did return to work at least one day following this episode and there was a period of time when he was reported to have been in such discomfort that he was unable to either stand or sit comfortably. Claimant experienced some difficulty in getting an appointment with the doctor and therefore was not seen until September 17.

During the investigation of this claim by the State Accident Insurance Fund the claimant told a representative of SAIF that he had no prior back injury so far as "I knew". Claimant testified that it slipped his mind that he had sprained his back "a couple of years ago" and that he had seen a doctor "two or three times" as a result of that injury. He also at the hearing acknowledged having slipped and fallen down stairs at school about eight years ago.

While claimant was unable to work he was able to maintain his automobile and participated to some degree in the moving of household goods and furniture, although it is denied that he did any heavy lifting. He was paid interim compensation for about six weeks.

In examining Exhibit 6 it is noted that the orthopedic physician and surgeon to whom the claimant was referred by his chiropractor had the impression that claimant had a lumbosacral strain but a reading of the report discloses an absence of objective findings. It is the Referee's opinion that the claimant is an unreliable historian who, as Dr. Thomas noted, exaggerated his complaints when seen. Claimant was afraid of heights (Exhibit 6, page 1) and it appears to the Referee that the claimant did not suffer an on-the-job injury. His description of the pivoting of the piece of scaffolding in his hand and his demonstration at the hearing convince the Referee that such a pivoting might well cause the claimant anxiety but would not exert any pressure in his body. He testified that prior to the time of the item striking the platform he had already grabbed the rebar (reinforcing steel). All or most of the weight of the 10 to 15 pound piece of metal held by the claimant would be resting on the platform.

ORDER

IT IS HEREBY ORDERED that the employer's denial of November 9, 1979 is approved and the relief which claimant requests is denied.

CLAIM NO. A 49793

October 28, 1980

PAUL CARROL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 20, 1980, the SAIF Corporation (SAIF) forwarded to the Board certain information concerning this claim. Claimant had been injured on July 30, 1947 and his aggravation rights had expired in this case. SAIF attached reports from Dr. Gambee which indicated that claimant needed a total hip replacement. SAIF advised Dr. Gambee it did not oppose this surgery. On October 13, 1980, Dr. Gambee performed a total hip replacement. SAIF indicated it did not oppose an Own Motion Order reopening this claim for the surgery that was performed on October 13, 1980.

The Board, after reviewing the evidence submitted to it, finds the evidence is sufficient to warrant a reopening of this claim. Therefore, the Board orders this claim be reopened effective the date claimant was hospitalized for the October 13, 1980 surgery for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. C 369629

October 28, 1980

JAMES FOLEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 3, 1980, claimant requested that the Board exercise its Own Motion jurisdiction and reopen his claim for an injury sustained in May 1972. Claimant advised the Board that he was scheduled for surgery on October 31, 1980 for a knee condition related to the 1972 injury. Claimant's aggravation rights have expired.

On October 16, 1980 the Board received a report from Dr. Raymond North indicating claimant's current condition was directly related to the May 1972 industrial injury advising of the upcoming surgery.

The Board advised the SAIF Corporation of claimant's request and on October 24, 1980 the SAIF indicated it would not oppose reopening claimant's claim for the surgery.

The Board, after thorough consideration of the evidence before it, concludes claimant's claim for his May 1972 injury should be reopened as of the day he enters the hospital for the surgery recommended by Dr. North and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. C 300516 October 28, 1980

JAMES R. MCCOOL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

This claim was originally established for an April 21, 1971 compensable injury to claimant's back. On October 13, 1980, the SAIF Corporation (SAIF) advised the Board that it was forwarding various information to the Board in this claim. SAIF indicated that claimant's aggravation rights had expired and this claim was being referred to it for consideration by the Board for reopening under its Own Motion jurisdiction. SAIF indicated it would not oppose reopening the claim for time loss as verified by claimant's treating physician.

On September 16, 1980, Dr. Curtis Adams reported that claimant was having a great deal of difficulty with his back. He felt that claimant should remain off work for approximately three weeks because of this condition. He felt if claimant's condition did not improve, another myelogram should be considered and possibly an arthrodesis of the lower spine area.

The Board, after reviewing the evidence submitted to it, finds this claim should be reopened as of September 16, 1980 for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED

October 29, 1980

FRANKLIN D. BARNETTE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

The SAIF Corporation (SAIF), on October 24, 1980, advised the Board claimant has been granted the following awards of compensation: (1) 19.2 degrees for 10% loss of use of an arm in April 1969; (2) 38.4 degrees for 20% loss of the use of an arm in April 1973; and (3) 57.6 degrees for 30% loss of use of an arm in December 1973 for a total award of compensation equal to 115.7 degrees for 60% loss of arm by separation for unscheduled disability. The Evaluation Division recommended claimant be granted an addition award of compensation of 50% loss of the arm by separation for unscheduled disability based on its belief claimant had received compensation equal to 30% loss of the arm by separation for unscheduled disability.

The Board, after reviewing the record in this case and in light of the additional information provided by the SAIF Corporation, amends its order and grants claimant an award of additional permanent partial disability compensation equal to 38.4 degrees for 20% loss of the arm by separation for unscheduled disability. This award of compensation is granted in lieu of the award granted by the board in its October 22, 1980 Own Motion Determination.

ORDER

The Board's Own Motion Determination dated October 22, 1980 is modified.

Claimant is hereby granted an award of additional compensation equal to 38.4 degrees for 20% loss of sue of the arm by separation for unscheduled disability. This award is in lieu of that granted by the Board in its October 22, 1980 Own Motion Determination.

The remainder of the Board's order is affirmed.

October 29, 1980

HARVEY O. BODDA, CLAIMANT
Gregory L. Decker, Claimant's Atty.
J. Phillip Parks, Defense Atty.
Own Motion Order

On May 3, 1966, claimant sustained a compensable injury to his left foot. The claim was initially closed by Determination Order dated September 30, 1968 which awarded claimant compensation equal to 50% loss of the left foot. Claimant's aggravation rights have expired. This claim was reopened by the Board under its Own Motion jurisdiction and closed by an award of additional temporary total disability compensation and an additional award of compensation equal to 10% loss of the left foot.

On October 17, 1980, United Pacific-Reliance advised the Board that Dr. Gallagher had recommended a below-the-knee amputation of claimant's left foot and that he be fitted with a below-the-knee prosthesis. Dr. Gallagher related the need for this surgery to claimant's original injury and the subsequent surgical treatment of it. United Pacific-Reliance indicated it would not object to an order reopening this claim for below-the-knee amputation.

The Board, after reviewing the evidence submitted to it in this case, finds the evidence sufficient to warrant the reopening of this claim. Therefore, the Board orders this claim reopened for payment of compensation and other benefits effective the date claimant is hospitalized for the treatment suggested by Dr. Gallagher until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. A 310030

October 29, 1980

OHMAN E. CHRISTOPHER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 21, 1980, the SAIF Corporation (SAIF) forwarded various copies of medical reports in this case. It advised the Board that claimant had been originally injured on August 7, 1952 and his aggravation rights have expired. One of the reports forwarded to the Board was a report of Dr. Matteri dated October 7, 1980 which indicated that claimant suffered from chronic osteomyelitis as a result of his 1952 injury. Dr. Matteri reported that claimant was at that time experiencing a flareup of his condition and was incapable of walking on his foot, and had asked that the claim be reopened. SAIF advised the board that it would not oppose an Own Motion Order reopening his claim for the treatment of claimant's chronic osteomyelitis.

The Board, after reviewing the evidence submitted to it in this case, finds the evidence is sufficient to warrant a reopening of this claimant at this time under its Own Motion jurisdiction. Therefore, the Board orders this claim reopened under its Own Motion jurisdiction effective October 7, 1980 for payment of compensation and other benefits as provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. A 903544

October 29, 1980

ROSCOE GEMMELL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

This is an Amended Own Motion Determination to correct the SAIF Corporation's designated claim number from the one presently appearing in the record as KD 99866 to the proper claim number which is A 903544.

October 29, 1980

ROLAND E. GERLITZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim for claimant's March 18, 1969 compensable injury to his left knee was reopened by the Board under its Own Motion jurisdiction on April 21, 1980. This was based on Dr. Slocums's report that on January 23, 1980 he performed an arthroscopy, "high tibial osteotomy, lateral closing wedge and Maquet procedure." Claimant has received awards of compensation for this injury equalling 40% loss of function of his left leg. The SAIF Corporation (SAIF) reported that claimant was released to return to work as of August 1, 1980.

In the middle of August 1980, Dr. Baldwin, who had taken over treatment of claimant, from Dr. Slocum, reported that claimant was doing reasonable well. He felt that claimant should continue to exercise as he could tolerate it, and he recommended no additional treatment at that time. He also indicated that claimant's condition was considered medically stationary and his claim could be closed.

On September 5, 1980, SAIF requested determination be made in this case. The Evaluation Division of the Workers' Compensation Department on October 15, 1980 recommended that the claim be closed and that claimant be granted an award of additional temporary total disability from January 23, 1980 through July 31, 1980 and recommended claimant be granted no additional award of permanent partial disability for this injury.

The Board concurs with the recommendation of the Evaluation Division.

ORDER

The claimant is hereby granted an award of additional temporary total disability compensation from January 23, 1980 through July 31, 1980. The record indicates that claimant has been paid this compensation.

October 29, 1980

NATHAN S. RANDALL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim for claimant's 1962 left leg injury was reopened by the Board effective September 11, 1979 under its Own Motion jurisdiction. Claimant indicated that he had been off work due to a cellulitis condition in his left leg from September 11 through 12, 1979. He indicated he returned to work on October 15, 1979. Dr. Courogen released claimant for regular work on December 17, 1979 indicating, however, that claimant was released for modified work and was to work six hours per day. He found that claimant's condition was medically stationary as of December 17, 1979.

Dr. Courogen, on August 7, 1980 reported that claimant's condition was stationary. However, he noted that claimant had a history of developing cellulitis every two or three months which required elevation of the leg and intravenous and organ antibiotics.

The SAIF Corporation, on September 25, 1980 requested determination be made in this case. The Evaluation Division of the Workers' Compensation Department on October 20, 1980 advised the Board that subsequently to the August 1980 report, Dr. Courogen had indicated on September 5, 1980 that claimant's condition was still stationary. The Evaluation Division recommended this claim be closed with an award of additional temporary total disability from September 11, 1979 through September 5, 1980 less time worked and recommended no additional award of permanent partial disability compensation.

The Board concurs with this recommendation. If the claimant continues to have difficulty with the cellulitis, medical care and treatment can be provided under the provisions of ORS 656.245 without the necessity of reopening this claim if claimant incurs no additional time loss.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from September 11, 1979 through September 5, 1980 less time worked.

CLAIM NO. C28273

October 29, 1980

THEODORE D. RAZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim for claimant's compensable injury to his left hip which occurred on July 11, 1966 was reopened by the Board under its Own Motion jurisdiction. On October 30, 1979 Dr. Adlhoch performed a left hip arthroplasty. After this surgery, claimant returned to full-time work on February 11, 1980.

Dr. Adlhoch on August 4, 1980 examined claimant. He felt that the range of motion in claimant's hip was satisfactory and that claimant had no pain in it. He felt that claimant's medical condition was stationary and he did not have any permanent residuals from this injury.

The SAIF Corporation on August 20, 1980 requested determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department on October 20, 1980, recommended that this claim be closed an award of additional temporary total disability compensation from October 29, 1979 through August 4, 1980 and no additional permanent partial disability award.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from October 29, 1979 through August 4, 1980.

CLAIM NO. 2001562005

October 29, 1980

LYLE SEEHAWER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

In an Own Motion Order dated June 6, 1980, the Board denied reopening this claim under its Own Motion jurisdiction. The Board based this on a report from Dr. Degge which indicated that claimant had periodic back symptoms while at work, which he had put up with, but since he had been laid off, he had sought medical treatment for them. Dr. Degge had opined the claimant's condition was stationary and did not appear to have any increased disability.

The employer, on October 15, 1980, advised the Board the Dr. Wilson, on October 2, 1980, had reported he felt claimant's current condition was related to his 1972 injury. Dr. Wilson, in that report, requested that additional treatment be provided claimant and asked that this claim be reopened. Dr. Wilson was under the impression that claimant would benefit from a lumbar spinal fusion. This surgery had been scheduled for October 6, 1980 by Dr. Wilson.

The employer indicated that after claimant had been laid off one job in January 1980, he had continued working as a pond helper. The employer indicated that he would oppose an Own Motion Order reopening this claim.

The Board, after reviewing the medical evidence in this case, finds it would be in the best interest of the parties that this claim be referred to Hearings Division to be set for a hearing. The Referee in this case shall determine if claimant's current condition and his medical treatment therefor is related to his March 13, 1972 injury and represents a worsening thereof since the last award or arrangement of compensation in this case. The Referee shall forward a recommendation on this issue along with a transcript of the proceedings and other exhibits introduced at the hearing to the Board for its consideration and review.

IT IS SO ORDERED.

WCB CASE NO. 79-8846 October 30, 1980

PHILLIP BROWN, CLAIMANT
Luebke & Wallingford, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant requests the Board review the Referee's order which granted claimant an additional 5% unscheduled disability. Claimant contends he is entitled to a substantial increase in the amount of permanent partial disability he has been granted for this injury.

On September 27, 1978, claimant, a 23-year-old moldercore maker, injured his back pushing a 60" diameter steel plate suspended by a crane. This injury was diagnosed as a low back strain with probable disc syndrome. Claimant was off work for about a week and returned to work, but worked only one and a half days before he had to stop working due to back pain.

In December 1978, Dr. Kloss reported he felt claimant did not have a herniated lumbar disc. He recommended claimant continue with physical therapy.

Dr. Case, in February 1979, found no evidence of neurological deficit. Dr. Case diagnosed a lumbar facet syndrome due to hyperextension of the lumbar spine, perpetuated by poor posture. It was the doctor's opinion claimant could return to light work and should avoid lifting over 50 pounds and repeated forward bending.

In March 1979, Dr. Rinehart reported there was no light work available for someone with claimant's background. He felt claimant could either be retrained to perform sedentary work or rehabilitated so he could perform manual labor.

On April 6, 1979, a Determination Order closed this claim. Claimant was granted temporary total disability

compensation and compensation equal to 16% for 5% unscheduled for his back injury. Subsequently, claimant attempted to return to his former job, but could not perform it. The claim was reopened on August 13, 1979.

The Orthopaedic Consultation in August 1979 reported claimant was complaining of constant low back pain. Their diagnosis of claimant's condition as related to this injury was chronic recurrent lumbosacral sprain. They felt claimant's condition was stationary and that claimant had minimal loss of function of his lumbosacral spine due to this injury. In their opinion, claimant was limited to a medium category of work. They felt claimant could return to his previous job with limitations. However, they also felt claimant needed vocational assistance.

A second Determination Order dated October 10, 1979 awarded claimant an additional period of temporary total disability compensation. On October 29, 1979, the Evaluation Division affirmed this Determination Order after consideration of additional evidence.

In September 1979, Dr. Rinehart reported claimant was returning to work as a molder on October 1, 1979. Dr. Rinehart felt if claimant was unable to perform this work, he would need retraining. Claimant tried to return to this employer to work, but the employer refused to allow claimant to return to work based on the information contained in the medical reports it had received.

At the hearing, claimant testified he has worked at a gas station, worked for this employer for eight years, and was at hearing working as a plumber's helper. Claimant has a 9th grade education and has obtained a GED. In 1976, claimant had strained his back and missed three to four months of work.

The Referee found the evidence indicated claimant had only a minimal disability. Considering all the evidence, the Referee concluded claimant had not proven that his disabilities were greater than minimum. Therefore, the Referee granted claimant an award of compensation equal to 16% for 5% unscheduled disability for his low back injury for a total of 10% unscheduled disability.

After a de novo review of this case, the majority of the Board reaches a conclusion different from that of the Referee. The medical evidence does indicate claimant has minimal impairment due to this injury. However, claimant cannot return to his previous employment or similar types of heavy, manual labor. Therefore, considering all the relevant factors in determining an injured worker's loss of wage earning capacity, such as his age, education, prior work experience, impairment, etc., the Board finds claimant is entitled to an increased award of permanent partial disability. Therefore, the Board grants claimant an award of compensation equal to 80% for 25% unscheduled for his low back injury. This award is in lieu of any prior awards of unscheduled disability for this injury.

ORDER

The Referee's order, dated April 1, 1980, is modified

Claimant is hereby granted an award of compensation equal to 80% for 25% unscheduled disability for his back injury. This is in lieu of all prior awards of unscheduled disability claimant has been granted for this injury.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with the Board review in the amount of 25% of the increased award not to exceed \$3,000.

Chairman Wilson dissents as follows:

The weight of medical evidence establishes that claimant has minimal disability from this industrial injury. This evidence also establishes that claimant has a lumbar facet syndrome which will become symptomatic from back strain whether the activity is work-related or not. It is for this reason that the various doctors have recommended light work and not because of any permanent residuals of the injury at Columbia Steel Casting.

The Referee gave the claimant every benefit of the doubt by increasing the unscheduled award to 10%. Certainly the record does not support any higher award than that and the very considerations which the majority rely on to increase the award to 25% are the ones which in most cases mitigate against such an increase. The order of the Referee should be affirmed.

WCB CASE NO. 79-6586
WCB CASE NO. 79-6961

October 30, 1980

HAROLD HAMILTON, CLAIMANT
Gary Allen, Claimant's Atty.
Rankin, McMurray, Osborn, Gallagher
& Vavrosky, Employer's Attys.
Request for Review by Employer

Moduline Industries and its administering agency, Underwriters Adjusting Company, on October 27, 1980 moved the Board to reconsider its October 14, 1980 Order on Review. The Board has reviewed this case again and reconsidered its initial decision. The Board sees no reason to change its Order on Review and affirms it.

IT IS SO ORDERED.

October 30, 1980

ELLA JEAN KNIGHT, CLAIMANT
C.H. Seagraves, Claimant's Atty.
Daryll E. Klein, Employer's Atty.
Request for Review by Claimant & Employer

The claimant and the employer request Board review of the Referee's order entered in this case. Claimant contends she is permanently and totally disabled. The employer contends the Referee's award of compensation is excessive.

The Board finds the Referee correctly recited the facts of the case in his order.

After a de novo review of the record in this case, the Board reaches a different conclusion than that reached by the Referee. The Board does not find the medical evidence alone establishes that that claimant is permanently and totally disabled. Therefore, to determine if claimant is permanently and totally disabled, the Board must consider other relevant factors. Claimant is approximately 50 years old and has some high school education. She has not worked since 1974. Further, claimant continues to complain of back pain and being unable to perform many household chores. She worked as a waitress and housewife. The consensus of the medical evidence is that claimant is capable of light work. However, claimant has repeatedly indicated she wishes to retire and to stay home so she can take care of her disabled husband. She has not sought or attempted to return to work. Claimant does admit if her at-home situation changed, she would return to work. Based on the medical evidence in the case and considering all the relevant factors in determining an injured worker's loss of wage earning capacity, the Board finds the Referee's award of compensation is excessive. The Board finds, Based on their consideration, claimant is entitled to an award of compensation equal to 256 degrees is in lieu of all previous awards of unscheduled disability claimant has been granted for this injury.

ORDER

The Referee's order dated December 24, 1979 is modified.

Claimant is hereby granted an award of compensation equal to 256 degrees for 85% unscheduled disability for her back injury. This is in lieu of all previous awards of unscheduled disability claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

October 30, 1980

JAMES PUTMAN, CLAIMANT
Elton T. Lafky, Claimant's Atty.
SAIF, Legal Services, Defense Atty.

This case is before the Workers' Compensation Board on the SAIF Corporation's (SAIF) request the Board review the Referee's order. SAIF contends the award of compensation granted by the Referee is excessive.

The Board finds the facts of the case were correctly recited by the Referee in his order.

After a de novo review of this record, the Board reaches a different conclusion than that reached by the Referee. The Referee found there was no evidence claimant's hearing loss was the result of presbycusis. Further, the Referee found claimant's marked loss of speech discrimination entitled him to an increased award of compensation. The Board and the Workers' Compensation Department have adopted administrative rules to be applied in rating hearing loss. ORS 438.65-565. In part, these rules require that an adjustment be made based on accepted values of hearing loss due to age or presbycusis. No evidence that such loss has occurred need be presented. Further, under the rules as adopted, the loss of speech discrimination is included or already calculated into the formula used to determine hearing loss. The Board, applying the adopted rules and ORS 656.214(f) and (g) finds the Referee's award of compensation to be excessive. However, applying these same standards, the Board finds the Determination Order's award to be mathematically incorrect. The Board finds claimant is entitled to an award of compensation of 61.19% for 31.87% binaural hearing loss. This is in lieu of any previous awards of permanent partial disability granted claimant for his hearing loss. This represents a 31.25% loss of hearing in claimant's left ear and a 36.25% loss of hearing in claimant's right ear.

ORDER

The Referee's order dated April 15, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 61.19% for 31.87% loss of binaural hearing.

The remainder of the Referee's order is affirmed.

October 30, 1980

GAVIN L. SMITH, CLAIMANT

J. David Kryger, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant & SAIF Corp.

The claimant and the SAIF Corporation (SAIF) seek Board review of the Referee's order which granted claimant an award of compensation equal to 184° for 70% unscheduled disability for his 1977 back injury. The claimant contends he is permanently and totally disabled. The SAIF Corporation contends the award of compensation granted by the Referee is excessive.

The Board finds the Referee correctly recited the facts of this case in her order.

After a de novo review of the record in this case, the Board reaches a different conclusion than the Referee did. It concurs with the evaluation of the evidence and the Referee's conclusion that claimant is not permanently and totally disabled. However, the Board finds the Referee's award of compensation is excessive.

The medical evidence indicates claimant cannot be employed at any job requiring bending, stooping, lifting over 20 to 30 lbs., repetitive lifting or twisting, prolonged sitting, standing or walking. It is the opinion of the medical doctors that claimant cannot return to work as a logger or as a mechanic, but can perform light work if he were motivated to do so. Claimant's impairment has been placed in the moderate range. Claimant has indicated he does not feel he could perform any work on a full time basis. However, the medical evidence establishes that claimant's claimed disability is not supported by any objective evidence. Further, the medical evidence establishes that claimant sees himself as retired and that he is motivated to obtain an award of compensation for permanent total disability. Claimant is 56 years old and has a GED. Based on the evidence in this case, considering all the relevant factors in determining an injured worker's loss of wage earning capacity, and comparing this case with the many others reviewed by the Board, the Board finds claimant is entitled to an award of compensation equal to 160° for 50% unscheduled disability for this back injury. This is in lieu of all previous awards of unscheduled disability claimant has been granted for this injury. The Board would urge the Field Services Division contact claimant and make every effort it can to place claimant in a job he is capable of performing.

ORDER

The Referee's order dated May 6, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for his 1977 back injury. This is in lieu of all previous awards of unscheduled disability claimant has been granted for this 1977 injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-4208 October 30, 1980

KENNETH H. SMITH, CLAIMANT
Don Atchison, Pozzi, et al, Claimant's Attys.
Lyle Velure, Velure, et al, Employer's Attys.
Order On Remand

At the close of the hearing in this case, the parties agreed to take the deposition of Dr. Holbert. This was done, but the transcript of that deposition was not forwarded to the Referee. The Referee proceeded to decide the issue of whether or not claimant's right knee condition had aggravated. Dr. Holbert's deposition was attached to the employer's brief filed with the Board. The Board finds this case was not fully developed or heard by the Referee. Therefore, the Board remands this case to Referee Nichols for consideration of the transcript of Dr. Holbert's deposition. After considering this additional information the Referee shall issue an appealable order in this case.

IT IS SO ORDERED.

WCB CASE NO. 79-7200 October 30, 1980

PETER A. SUMMERS, CLAIMANT
J. Michael Starr, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant requests the Board review the order of the Referee entered in this case. Claimant contends he is entitled to additional temporary total disability compensation.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of the record in this case, the Board reaches a different conclusion than the Referee. This claim was closed by an August 13, 1979 Determination Order which granted claimant an award of total temporary disability compensation from January 16, 1979 through May 17, 1979 last time worked. Dr. Karasek, on January 2, 1980, reported claimant was unable to perform "his full duties" and was temporarily disabled from August 6, 1979 through October 25, 1979. He felt this disability was partially due to claimant's continuing problem with headaches and his personality change. Dr. Karasek noted claimant had a cervical strain and a post traumatic syndrome. The Board finds that claimant's headache complaints and personality change are related to his industrial injury. The Board finds claimant is entitled to an award of additional temporary total disability compensation from August 5, 1979 through October 25, 1979 based on Dr. Karasek's January 2, 1980 report. Claimant's attorney is granted a fee equal to 25% of this increased compensation not to exceed \$300.00.

ORDER

The Referee's order dated March 10, 1980 is modified.

Claimant is hereby granted an award of additional temporary total disability compensation from August 5, 1979 through October 25, 1979.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of 25% of increased compensation not to exceed \$300.00.

WCB CASE NO. 79-4454

October 30, 1980

CARROLLE J. TUCKER, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Claimant requests the Board review the Referee's order entered in this case. Claimant contends she is entitled to an increased award of compensation.

The Board finds the Referee correctly recited the facts of this case in his order.

October 31, 1980

RICHARD D. BOZARTH, CLAIMANT
Bernard Jolles, Claimant's Atty.
William H. Replogle, Employer's Atty.
Request for Review by Employer

The employer requests that the Board review the order entered in this case. The employer contends claimant has not proven he is permanently and totally disabled.

On December 14, 1977, claimant, a 57-year-old offbearer with this employer, injured his back while stacking doors. The injury was diagnosed as a back strain. X-rays revealed osteoarthritis.

Dr. Noall reported in late December 1977 that claimant was complaining of right low back pain and right lower extremity problem. Claimant had worked up to December 19, 1977 when he was forced to quit due to these problems. Dr. Noall diagnosed a sprain of the lower back superimposed on incomplete sacralization of the vertebra on one side with arthritic changes. Physical therapy was prescribed.

In February 1978, Dr. Noall indicated claimant continued to complain of leg and back pain, and the doctor felt claimant was precluded from his regular occupation. He had released claimant for "lighter work" on January 26, 1978, advising claimant to avoid lifting and bending, but the employer did not have any work for claimant within these restrictions.

On March 29, 1978, claimant was hospitalized for diagnostic testing, and in April 1978, Dr. Caron reported Dr. Duncan had diagnosed poor arterial circulation in claimant's right leg as an additional cause of pain in the leg when claimant exercised or used the leg. He noted Dr. Noall felt claimant's pain was caused by degenerative back disease.

In May 1978, claimant was referred for vocational assistance. He indicated he has a 6th grade education and had worked for this employer only five months. Claimant returned to work for this employer, and his vocational assistance effort was terminated. However, claimant could not perform his job due to back and leg pain and quit.

Dr. Anderson, in June 1978, reported he felt claimant's problems were "secondary to degeneration disease which was likely significantly hastened by the extreme physical stress" of claimant's job. He felt claimant could perform a less demanding job, even with some stooping, lifting and bending without claimant again becoming symptomatic. Dr. Anderson did not feel claimant could return to his previous job.

In late October 1978, Dr. McNeill reported claimant complained of right leg and back pain. Claimant stated he had trouble walking, sitting and standing for long periods of time and with numbness in his leg. The diagnosis by Dr. McNeill was spinal stenosis degenerative arthrosis and trochanteric bursitis. He felt claimant had marked degenerative arthritis which accounted for his back and leg symptoms. It was Dr. McNeill's opinion claimant could not return to a manual-laboring type job and needed a more sedentary employment.

In October 1978, Dr. Duncan reported he felt claimant's leg problems were related to his back problem and not to arterial circulation.

On January 2, 1979 a Determination Order was entered and awarded claimant a period of temporary total disability compensation.

For Social Security disability purposes, Dr. Caron, on an IRS form, found claimant permanently totally disabled.

Claimant testified he has been blind in his right eye since birth. He said he has worked at a number of jobs which would be classified as manual labor. Claimant indicated he worked at lighter jobs from May 1978 through September 1978, but had to quit due to severe pain. In the fall of 1979, claimant attempted to work as a security guard but could not do the walking required. Claimant does not feel he could perform any of the jobs he has previously done. At the time of the hearing, claimant indicated he still has problems with his right leg and back. These problems limit the amount of activity claimant can engage in, according to claimant.

The Referee found claimant's right leg problems were related to his back injury. Further, the Referee found claimant was not capable of working at any gainful and suitable occupation. Therefore, the Referee granted claimant an award of compensation for permanent total disability.

After a de novo review of the record in this case, the Board reaches a different conclusion than that of the Referee. The preponderance of the medical evidence indicates claimant is not permanently and totally disabled, but is capable of light-sedentary work. Claimant has not made a reasonable effort to obtain employment within the restrictions placed on him. Further, claimant has not attempted to obtain vocational job placement or retraining so that he could perform work within his capabilities.

The Board does not find claimant is permanently and totally disabled and, therefore, reverses that portion of the Referee's order which so found. The Board, after considering all the relevant factors in determining an injured worker's loss of wage earning capacity, finds claimant is entitled to an award of compensation equal to 240° for 75% unscheduled disability for his right leg and back injuries. The Board also urges the Field Services Division to contact claimant and assist him in returning him to some form of gainful employment.

ORDER

The Referee's order dated May 8, 1980 is modified.

Claimant is hereby granted 240° for 75% unscheduled disability for this injury. This is in lieu of all prior awards of unscheduled disability for this injury. The employer is entitled to offset payments made pursuant to the Referee's order against this award of compensation.

The Remainder of the Referee's order is affirmed.

WCB CASE NO. 79-7873

October 31, 1980

SHARRON L. CHURCH, CLAIMANT
Jerry Kleen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF Corp.

This case is before the Workers' Compensation Board on the SAIF Corporation's (SAIF) request that the Board review the Referee's order entered in it. SAIF contends the Referee erred in setting aside its denial of this claim.

Claimant, a 36-year-old waitress at the Downtown Drive-in alleges that on June 27, 1979 she suffered a compensable injury to her back while lifting a tray containing glasses. No claim for this alleged injury was ever filed by claimant. The employer, however, on July 10, 1979 did file a Form 301 indicating claimant contended she injured her low back on June 27, 1979. Claimant testified she never returned to work. Claimant had prior injuries: In 1973 a back injury caused by "nerves"; in 1974 while working as a janitor and in 1975 working at a cannery.

On July 3, 1979, Dr. Young reported he examined claimant and diagnosed an acute lumbosacral strain. Claimant provided him with a history of lifting heavy dishes and being on her feet on June 27, 1979 which resulted in her back injury.

Dr. Searing, on July 5, 1979, hospitalized claimant due to severe pain in the lumbosacral area. Claimant stated that she had had similar pains several years previously which required traction. The diagnosis was still low back strain.

While hospitalized, claimant was examined by Dr. Paluska. He reported that claimant had a history of previous backache in 1974 and was treated with pelvic traction. Claimant denied any significant discomfort since that time. An EMG study done while claimant was hospitalized was interpreted as being negative. Dr. Paluska did not feel that claimant had any intervertebral disc syndrome. While hospitalized, claimant also complained of a right shoulder problem relating to lifting heavy dishes.

On September 7, 1979, the SAIF denied responsibility for claimants low back claim. It felt that there was insufficient evidence that this condition which required treatment was a result of an industrial injury exposure.

Dr. Paluska, in late January 1980, reported that claimant was still complaining of pain in her low back area which radiated into the area just right of the midline behind the right hip. It was his impression that claimant was still suffering from a resolving chronic ligament strain of the lumbosacral spine and from tendonitis of the right shoulder.

Claimant testified that her low back pain came from lifting glasses on a tray off a shelf. She stated this tray weighed approximately ten to fifteen pounds. She felt that this incident occurred on June 27, 1979, a Saturday. The Board takes judicial notice of the fact that June 27, 1979 was, in fact, a Wednesday. Claimant indicated that her normal shift was from 2 to 10 p.m. Monday through Friday, but she had worked this particular Saturday. She indicated that on Monday, she went to the doctor and then did not return to work and did not inform her employer of any injury. Claimant admitted that she may have complained of back pain prior to this alleged injury. The last day claimant worked was June 30, 1979.

On August 15, 1979 a SAIF representative interviewed claimant at home and took a recorded statement from her. Claimant indicated that she felt the injury occurred on June 27, but that her back had started hurting before she had gone to work. Claimant was unable to say exactly when her back had started to hurt. Later in the interview she indicated her back had started to hurt on June 22, 1979 and was especially bad on June 23, 1979. She then indicated she injured her back on June 22, 1979. She stated on July 2, she advised her employer of this and she also claimed that she injured her arm in the same incident.

The owners of this business testified that claimant frequently complained of back problems prior to her alleged injury, and in fact had lost time from work due to complaints of back pain. A co-worker testified that she overheard claimant in a conversation taking place either on the 29th or 30th of June 1979 in which claimant stated that she and her husband were preparing to paint the outside of their house that upcoming weekend. Claimant stated her back hurt and she was stiff.

Kim Ellen, another co-worker of claimant's, testified that claimant was the head waitress and trained her. She stated that claimant was constantly complaining that her back bothered her. She indicated that claimant continued to take glasses off the shelf, even though the owners had told her to cease performing this activity because of her continued complaints of back pain. Ms. Ellen testified that she did not know of any accident or injury which occurred in June 1979. She indicated that she was there and claimant made no complaints of any such incident to her. She also indicated claimant and her husband went dancing once or twice a week. Claimant and her husband denied this. Also, claimant denied ever telling Dr. Young that she had injured her back on June 27, 1979.

The Referee noted that there were discrepancies in the evidence as to when claimant worked and when she saw her physician. However, the Referee found that the medical evidence indicated that claimant suffered a back injury and consequently notwithstanding the discrepancies, found the evidence consistent with the claim of industrial injury as alleged by claimant. Therefore, the Referee remanded this claim to SAIF to be accepted for payment of compensation from July 3, 1979 until terminated pursuant to ORS 656.268 and granting claimant's attorney a fee.

After de novo review of the record in this case, the Board reached a different conclusion than that reached by the Referee. The Board finds that claimant has failed to carry the burden of proving that she suffered a compensable injury as alleged. The Board finds that there are various discrepancies in claimant's testimony and her history as given to the various doctors in this case. There is clear evidence that claimant had prior back complaints. There is no proof that claimant's activity of lifting the glasses caused any injury to her back. Further evidence does not indicate that this incident aggravated claimant's pre-existing back condition. The Board does not find then that claimant has proven by the preponderance of the evidence this glass lifting incident caused her back problem to aggravate so as to require medical care and treatment or time loss. Therefore, the Board reverses the Referee's order and orders the denial issued by SAIF on September 7, 1979 to be restored and affirmed.

ORDER

The Referee's order dated April 18, 1980 is reversed in its entirety.

The SAIF Corporation's denial dated September 7, 1979 is reinstated and affirmed.

WCB CASE NO. 79-4474

October 31, 1980

LUCILLE WORTHINGTON LOGAN, CLAIMANT
Crane & Bailey, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant & SAIF

The claimant and the SAIF Corporation (SAIF) both request the Board review the Referee's order in this case. Claimant contends the Referee went beyond the scope of the issues in finding claimant's retention of urine and denervation of her bladder were not disabling. SAIF contends its denial in this case should be affirmed.

Claimant, a 38-year-old waitress at the Blue Ox Restaurant and Lounge, sustained a compensable back injury on October 3, 1975 while lifting heavy trays of dishes. This injury was diagnosed as a lumbar strain and second degree cystourethrocele.

On November 11, 1975 Dr. Rudd performed a Marshall-Marchetti urethropexy to resuspend claimant's bladder. Dr. Rudd reported the surgery was successful, but claimant was still unable to fully empty her bladder. He reported claimant was medically stationary and released her for regular work as of March 1, 1976.

This claim was initially closed by Determination Order dated May 6, 1976 which awarded claimant a period of temporary total disability compensation.

In November 1978, Dr. Seeman reported he had treated claimant since 1974 for repeated bladder problems. He stated that claimant was unable to fully empty her bladder and had a urinary stress incontinence problem. It was his opinion that claimant's work as a waitress irritated her urological condition. He felt that claimant had suffered an aggravation of her urological condition which Dr. Rudd had described.

On May 2, 1979 SAIF Corporation denied claimant's aggravation claim.

In July 1979, Dr. Much, medical examiner for SAMP, reported claimant had had four different surgeries to re-suspend her bladder. He felt there was apparently a weakness of the tissue in the area and that this was a fairly common cause of recurrent bladder problems. It was Dr. Much's opinion that there was no reason to associate claimant's present problems with her injury of October 1975. He felt the problems claimant was experiencing at that time were associated with tissue weakness in the area and a natural tendency for such bladder prolapse situations to recur. Dr. Payne, who reviewed the records relating to claimant, concurred with Dr. Much that there was no causal connection between her work at the Blue Ox and claimant's current problems.

Dr. Seeman, in February 1980, reported claimant had been seen in January 1977 and was complaining of head and back pains and intermittent bladder irritations with lower abdominal pain since the October 2, 1975 injury. Claimant was retaining urine. He felt this condition had been aggravated and accelerated by the 1975 injury.

Dr. Merrill, a urologist, in November 1979 reported that he had been treating claimant with intermittent catheterization which seemed to be relieving her abdominal pain due to a distended bladder. He felt claimant's primary problem was due to denervation of the bladder. It was Dr. Merrill's opinion the denervation resulted from one or more of the operations designed to correct her stress incontinence. However, he felt it was impossible to rule out that these conditions may have been aggravated by her 1975 injury.

At the hearing, claimant originally testified that she had not worked as a waitress after this injury. However, on cross examination, she admitted she had worked in Montana and California as a waitress. Claimant indicated that she had difficulty for several years with retention of urine which had resulted in abdominal discomfort and a high incidence of bladder infection.

The Referee found that the medical evidence indicated there was no causal connection between claimant's stress and incontinence in her employment at the Blue Ox. However, he found that although the denervation of claimant's bladder and her subsequent problems involving retention of urine were the result of her employment at the Blue Ox, they were not disabling in the sense that she was unable to work. The Referee found that SAIF's denial in May 1979 denied claimant benefits pursuant to ORS 656.245, and he set that portion of the denial aside and remanded to SAIF for acceptance of payment of medical care occasioned by claimant's excessive retention of urine and bladder infection occasioned by such retention. He also ordered SAIF to provide or pay for such apparatus necessary or desirable by claimant's physician for intermittent catheterization as suggested by Dr. Merrill. The Referee granted claimant's attorney a fee of \$800 for prevailing in obtaining medical benefits under ORS 656.245 for claimant which had been denied by SAIF.

After de novo review of the record in this case, the Board modifies the Referee's order. The Board does not find that claimant's testimony as straight forward as did the Referee. She at first denied working anywhere else as a waitress, but later admitted that she had worked as a waitress, both in Montana and California after this injury. The medical evidence indicates that working as a waitress was contraindicated for claimant. The Board finds that the preponderance of the evidence in this case does not establish claimant's difficulty with retention of urine is related to her 1975 injury. Drs. Payne and Much concur in finding there is no causal connection between her work at the Blue Ox and her present condition. Dr. Merrill cannot make a determination as to the cause of claimant's current condition. Dr. Seeman is the only medical doctor who feels claimant's current difficulties relate to her October 1975 injury. The Board does not find this opinion persuasive since, after this injury, claimant returned to work as a waitress and worked at least two different occasions. Further, the Board does not feel that the Referee was correct in ordering SAIF to provide whatever apparatus is necessary for claimant's periodic catheterization. There is no evidence that claimant's retention of urine is related to her 1975 injury, and, therefore, such treatment cannot be provided pursuant to ORS 656.245.

ORDER

The Referee's order, dated April 17, 1980, is modified.

That portion of the Referee's order which set aside a portion of the May 2, 1979 denial issued by the SAIF Corporation and awarded claimant's attorney a fee is reversed.

The SAIF Corporation's May 2, 1979 denial is reinstated in its entirety and affirmed.

WCB CASE NO. 79-612

October 31, 1980

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

The claimant requests the Board review the Referee's order entered in this case. The claimant contends: (1) The Referee failed to address the question of whether or not an incident in California was compensably related to claimant's Oregon injury and the responsibility of the SAIF Corporation (SAIF); and (2) the Referee failed to award claimant compensation for permanent total disability. The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of the record in this case, the Board reaches a slightly different conclusion than that of the Referee. The Board agrees with the Referee's affirmation of SAIF's denial of claimant's aggravation claim. Claimant went to work as a welder in August 1978 and worked at that job for six days. He stated he came down off of a tank he had been working on and his legs were "gone." He was then assisted by his co-workers to a hospital. Dr. Berrier reported claimant had an episode of "auto leg weakness bilaterally in which he fell with an acute onset of low back pain." A transcutaneous nerve stimulator was prescribed for claimant. Claimant contends this second injury which occurred in California is merely a form of or a recurrence of his first injury. The Board does not agree with claimant's contention. The first injury resulted from lifting a heavy object and did not cause claimant's legs to buckle. The Board does not find the preponderance of the evidence establishes that claimant's condition due to the compensable injury has worsened since the last award or arrangement of compensation in this case. While it is true claimant's overall condition may have worsened, the Board cannot find any support for claimant's contention the California incident is related to the accepted injury.

In addition, the Board finds the Referee's award of permanent partial disability was excessive. Claimant was referred for vocational assistance. However, claimant elected not to cooperate with the vocational rehabilitation personnel. The medical evidence is claimant has the physical capacity to perform moderate work with no lifting over 50 lbs., repetitively 25 lbs., and no repetitive bending, stooping or twisting. Claimant is only 40 years of age with a 9th grade education and is not well motivated. The Board finds claimant is entitled to an award of compensation equal to 112° for 35% unscheduled disability for his back injury. The Board would urge Field Services Division to contact this claimant for job placement assistance.

ORDER

The Referee's order dated February 14, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 112° for 35% unscheduled disability for his back injury. This is in lieu of all previous awards of unscheduled disability claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-5446

October 31, 1980

ALEX A. RENTARIA, CLAIMANT
Jolles, Sokol & Bernstein,
Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Employer

The employer requests the Board review the Referee's order entered in this case. The employer contends the Referee's award of compensation equal to 30° for 25% unscheduled disability is excessive.

The Board finds the facts of this case were correctly recited by the Referee in his order.

After a de novo review of the record of this case, the Board reaches a different conclusion than the Referee. The Board does not find the preponderance of the evidence supports the award of compensation made by the Referee. Doctors Losli and Carr, shortly after this injury, opined claimant would not have any permanent impairment due to this injury. Dr. Carr felt claimant would be able to return to the same job he had at the time of this injury; but noted claimant might not be able to work on the greenchain. Dr. Pasquesi felt claimant should avoid work requiring repetitive bending, stooping and twisting, and lifting of more than thirty pounds. He felt claimant had "chronic moderate pain" and an impairment equal to 10% of the whole man. Dr. Pasquesi placed restrictions on claimant based on subjective complaints and found no objective medical findings. Dr. Tesar concurred with Dr. Pasquesi's report.

Claimant was offered vocational assistance by a private counseling service. The opinion of the counselor, supported by Dr. Tesar and a prospective employer, was that claimant was not interested in returning to work, but wanted to return to school. While such ambitions are admirable, when they prevent an otherwise employable worker from returning to work, they cannot be considered in determining his loss of wage earning capacity.

Claimant has had no surgery, no hospitalization, takes no medication and the only diagnosis was a strain.

Based on the record in this case, claimant's injury, the residuals from it, and considering all the relevant factors in determining an injured worker's loss of wage earning capacity, the Board finds the Determination Order correctly compensated claimant for any loss of wage earning capacity he has suffered due to this injury. The Board in reaching this result, does note that Dr. Pasquesi's rating of permanent impairment is identical to this award and is aware that impairment is only one of the relevant factors considered in rating a worker's loss of wage earning capacity. However, the record as a whole supports the award of unscheduled disability granted by the Board.

ORDER

The Referee's order dated January 24, 1980 is reversed in its entirety.

The Determination Order dated May 30, 1979 is restored and affirmed.

October 31, 1980

EDWARD A. RINGER, CLAIMANT
Cash R. Perrine, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

This case is before the Workers' Compensation Board on the employer's request the Board review the Referee's order entered in this case. The employer contends claimant failed to prove his psychiatric condition is its responsibility.

Claimant, a 58-year-old sawyer, alleges that on December 20, 1978 he suffered a "nervous breakdown" due to his work stress. Claimant had been employed at this job for seven years. He testified the "pressure" of this job had not changed during that time, but changes in it had made him nervous. After his "nervous breakdown" claimant was off work for 90 days before returning to work for this employer at a different job.

Claimant has a history of high blood pressure. In June 1977 he began taking a medication for this condition which contained reserpine. This drug has a known side effect of causing depression.

The issue to be resolved in this case is whether or not claimant's mental condition arose out of his employment or was caused by his medication. There is a split between the medical doctors as to the affect reserpine had on claimant.

Dr. Spence, a general practitioner, reported that since March 1976 claimant had been using medication to control his high blood pressure. From June 1977 to "late December 1978" claimant was taking medicine containing reserpine. Dr. Spence saw claimant on December 20, 1978 and described him as extremely nervous, tense with volatile emotions including inappropriate thought control, outbursts of crying and thought dissociation. Claimant and his wife told Dr. Spence this was due to claimant's job stress. It was noted claimant had been experiencing "mood swings" over the last year. After this incident, claimant was taken off medication containing reserpine and his condition improved. Dr. Spence attributed this improvement to claimant's removal from his job and not being taken off the medication. Claimant's condition was diagnosed as an acute depressive reaction. Dr. Spence opined this was due to claimant's job stress and not to his use of medication containing reserpine.

Dr. Parvaresh, a psychiatrist, examined claimant and found no evidence of depression. After reviewing claimant's history, he felt that if claimant had had the same job for 11 years and if no significant change in the quantity or quality of his work had occurred, it was highly unlikely claimant's job contributed to his December 1978 incident. It was his opinion other factors contributed to this incident.

At the hearing, Dr. Parvaresh testified he felt the reserpine was responsible for claimant's depression. He noted claimant's condition on December 20, 1978 had developed in a short period of time and its symptoms were more indicative of a drug-induced depression rather than of a job stress type of induced depression.

The Referee found the claimant had established legal and medical causation and set aside the employer's denial of responsibility for this claim.

After a de novo review of this record, the Board finds claimant has proven neither legal nor medical causation that his job caused his psychiatric condition. The evidence does not establish that claimant's job contributed to claimant's December 20, 1978 incident and, therefore, claimant fails to establish legal causation between his job and his psychiatric condition. Further, the medical evidence establishes that claimant's condition was very likely caused by his use of medication containing reserpine and not due to "job stress."

The Board finds Dr. Parvaresh's opinion on this point to be more persuasive than that of Dr. Spence's. Dr. Parvaresh is a psychiatrist. The symptoms described by Dr. Spence on December 20, 1978, Dr. Parvaresh found were of a drug-induced depression. The Board finds claimant has failed to meet his burden of proof and orders the employer's denial restored and affirmed.

ORDER

The Referee's order dated July 30, 1979 is reversed in its entirety.

The employer's denial dated February 27, 1978 is restored and affirmed.

November 3, 1980

JEFFERSON HOOD, CLAIMANT
SAIF, Defense Atty.
Own Motion Order

On August 22, 1980 claimant requested the Board exercise its own motion jurisdiction and reopen this claim for his September 8, 1970 back injury. This claim was originally closed and claimant's aggravation rights have expired.

Claimant was hospitalized on July 15, 1979 due to a motor cycle injury. His injury in this accident was diagnosed as an undisplaced fracture of the sacrum with diastasis of the pubis symphysis. Dr. Schneider treated claimant for this injury. In October 1980, Dr. Schneider opined that claimant's complaints of low back pain were the result of his preexisting back injury (the September 1970 injury) and the more recent motor vehicle accident.

Also in October 1980, Dr. Curran reported that in his opinion claimant was suffering from the same problems as he had before. He found no difference in claimant's condition. It was his opinion that claimant's symptoms at that time were the same basic symptoms that he had seen in claimant for several years. Dr. Curran opined that claimant's condition had not deteriorated.

Wausau insurance Companies, on October 21, 1980, advised the Board based on the medical evidence it had before it, it would oppose an own motion order reopening this claim.

The Board, after reviewing the medical evidence submitted to it in this case, finds the evidence is not sufficient to warrant a reopening of this case at this time. Therefore, the Board denies claimant's request that it reopen this claim under its own motion jurisdiction.

IT IS SO ORDERED.

November 4, 1980

WALTER J. DETHLEFS, CLAIMANT
Richard Sly, Claimant's Atty.
Roger R. Warren, Employer's Atty.
Order Denying Remand

On September 23, 1980, claimant, by and through his attorney, requested the Board consider additional evidence in its review of this case. The evidence consists of a report from Dr. Billmeyer dated July 15, 1980 which responds to a letter from the employer's insurance carrier. Claimant contends this report was obtainable only after the hearing had been held.

The insurance carrier on October 17, 1980 advised the Board it opposed claimant's motion. It contends the information contained in Dr. Billmeyer's report could have been obtained prior to the hearing.

The Board, after being fully advised of the facts in this case, denies claimant's motion. The Board agrees with the insurance carrier that the offered evidence was obtainable prior to the hearing and cannot be considered as newly discovered evidence. To admit such evidence now would be improper.

ORDER

Claimant's motion dated September 23, 1980 is denied.

CLAIM NO. YC 69382

November 4, 1980

ROBERT J. HAINES, CLAIMANT
SAIF, Defense Atty.
Own Motion Determination

This claim for claimant's April 20, 1967 left leg injury was reopened by the Board on its Own Motion jurisdiction by an Order dated July 10, 1980. This claim was reopened effective May 22, 1980, the date Dr. Scheinberg hospitalized claimant in preparation for surgery which consisted of removal of the plate and screws from the claimant's left tibia. Dr. Scheinberg reported that he had examined claimant on August 7, 1980 and had found claimant's condition medically stationary. He indicated that claimant was functioning normally without any significant permanent residuals from the recent surgery.

The SAIF Corporation, on September 16, 1980, requested determination be made in this case. The Evaluation Division of the Workers' Compensation Department, on October 22, 1980, recommended this claim be closed with an award of additional temporary total disability compensation from May 22, 1980 through August 7, 1980. It did not recommend any award of additional permanent partial disability compensation.

The Board concurs with this recommendation.

ORDER

The claimant is hereby granted an award of additional temporary total disability compensation from May 22, 1980 through August 7, 1980.

WCB NO. 80-932

November 4, 1980

RICHARD HASKELL, CLAIMANT
Alan M. Scott, Claimant's Atty.
James D. Heugli, Employers' Atty.
Order Denying Motion

On October 15, 1980, claimant, by and through his attorney, requested the Board abate its establishing a briefing schedule in this case. In this case the Referee found claimant had suffered a new injury and denied claimant's aggravation claim. Claimant then proceeded to file a new injury claim which was denied. A hearing is pending on that denial.

The employer, in this case, on October 20, 1980, advised the Board it objected to any delay in the review of this case. It pointed out this case could have been joined and one hearing held to litigate the rights of all the parties. This was not done and the employer proceeded to the hearing. The employer has not been made a party to the hearing in the denied new injury claim. It contends the Board must review this case on the facts developed at the hearing in this case and should not consider any facts outside the record in this case.

The Board, after being fully advised in this case, denies claimant's motion. The Board agrees with the employer that it would be inappropriate to stay its review of this case for the reason set forth by the employer.

ORDER

Claimant's motion to abate the briefing schedule in this case is denied.

WCB CASE NO. 79-6439

November 4, 1980

JO ELAINE JENKINS, CLAIMANT

Olson, Hittle, Gardner & Evans, Defense Atty's.

Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Atty.
Order on Review

The employer seeks Board review of the Referee's order entered in this case. The employer contends claimant did not meet her burden of proving her entitlement to the award of additional compensation of 112° for 35% unscheduled disability which the Referee granted her. The Board finds the Referee correctly recited the facts of this case in her order, except on page 4, paragraph 4. Claimant returned to her employer and tried to persuade them she could return to LPN floor work, not the job she was retrained into as the Referee states.

After a de novo review of the records in this case, the Board reaches a different conclusion than the Referee. Based on the evidence in this case and comparing the facts of it with other cases the Board has reviewed, the Board finds the referee's award of compensation is excessive.

Claimant is 45 with a high school education. Because of this injury, claimant is now precluded from her regular occupation. However, through the auspices of Vocational Rehabilitation, she has acquired new skills which broaden her employability and which decreases her loss of wage earning capacity. Further, the medical evidence indicates that some of claimant's residual disability is related to her 1969 injury.

The Board finds claimant would be adequately compensated by an award of compensation equal to 80° for 25% unscheduled disability for her back injury. This is in lieu of all previous awards of unscheduled disability claimant has been granted for this injury.

ORDER

The Referee's order dated April 3, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for her back injury. This is in lieu of all previous awards of unscheduled disability for this injury.

The remainder of the Referee's order is affirmed.

CLAIM NO. H-10009

November 4, 1980

FRED W. LYON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim was established for claimant's September 15, 1969 right knee injury. The claim was initially closed by Determination Order dated November 13, 1970 which awarded claimant a period of temporary total disability compensation equal to 15° for 10% loss of his right leg. Claimant's aggravation rights have expired.

Dr. Lynch reported that he had taken claimant off work effective September 13, 1979 because of difficulty with the knee. Dr. Lynch felt that claimant's knee condition had worsened due to progression of the degenerative arthritis. This claim was voluntarily reopened by the insurance carrier for payment of temporary total disability compensation and payment of medical care and treatment.

On January 4, 1980, Dr. Lynch reported that claimant had progressed and was getting along fairly well. He noted that claimant had had a lateral minisectomy following his original injury. Claimant reported that he experienced some grating over the lateral joint compartment with knee motions. Dr. Lynch did not feel claimant was in need of any other treatment at that time. However, he felt that claimant would eventually require total knee replacement.

Dr. Lynch, on June 17, 1980, reported that claimant had developed, superimposed on his injury, degenerative joint arthritic changes which forced claimant to significantly modify his weight bearing activities. He felt again that claimant may well need a total knee replacement in the future. It was his opinion that claimant's right knee condition was stationary.

Industrial Indemnity Company, the insurance carrier responsible for the right knee condition, on August 11, 1980 requested determination be made in this claim. It had paid temporary total disability compensation from September 13, 1979 through August 4, 1980. The Evaluation Division of the Workers' Compensation Department, on October 23, 1980 recommended this claim be closed and award of additional temporary total disability compensation from September 13, 1979 through either January 4, 1980 or June 17, 1980 and an additional award of compensation equal to 37.5° for 25% loss of the right leg.

The Board after reviewing the evidence in this case finds that it is proper to close this claim with an award of additional temporary total disability from September 13, 1979 through June 17, 1980 and would grant claimant an additional award of compensation equal to 37.5° for 25% loss of his right leg. These awards are in addition to any prior awards claimant has received for this injury.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from September 13, 1979 through June 17, 1980 and an additional award of compensation equal to 37.5° for 25% loss of his right leg

WCB CASE NO. 80-7000

November 4, 1980

VICTOR L. NEAL, CLAIMANT
Samuel J. Imperati, claimant's Atty.
Keith D. Skelton, Employer's Atty.
Own Motion Order

On April 10, 1980, claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction and reopen this claim for his May 19, 1968 injury. This claim was classified as a "medical only" claim. Attached to claimant's request were various medical reports.

In June 1979, Dr. Lohr reported claimant suffered a lumbar strain at home while moving boxes. Claimant as referred to Dr. Buza and underwent surgery on March 23, 1979. In the middle of June 1979, Dr. Buza reported claimant was still unable to return to work after his off-the-job injury.

Dr. Buza, in August 1979, noted claimant had injured his back in May 1968. Claimant complained of periodic back pain after the May 1968 injury. After the March 1979 surgery, claimant continued to complain of back pain. Dr. Buza felt claimant should be retrained for a lighter type of work.

In February 1980, Dr. Buza placed various restrictions on claimant's working capabilities. He felt claimant could perform a sedentary occupation, but felt claimant would be unable to work in the immediate future.

The Orthopaedic Consultants, in September 1980, examined claimant. They were unable to find a causal relationship between claimant's 1968 injury and his 1979 home injury.

The Board, after reviewing the evidence submitted to it, finds that claimant's offthejob lifting incident on February 26, 1979 is not related to his 1968 injury. The evidence establishes that the surgery performed in March 1979 and claimant's current condition is related to the February 26, 1979 incident and not the responsibility of Liberty Mutual Insurance Company. Therefore, the Board denies claimant's request for Own Motion relief.

IT IS SO ORDERED.

CLAIM NO. 133 CB 6928 226

November 4, 1980

DONALD L. OTT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 6, 1980, claimant requested the Board reopen this claim under its Own Motion jurisdiction. This claim had been established for claimant's January 25, 1973 back injury. The claim was closed and claimant's aggravation rights have expired.

Dr. Martens in September 1980 reported claimant on September 1, 1980 had bent over to put groceries in a sack and felt a sharp pain in his low back which radiated to his left buttock. The diagnosis was a recurrent lumbo-sacral strain with left L5 nerve root irritation. Dr. Martens prescribed physical therapy, pain medication and bed rest.

The Travelers, the carrier responsible for claimant's January 1973 injury, on September 23, 1980 denied reopening this claim. It felt there was no relationship between claimant's June 1973 injury and the September 1, 1980 incident. The Travelers advised the claimant to request the Board consider his contention under its Own Motion jurisdiction. However, it indicated it opposed an Own Motion Order reopening this claim based on claimant's "new injury."

The Board, after reviewing the information provided to it, does not find the evidence is sufficient at this time to warrant the Board exercising its Own Motion jurisdiction. The medical evidence does not relate claimant's current condition to his January 1973 injury. Further, the Board is unable to determine if the January 1980 injury is sufficient to constitute a new and intervening injury which relieves The Travelers of responsibility. However, as stated before, the Board denies claimant's request based on the medical evidence which fails to relate his current condition to the 1973 injury.

ORDER

Claimant's request for Own Motion relief is denied.

WCB CASE NO. 79-7566

November 4, 1980

WILLIAM W. POOLE, CLAIMANT
Donald R. Wilson, Claimant's Atty.
SAIF Legal Services
Order on Review

This case is before the Workers' Compensation Board on request by SAIF Corporation (SAIF) and the claimant for Board review of the Referee's order. The SAIF contends that the Referee erred in deciding issues not raised by the request for hearing, in finding a claim of aggravation or request for reopening as against SAIF, and in finding premature closure by the last Determination Order. The SAIF contends that the last Determination Order should be reinstated and affirmed. The claimant contends that he is entitled to an award of compensation for permanent and total disability.

The Board finds that the Referee correctly recited the facts of this case in his order.

After de novo review of the record in this case, the Board reaches a different conclusion than that reached by the Referee. The Board finds that claimant has proven by a preponderance of the evidence that he is entitled to an award of compensation for permanent and total disability. The Board finds the medical evidence indicates that as a result of this injury and the treatment claimant has received for it, it has rendered him unable to return to any regular and gainful employment. Claimant had originally suffered an injury to his neck for which he received surgical treatment. Subsequent to this, claimant developed hoarseness of his voice and a psychiatric condition which has been diagnosed as reactive depression. The consensus of the medical opinion is that claimant has suffered severe loss of function of his neck and cervical spinal cord due to this injury. Further, he has loss of use of his voice and loss of function of his right leg and left arm. Claimant,

attempted to maintain his employment as a teacher after his injury and initial treatment for it. However, as indicated by his principal, claimant was unable to perform this job and was eventually terminated in November 1977 due to his worsening physical and mental condition. The evidence indicates that claimant was a well qualified, well respected and superior teacher. Claimant has cooperated fully with the rehabilitation people and with all medical providers who have treated him. Claimant has worked in many other jobs other than as a teacher. The Board does not find that this evidence indicates that claimant is able to perform any of these jobs. The Board finds it may be beneficial to claimant to receive additional psychiatric treatment to assist him, and such treatment can be provided under ORS 656.245. Based on the totality of the evidence in this case and considering all the relevant factors in determining an injured worker's loss of wage earning capacity, the Board finds that claimant has established that, based on his severe physical impairments and his severe psychological condition, that he has proven by a preponderance of evidence that he is entitled to an award of compensation for permanent and total disability. Therefore, the Board modifies the Referee's order and grants claimant an award of compensation for permanent and total disability.

ORDER

The Referee's order dated April 4, 1980 is modified. Claimant is hereby granted an award of compensation for permanent and total disability effective the date of the Referee's order. The SAIF Corporation is entitled to offset any payments of compensation that were made pursuant to the Referee's order against this award of compensation.

Attorney's fees should be 25% of the increased compensation not to exceed \$3,000.00.

November 4, 1980

OSCAR ROSIN, CLAIMANT
SAIF Legal Services
Own Motion Determination

This claim was established for claimant's April 24, 1963 right knee injury. The claim was closed by Determination Order dated July 23, 1964 which granted claimant an award of temporary total disability compensation and compensation equal to 70% loss of the right leg. Claimant's aggravation rights have expired.

Claimant was hospitalized on December 6, 1979 by Dr. Donald C. James. On the following day, Dr. James performed surgery consisting of a valgus producing high tibial osteotomy, utilizing the Maquet procedure. Dr. James, on August 28, 1980, reported that claimant's condition was medically stationary. He noted that claimant continued to have difficulty with his knee, and it was very painful with intermittent effusions and discomfort over the intermedial joint line. Dr. James felt that claimant possibly might require a total knee replacement in the future. He noted that claimant was having difficulty carrying out anything other than normal daily activities.

The SAIF Corporation, on September 11, 1980, requested claim closure. The Evaluation Division of Workers' Compensation Department, on October 22, 1980, recommended that the Board exercise its Own Motion jurisdiction and order this claim closed with an award of temporary total disability compensation from December 6, 1979 through August 28, 1980. The Evaluation Division also recommended that claimant be granted an additional award of compensation equal to 15% loss of his right leg.

The Board concurs with this recommendation.

ORDER

The Board orders this claim reopened and finds that claimant's condition is stationary and that claim can be closed. Claimant is hereby granted an award of additional temporary total disability compensation from December 6, 1979 through August 28, 1980. The Board also grants claimant an additional award of permanent partial disability compensation equal to 15% loss of the right leg.

November 4, 1980

RUBY (BARBARA) SHIELDS, CLAIMANT
Robert A. Bennett, Claimant's Atty.
David O Horne, Employer's Atty.
Order On Review

The employer seeks Board review of the Referee's order contending the award of compensation is not supported by the evidence.

The Board finds the Referee's opinion and order correctly recites the facts.

After a de novo review, the Board reaches a conclusion different from that of the Referee. In this case, claimant is approximately 49 years old and has a high school education, she also attended college for a year. She has worked in a variety of jobs such as a waitress, bartender, mill worker, sales worker, and container assembly. While with this employer, claimant developed a lung condition due to exposure to epoxy.

Dr. Tuhy felt claimant had a 40-50% respiratory impairment, but could not determine what portion of the impairment was due to claimant's work exposure and what portion was the result of other causes. Claimant's pulmonary function is approximately 2/3 of normal.

Dr. Baker feels claimant can work if she is not exposed to large amounts of airway irritants.

Based on the evidence in this case and considering all the relevant factors in determining an injured worker's loss of wage earning capacity, the Board finds the Referee's award of compensation is excessive. The Board finds the claimant is entitled to an award of compensation equal to 128° for 40% unscheduled disability for her respiratory problems. This award of compensation is in lieu of all previous awards of unscheduled disability claimant has been granted for this injury. The Board urges the Field Services Division to contact claimant and offer her assistance. The Board further urges the claimant to fully cooperate with the Field Services Division.

ORDER:

The Referee's order dated March 24, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 128° for 40% unscheduled disability for her respiratory disease. This is in lieu of all previous awards of unscheduled disability claimant has been granted for this condition.

The remainder of the Referee's order is affirmed.

This matter came on regularly for hearing in Portland, Oregon on February 25, 1980, before Nathan Ail, Referee. Claimant appeared with her attorney Robert A. Bennett and defendant was represented by David Horne. The matter was closed the same day.

The sole issue is extent of disability. Claimant is dissatisfied with her Determination Order of July 25, 1979 which failed to award permanent disability compensation.

FINDINGS:

Claimant is 49 years of age and has a high school education. She has work experience as a waitress, bartender, knitting mill worker, sales worker and container assembler. On October 12, 1978 claimant suffered and occupational lung disease due to exposure to epoxy while doing electronic assembly work. She eventually came under the care of Dr. Baker, allergist who concluded she was medically stationary in June 1979. He stated she had asthma and fixed irreversible obstructive lung disease. He recommended work in an area relatively free of significant airway irritants and especially the epoxy resins. (Exhibit 17).

In October 1979, claimant was examined and evaluated by Dr. Tuhy, diseases of the lungs. He concluded she had reactive airway disease which was precipitated by exposure to epoxy material used at work. He also found unrelated hypertension, moderate obesity elements of a menopausal syndrome, anxiety and depression. He stated she should not return to work involving exposure to epoxy paints and should avoid things that bring on difficult breathing, pain and cough, such as moderate or severe exertion, certain sprays, much cigarette smoke and nonspecific lung irritants. He felt she could do light work in an environment free of such irritants. He opined she was medically stationary and estimated her respiratory impairment was 40-50% impairment "of the whole man" according to AMA classes of respiratory impairment. (Exhibit 24):

Claimant testified her condition causes intermittent facial swelling, dizziness, shortness of breath, and a feeling of heaviness in the chest. She reacts to exertion, air pollution, bus fumes and coldness. She stated she can no longer participate in sports, dance, fish, vacuum, mop or do yard work. She has sought employment at various plants however they were either not hiring or there was pollution exposure. Her doctors have recommended she give up smoking.

Linda Gale, private investigator retained by the insurer testified she had claimant under surveillance for several days. On one occasion for a two and half hour period she saw claimant playing bingo in a "smoking section" during which time claimant smoked four cigarettes.

OPINION:

It appears from the medical evidence claimant has an irreversible pulmonary condition which limits her employment to light work in an environment free of epoxy and numerous other irritants. According to Dr. Tuhy, her impairment is 40-50% "of the whole man."

The evidence indicates claimant has suffered permanent physical impairment as a result of her industrial injury. Upon considering her physical impairment, age, education and training, work experience, trainability and mental capacity I find claimant has been permanently precluded from a large segment of the labor market.

ORDER:

IT IS NOW THEREFORE ORDERED that claimant be paid an award of permanent partial disability equal to 192 degrees for 60% unscheduled disability for reactive airway disease.

IT IS FURTHER ORDERED that claimant's agreement with her attorney be approved for the payment of an attorney fee to the extent of 25% of the increased compensation awarded herein but not to exceed \$2000.00.

WCB 79-1319

November 4, 1980

RONALD WATSON, CLAIMANT
Steven P. Pickens, Claimant's Atty.
SAIF, Legal Services
Order on Review

The SAIF Corporation (SAIF) seeks Board review of the Referee's order entered in this case. The SAIF contends claimant failed to prove he suffered a compensable injury.

The Board finds the Referee correctly recited the facts of this case in her order.

After a de novo review of the record in this case, the Board reaches a different conclusion than the Referee. On January 9, 1979 when claimant filed his claim for this injury, he indicated his injury of January 7, 1979 was caused by "inspecting livestock, working chutes, and other various strenuous activities." Dr. Handelman first examined claimant on January 8, 1979 and fails to mention any work related injury and, in fact, reported claimant denied any ocular trauma. At that time, claimant indicated he had been having difficulty with his vision for two days.

However, claimant later remembered he had been struck in the right eye and nose on December 12, 1979. Claimant testified he had been walking to a restroom and ran into a piece of pipe at about eye level.

The Board does not find claimant's testimony to be consistent. He fails to mention any eye trauma on the Form 801 and when questioned by Dr. Handelman. The Board has such serious questions about how or if this alleged injury occurred that it cannot find claimant has established he was in fact injured as he testified he was.

Therefore, the Board reverses the Referee's order in its entirety, finding claimant failed to establish legal causation between his work and his eye condition.

If the Board had not found claimant had failed to establish legal causation in this case, the Board would still have denied claimant's claim. There is no evidence that claimant suffered any "blunt trauma" to his eye as reported to Dr. Handelman. Dr. Handelman reported claimant's right eye had old retinal tears and untreated retinal tears in the left eye. Claimant has severe myopia. Dr. Handelman felt based on a history of blunt trauma to the right eye and an eye with vitreous and retinal degeneration, the injury to claimant's right eye in December 1973 caused the retinal detachment.

However, Dr. Weisel who has treated claimant since 1967 opined the retinal detachment occurred on approximately January 7, 1979. He felt this condition did not arise from any on-the-job injury, but was related to claimant's severe myopia and retinal and vitreous degenerative changes associated with the myopia condition. Dr. Handelman had noted that claimant was in a "high risk" category for development of spontaneous retinal detachment without any trauma. The Board finds Dr. Weisel's opinion in this case to be more persuasive. He has been treating claimant for a number of years. Further, the inconsistencies given by claimant as to how and when he experienced difficulty with his eye, causes the Board to question Dr. Handelman's opinion based on the history given to him by claimant. Therefore, based on the weight of the medical evidence, the Board would affirm the SAIF's denial.

ORDER

The Referee's order dated April 10, 1980 is reversed in its entirety.

The SAIF Corporation's denial dated February 1, 1979 is restored and affirmed.

November 4, 1980

CHARLES WILLIAMS, CLAIMANT
Walter Aho, Claimant's Atty.
Fireman's Fund, Employer's Atty.
Own Motion Order

Fireman's Fund provided the Board with a September 9, 1980 report from Dr. Keizer. Dr. Keizer reported that on April 11, 1972 claimant had suffered an injury to his left foot. On April 23, 1980, claimant underwent additional surgery on his foot. Dr. Keizer related the need for this surgery to claimant's 1972 injury.

Claimant's aggravation rights have expired. Fireman's Fund indicated it did not oppose an Own Motion Order reopening this claim effective April 23, 1980.

The Board, after reviewing the evidence in this case, finds the evidence is sufficient to warrant the reopening of this claim effective April 23, 1980 for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

November 5, 1980

PHYLLIS I CORBETT, CLAIMANT
Malagon & Yates, Claimant's Atty's.
Schwabe, Williamson, et al, Employer's Atty's.
Amended Order on Review

On October 29, 1980 the Board issued its Order on Review in the above entitled case. The Board has since been advised of some errors in the Order. The heading should be corrected to indicate that employer requested this review. The employer contends that claim was not prematurely closed and claimant was not entitled to additional temporary total disability. The Board finds that the Referee's order was correct except for his description of the injury. According to the record, claimant slipped and fell while walking across the floor in the steam room injuring her back. The Referee's order should be affirmed and adopted with the above correction.

The remainder of the Board's order should be affirmed.

IT IS SO ORDERED.

November 5, 1980

RAY GURNEY, CLAIMANT
Steven P Dickens, Claimant's Atty.
SAIF Legal Services
Order on Review

The claimant seeks Board review of the Referee's order entered in this case. The claimant contends he is entitled to an increase in his permanent partial disability awarded for this injury.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of the record in this case, the Board modifies the Referee's order. Claimant is in his early 60's and has a sixth grade education. He has worked as a logger, greens keeper and as a truck driver. There is no history of prior back trouble. Because of this injury, claimant has undergone surgery. The Orthopaedic Consultants felt claimant had a total loss of function of his back in the moderate range, but only a mildly moderate loss of function of his back due to this injury. They felt claimant's pulmonary problem was more disabling than his back condition. Dr. Yamodis concurred with this report.

The Board finds claimant's pulmonary problem has worsened since claimant's injury and cannot be considered as a pre-existing disability within the meaning of ORS 656.206(1)(a). However, the Board, based on the evidence in this case, finds claimant is entitled to an increased award of compensation. The Board does not find claimant is permanently and totally disabled. However, the Board finds claimant is entitled to an award of compensation equal to 160° for 50% unscheduled disability for this injury. This award is in lieu of all previous awards of unscheduled disability granted claimant for this injury.

ORDER

The Referee's order dated March 6, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for his back injury. This is in lieu of all prior awards of unscheduled disability claimant has been granted for this injury.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of 25% of increased compensation not to exceed \$3,000.

November 5, 1980

LINDA LEE HARRY, CLAIMANT
Evelyn Scott Ferris, Claimant's Atty.
SAIF Legal Services
Gary Allen, Employer's Atty.
Order on Reconsideration

On October 21, 1980 the SAIF Corporation (SAIF) moved the Board to reconsider its Order, dated October 8, 1980, remanding Workers' Compensation Board Case No. 78-730 to the Hearings Division for additional evidence. This had been done based on the Board's granting claimant's motion to do.

The Board, after considering SAIF's motion, sees no reason to reconsider its order. Therefore, the Board denies SAIF's motion to reconsider.

ORDER

The SAIF Corporation's Motion to Reconsider is denied.

November 5, 1980

ELLA JEAN KNIGHT, CLAIMANT
C. H. Seagraves, Claimant's Atty.
Daryll E Klein, Employer's Atty.
Amended Order on Review

In the Board's Order on Review dated October 30, 1980 for the above entitled case, the second paragraph of the Order on page 2 incorrectly stated the award of compensation to be 256° for 85% unscheduled disability, the 85% being incorrect.

The award of compensation should properly be stated as being 256° for 80% unscheduled disability for claimant's back injury.

November 5, 1980

GORDON H LUCAS, CLAIMANT
Huffman & Zenger, Claimant's Atty.
SAIF Legal Services
Order on Review Amended

The Board issued an Order on Review in the above entitled case on October 24, 1980. The order was not clear and should be corrected to reflect the following changes. The second full paragraph should be deleted and the following paragraph inserted in its place:

"Claimant seeks Board review of the Referee's order which granted him additional temporary total disability from August 2, 1978 through November 28, 1978 and affirmed the March 8, 1979 Determination Order with respect to the award of 27° for 20% loss of the right foot."

The second full paragraph in the "Order" portion of the Board's order should be deleted.

The remainder of the Board's order is affirmed.

IT IS SO ORDERED.

November 7, 1980

GEORGE A EVERTS, CLAIMANT
Eichsteadt, Bolland, et al, Claimant's Atty.
SAIF, Legal Services
Order

On October 20, 1980, claimant's attorney advised the Board claimant had suffered a stroke during the week of October 5, 1980. Claimant's attorney felt the stroke was directly related to both high blood pressure and to the employment-related assault of September 15, 1974 which had resulted in claimant's serious head injuries. Claimant's attorney requested the Board withhold its review of this case to allow him additional time to determine if the medical doctors could relate the stroke to claimant's 1974 injury. Claimant's attorney felt that with this additional information he might seek reopening of the hearing.

The SAIF Corporation (SAIF) advised the Board it objected to claimant's motion. SAIF states this case has already been tried and submitted to the Referee. The Referee ruled adversely to claimant's contentions. SAIF contends it would be improper to withhold review of this case or to reopen it. It is SAIF's position that claimant could file an aggravation or new injury claim for the October 1980 incident.

The Board, after considering the arguments of both parties, denies claimant's motion. The Board sees no reason to withhold its review of this case or to reopen the hearing. The Board agrees with SAIF that to do so at this point would be improper.

ORDER

Claimant's motion to withhold review of this case is denied.

SAIF CLAIM NO. D 3824

November 7, 1980

CURTIS G FAHY, CLAIMANT
Myrick, Coulter, et al, Claimant's Atty's.
SAIF Legal Services
Own Motion Order

On October 2, 1980, claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction and reopen this claim. Claimant had on January 28, 1974 injured his low back. This claim was closed and claimant's aggravation rights have expired. Attached to claimant's request was a medical report from Dr. Weinman.

Dr. Weinman reported that claimant, on May 20, 1980, had been experiencing low back and right leg pain since May 18, 1980 when he had trouble getting out of bed. The doctor recommended claimant rest. The diagnosis was a probable herniated right lumbar disc. By June 3, 1980, Dr. Weinman indicated claimant was back to "what was normal" for him and released claimant for regular work. Dr. Weinman felt this claim should be reopened from May 18, 1980 until June 3, 1980.

The SAIF Corporation (SAIF) in October 1980 advised the Board it opposed an Own Motion Order reopening this claim. SAIF noted claimant's current complaints resulted from a new incident which occurred when claimant twisted his back getting out of bed. It did not feel it was responsible for claimant's current condition.

The Board, after reviewing the information provided to it, does not find any evidence relating claimant's condition in May-June 1980 to his January 28, 1974 injury. Therefore, the Board denies claimant's request for Own Motion relief.

IT IS SO ORDERED.

CLAIM NO. B 66126

November 7, 1980

BARBARA FOSS, CLAIMANT
SAIF Legal Services
Order

The Board, on August 14, 1980, denied reopening of this claim under its Own Motion jurisdiction. The Board found the evidence was insufficient to warrant reopening. Claimant's attorney, on September 12, 1980, requested the Board reconsider its order.

On September 7, 1980, Dr. Berkeley reported claimant had pain in her low back, leg, neck and shoulderarm. A myelogram revealed a C56 spondylopathy. No surgery was scheduled to correct this condition. Dr. Berkeley commented he had not said claimant's cervical problem was related to her back condition. He felt because of claimant's back pain and right sciatica, she was "100% disabled."

Subsequently, claimant's attorney provided the Board with additional argument concerning claimant's disability. Further, affidavits from people who knew claimant were forwarded to the Board. Also medical bills were forwarded to the SAIF Corporation (SAIF) and the Board.

On October 27, 1980 SAIF advised the Board it was willing to pay for all treatment that was needed for claimant's low back condition. It felt it did not have any responsibility for treatment of claimant's cervical or shoulder problems.

The Board, after reviewing the rather extensive evidence in this case, finds the evidence does not establish a causal nexus between claimant's original injury and her current upper back and neck complaints. Further, the evidence does not support reopening of this claim by the Board.

Therefore, the Board, after reconsidering its August 14, 1980 Own Motion Order, sees no reason to alter that order.

ORDER

The Board's Own Motion Order dated August 14, 1980 is affirmed.

CLAIM NO. 21C100369 November 7, 1980

ALDINE KEITH, CLAIMANT
Pozzi, Wilson, et al, Claimant's atty's.
Own Motion Order

On September 22, 1980 the Board ordered this claim reopened for payment of compensation and other benefits if and when claimant entered the pain clinic as an inpatient. The employer and its insurance carrier requested the Board reconsider its order. The Board's order was abated because the appeal time was expiring.

The Board, after considering the employer's and its carrier's contentions and claimant's response, sees no reason to change its original order. Therefore, the Board orders its September 27, 1980 Own Motion Order reinstated.

ORDER

The Board's Own Motion Order dated September 22, 1980 is reinstated.

WCB CASE NO. 79-6300 November 7, 1980

LARRY R PAYN, CLAIMANT
Olson, Hittle, et al, claimant's atty's.
SAIF Legal Services
Own Motion Determination

This claim for claimant's December 20, 1973 right knee injury was reopened by the Board under its Own Motion jurisdiction in July 1980. This was based on Referee Neal's recommendation that since claimant's aggravation rights had expired, the Board reopen this claim effective the date claimant entered the hospital for the July 27, 1979 surgery on his right knee. The surgery performed by Dr. Laubengayer was a release of the lateral retinaculum of the right patella, which hopefully would relieve pain in the patella.

In January 1980, Dr. Balme examined claimant and found claimant's condition was medically stationary. He recommended claimant not undergo additional surgery. On February 12, 1980 Dr. Laubengayer found claimant's condition was medically stationary. He felt claimant had a "very mild impairment" in his right knee. In May 1980 claimant fell and injured his right knee. Dr. Laubengayer felt claimant might require additional treatment if his knee condition worsened.

On October 3, 1980, the SAIF Corporation requested a determination be made of claimant's entitlement to additional temporary total disability and permanent partial disability compensation. The Evaluation Division of the Workers' Compensation Department on October 27, 1980 recommended this claim be closed and claimant be granted an additional award of temporary total disability compensation from July 26, 1979 through February 12, 1980 and additional compensation equal to 10% loss of the right leg making a total award of 20% loss of the right leg.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from July 26, 1979 through February 12, 1980 and additional compensation equal to 10% loss of his right leg making a total award of 20% loss of the right leg.

Claimant's attorney was granted an award of attorney fees in the Board's Own Motion Order entered in this case.

WCB CASE NO. 78-10,286

November 7, 1980

BONNIE B PRATER, CLAIMANT
Dan O'Leary, claimant's atty.
Roger A ludtke, Employer's Atty.
Amended Order on Review

The Board issued its Order on Review on October 28, 1980 in the above entitled case and failed to include a provision for attorney's fee. The Order should be amended as follows:

"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."

The remainder of the Board's order is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 80-5174

November 7, 1980

ELSIE RIOS, CLAIMANT

James Francesconi, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Order Suspending Board Review

On October 21, 1980 claimant, by and through her attorney, requested the Board extend the time for the filing of briefs in this case and possibly to join the SAIF Corporation to a new injury case. The Referee in this case found claimant had experienced a new injury and denied claimant's aggravation claim. Claimant has filed a new injury claim which was denied and a hearing is pending on that denial.

The SAIF Corporation advised the Board it objected to claimant's motion to join it to the new injury proceedings. However, it did not object to an extension of time for the filing of briefs in this case until a decision has been entered in the new injury claim.

The Board, after considering the contentions of both parties, finds it would be in the best interest of justice if the briefing schedule in this case was extended until a decision has been entered in the new injury claim. Therefore, the Board orders that a briefing schedule will not be established in this case until the Board has been advised that an appealable order has been entered in the new injury claim.

IT IS SO ORDERED.

JOE E. ROBERTSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion and Order Referring for Consolidated Hearing

On October 6, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen this claim for his January 14, 1975 injury. Attached to claimant's request were medical reports from Dr. Campagna.

In December 1979, Dr. Campagna reported that claimant was complaining of neck and right occipital pain. He noted that claimant had suffered a low back injury in 1965 and a head and neck injury in 1973. Dr. Campagna felt that claimant had a post concussion syndrome and cervical spondylosis at the C5C6 and C6C7 levels. It was Dr. Campagna's opinion that claimant's current upper back condition arose out of or had been aggravated by the January 14, 1975 injury.

On October 22, 1980, SAIF advised the Board that it opposed an Own Motion Order reopening this claim for treatment of claimant's spondylosis on the basis that this claim was established for a contusion to claimant's left shoulder. It advised the Board that a hearing was pending in Claim No. D 367993, on its denial of responsibility for a new injury occurring in 1979.

The Board, after reviewing the evidence submitted finds it would be in the best interests of the parties if the Board referred this case to the Hearings Division to be set for hearing. This matter is to be consolidated with the pending hearing regarding SAIF's denial in Claim No. D 367993. The Referee shall take evidence and determine whether claimant's current cervical spondylosis condition is related to his January 14, 1975 injury and represents a worsening thereof since the last award or arrangement of compensation in that claim. Upon the conclusion of the hearing, the Referee shall request a transcript of the proceedings be prepared and forward it to the Board together with the exhibits, and any other evidence submitted at the hearing. The Referee shall make a recommendation to the Board on claimant's request for Own Motion relief based on the record established at the Hearing.

IT IS SO ORDERED.

WCB CASE NO. 79-7134

November 7, 1980

KENNETH L. WARD, CLAIMANT

Olson, Hittle, Gardner & Evans, Claimant's Attys.

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 Referee is final by operation of law.

WCB CASE NO. 79-8422

November 7, 1980

BILLY WASHINGTON, CLAIMANT

Stoll & Stoll, Claimant's Attys.

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 Referee is final by operation of law.

WCB CASE NO. 78-9808

November 13, 1980

WILLIAM JOHN AMRHEIN, CLAIMANT

Frank R. Alley, III, Employer's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by SAIF

The SAIF Corporation seeks Board review of the Referee's order which revoked the order which declared the employer as non-complying.

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 22, 1980, is affirmed.

This is an appeal pursuant to ORS 656.740. At hearing in Medford, Oregon on October 4, 1979 the employer appeared with his attorney, Frank R. Alley, III; the State Accident Insurance Fund by Stephen D. Brown. The issues are whether or not the employer's annual renewal fee to the State Accident Insurance Fund was delivered before termination deadline and therefore cancellation of insurance benefits was in error, and whether or not cancellation of benefits was in error as the employer had on deposit certain funds which, in the event that any amounts due had not arrived on time, should have been applied toward such obligation. The hearing was continued for argument and closed on February 1, 1980.

FINDINGS

On November 22, 1978 a proposed and final order was published declaring the employer a non-complying employer during the period October 1 to October 12, 1978 (Hr. Ex. A-5). The employer is in the concrete construction business. He has had insurance with the State Accident Insurance Fund since 1968. He was sent advance notice that his coverage would expire, showing the expiration of his policy (Hr. Ex. G), and that for renewal of the policy period October 1, 1978 to September 30, 1979, it would be necessary that he pay a premium of \$15. This notice is prepared by computer and routed directly to the post office. If the notice were not delivered it would be returned and a correct address would be ascertained. This did not occur. In the 11 years that the employer had been doing business with the State Accident Insurance Fund he had always made payments by mail and on September 29, 1978, he prepared, along with other checks, a \$15 check to the State Accident Insurance Fund (Hr. Ex. B), which he deposited in a United States mail box on that date. This check was deposited by the State Accident Insurance Fund in a bank on October 5, 1978 (Hr. Ex. B). Termination date of the policy was September 30, 1978. A termination notice is prepared only when premiums are not paid. If a contributing employer fails to pay any required premiums before the due date, the Fund is required to terminate coverage by giving the employer written notice of termination, ORS 656.427. The employer's coverage was cancelled effective midnight of the last day. On September 30, 1978 the employer had a credit balance of \$10.30. This balance was generated by payment of amounts in excess of those required. He had been delinquent twice before in 1978. If a policy is cancelled, an employer must pay a registration fee and submit an application along with with requisite premium. The coverage was

cancelled on September 30, 1978 and reinstated on October 12, 1978 with receipt of the required deposit, ORS 656.552. An employer could request that funds on deposit with the Fund be applied to premium, but the Fund need not honor such request, depending on the circumstances. The employer's deposit with the Fund was intact during the period October 1 through October 12, 1978. However, there was no automatic transfer of these funds because it was not determined that he would renew coverage with the Fund. He applied again for coverage on October 12, 1978 with the requisite registration fee (Hr. Ex. V).

OPINION

Determination date of policy was Saturday, September 30, 1978. The next business day was Monday, October 2, 1978, ORS 174.120; 187.010. At issue is whether the employer made timely payment of the annual renewal fee pursuant to ORS 656.504. ORS 656.427 provides for termination of coverage by the Fund. On failure of a contributing employer to pay any required contribution, fee, premium, or deposit on or before the due date, the Fund shall terminate the coverage by giving the employer written notice of termination. The termination is effective at midnight, not less than 30 days after the date notice is mailed. However, termination does not take effect, if prior to the effective date, the employer pays the contribution fee, premium or deposit due together with any penalty imposed. The employer contends that the mailing of the fee constituted a payment pursuant to ORS 656.427.

The check dated September 29, 1978 in the amount of \$15 to the State Accident Insurance Fund shows a bank date stamp October 5, 1978. Several other checks, which the employer testified were mailed the same day, show bank date stamps on October 2, 1978. The State Accident Insurance Fund cites ORS 656.419 (3) for the proposition that required fees or premiums be received by the Fund. However, this section concerns issuance of guaranty contracts in distinction to ORS 656.427 which provides for termination of coverage. While 656.419 provides that the fees or premiums must be received by the Fund, ORS 656.427 provides only that coverage may be terminated if a contributing employer fails to pay required contributions, fees, premiums. As the termination date was on Saturday, the employer would be given til the following Monday to make payment. The evidence indicates that claimant had done business with the State Accident Insurance Fund for many years and had always made payments by mail, and in these type cases, the general rule is that posting of a letter constitutes payment, 60 Am Jur 2d Payment, Section 17. There is no evidence of when the check was received by the Fund, however, there is uncontraverted evidence that the employer prepared several checks dated September 21, 1978, some of which were deposited the following Monday. Had ORS 656.427 required receipt by the Fund it must be presumed the statute would have so stated as in ORS 656.419. Having seen and heard the witnessess and having examined all of the evidence in this case, I find that claimant mailed the requisite payment before the due date, and consequently paid it pursuant to ORS 656.427.

ORDER

IT IS NOW THEREFORE ORDERED that so much of Proposed and Final Order No. 5055-A as declares Boyd Carstensen, dba Carstensen Construction a non-complying employer be, and the same hereby is, revoked.

SAIF CLAIM NO. A509799

November 13, 1980

ETTIS R. BROCKETT, CLAIMANT
Cash R. Perrine, Claimant's Atty.
Marshall C. Cheney, Employer's Atty.
Marcus K. Ward, Atty. for SAIF.
Own Motion Determination

This claim for claimant's October 24 1955 back injury was reopened effective January 16, 1979 by the Board under its own motion jurisdiction. This claim had been originally closed in 1958 and claimant's aggravation rights have expired. The claim was reopened and closed subsequently resulting in claimant receiving a total award of compensation equal to 70% loss of function of an arm for unscheduled disability.

Claimant returned to work after this injury and worked at several different jobs. However, he continued to experience back problems.

Dr. Carroll began treating claimant on January 16, 1979. He released claimant for a "trial of work," but claimant could not do the work because of increasing back pain. On June 20, 1979, Dr. Carroll reported he felt claimant should retire with total disability due to his low back condition.

The Orthopaedic Consultants, in November 1979, reported claimant's stopping work was the best treatment for him. They felt claimant was unable to perform any gainful occupation on a sustained basis and was permanently and totally disabled.

On September 3, 1980, Dr. Bernson reported he had discussed with claimant the possibility of performing additional tests and surgery on claimant. Claimant was against such additional treatment.

The SAIF Corporation, on October 6, 1980, requested a determination be made of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on October 30, 1980, recommended this claim be closed with an award of additional temporary total disability compensation from January 16, 1979 through September 3, 1980 and claimant be granted an award of compensation for permanent total disability.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from January 16, 1979 through September 3, 1980 and an award of compensation for permanent total disability effective September 4, 1980.

Claimant's attorney was awarded a reasonable attorney's fee in the Own Motion Order dated August 15, 1980.

WCB CASE NO. 78-2647

November 13, 1980

LYNN CRAMER, CLAIMANT

Gary Bisaccio & Kerry Chipman, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed SAIF's denial of his claim for a heart attack.

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 April 28, 1980, is affirmed.

This matter came on regularly for hearing on February 12, 1980 before Nathan Ail, Referee. Claimant appeared and was represented by Kerry Chipman and Gary Bisaccio. Al Cwen represented SAIF. After that session the hearing was reconvened on February 13. The record closed after oral arguments on March 31, 1980.

The sole issue is compensability.

FINDINGS:

Claimant then a 45 year old television repairman suffered an acute myocardial infarction at his place of employment, during the morning of January 10, -1978. The work episodes he related were unwitnessed. He had no prior medical history of such condition, although he had experienced intermittent vague chest pain previously. When admitted to the hospital that day the emergency room nurse reported a history of onset while working on a T.V. however the medical resident reported the sudden onset occurred approximately at noon while eating lunch. (Exhibit 2 pgs. 3 & 11). Dr. Amato, internist who treated him at the hospital and thereafter reported he had been sitting at his work bench when the initial episode occurred. The hospital history reveals a family background of heart problems including claimant's brother, sister, mother and father. It also revealed he had smoked one or two packs of cigarettes a day for approximately 20 years. Dr. Amato advised in February, 1978 that he was unable to state the infarction was a direct result of job exposure. (Exhibit 3).

On February 10, 1978 claimant was interviewed by Barbara Prentiss R.N., for SAIF. The interview was recorded and later transcribed (Exhibits 10 & 11) respectively. He reported he started work at 9:30 A.M. the day in question and according to his usual routine moved some T.V. sets including consoles. He did not say anything unusual occurred until about 11:00 A.M. after he had picked up and placed a forty pound chassis on the work bench, repaired it and put it down. He then lifted another forty pound chassis which felt as if it weighed twice as much as it did. His symptoms then commenced. (Exhibit 11 pgs. 2, 3, 7 & 8). He advised her he smoked one half pack of cigarettes a day. (Exhibit 11 pg. 10)

Dr. Harwood M.D., medical consultant for SAIF, opined there was no causal relationship. He based his opinion on the history of smoking, family history, which he labeled highly significant risk factors, and that claimant was not subjected to sufficient stress so as to have precipitated the infarction. (Exhibit 4).

Claimant was examined by Dr. Grossman, internist in September 1978. Claimant's history then was the onset occurred about 11:30 A.M. after moving several T.V. consoles and then removing a chassis from a cabinet. He stated he also had been moving large sets an hour earlier. Dr. Grossman opined it was probable the work activity was a significant contributing factor. (Exhibit 7).

Claimant was examined by Dr. Rogers, heart specialist in February 1979. The history then was, he had carried three television consoles of 150 pounds each twenty paces over a period of thirty minutes. About 11:00 A.M. within a few minutes after carrying the last one he developed a new burning in the manubrial area. He felt better after a few minutes then sat at the workbench and pulled a twenty five pound chassis out of a television set after which the burning reoccurred. Dr. Rogers opined the physical effects of carrying the 150 pound consoles during a thirty minute period was a material precipitating cause of the infarction if it began within a few minutes after the second or third of those carries. On the other hand, he felt if there was more than a thirty minute interval between the last strenuous physical effort and the onset of symptoms he would doubt the relationship between the effort and the coronary attack. (Exhibit 8).

In May 1979, Dr. Amato received a history similar to that reported by Dr. Rogers. He opined it was probable the work activity was a significant contributing factor if the amended history was accurate. (Exhibit 9).

Claimant testified when he started work he picked up forty pound chassis and carried it thirty feet to the work bench. He then moved a forty pound chassis into a cabinet and then moved it, (combined weight 150 pounds), out of the way. He then moved another 150 pound console to the work bench. It was then he started to develop symptoms. After resting he lifted another chassis which felt very heavy and then symptoms became more severe. He became dizzy, passed out and fell against a cabinet. He testified he had smoked from three quarters to one and half packages a day and as much as two packages a day. He stated he didn't tell Ms. Prentiss about the episodes of moving the heavier three sets because his answers to her were general and he hadn't stopped to recall specific activities. He also stated it took him several months to recall all the details because of his heart attack.

OPINION:

Claimant contends his myocardial infarction resulted from episodes which occurred in the course of his employment. Several physicians concluded that, based on claimant's reported history, there was a medical relationship of the injury to claimant's employment. Unfortunately the episodes related were unwitnessed and there are several inconsistencies in claimant's given history. There were two opposing histories at the hospital, that the symptoms arose while working at a bench and they occurred while eating lunch. Also despite pointed questions by The Fund's investigator claimant failed to relate he had symptoms while lifting three 150 pound O.V. sets. Nor did he report that to his treating physician. He first made mention of said episodes thirteen months after the date of injury and that is the history upon which the physicians based their opinions on causation. Claimant contends he had suffered a lapse of memory due to his illness however that is also uncorroborated. The record also indicates claimant reported inconsistently the amount of cigarettes he smoked. Claimant's case rests fully on his unsupported and materially inconsistent statements. I conclude he has not sustained his required burden of proof by a preponderance of the evidence.

IT IS NOW THEREFORE ORDERED that the employer's denial of March 21, 1978 be and the same hereby is sustained.

WCB CASE NO. 78-9487

November 13, 1980

KATHERINE DUNN, CLAIMANT

Cottle, Howser & Cue, Claimant's Attys.

Keith D. Skelton, Employer's Atty.

SAIF, Legal Services, Defense Atty.

Order on Review

The employer and the claimant seek Board review of the Referee's order entered in this case. The employer contends the award of compensation granted by the Referee is excessive, and claimant contends she is entitled to additional award of permanent partial disability compensation. The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of the record in this case, the Board reaches a different conclusion than that of the Referee. Claimant is 35 years old and has a high school plus on-the-job training in electronics and as a dietary aide. The medical evidence indicates claimant should avoid occupations requiring prolonged standing or repetitive bending and twisting. It is felt claimant could perform sedentary work requiring no lifting over ten pounds. Claimant has undergone two surgeries to her back due to this injury. Also, the medical evidence indicates part of claimant's continuing back difficulty is due to her excessive weight. It has been suggested claimant reduce her weight but she has been unable to do so, and she also failed to follow through in her exercise problem. Since this injury, claimant has been retrained as a secretary which gives her a skill which enhances her work opportunities and her earning capacity. Based on the record in this case and considering all the relevant facts to determine an injured worker's loss of wage earning capacity, the Board finds the Referee's award of compensation is excessive. Based on this same evidence, the Board finds claimant is entitled to an award of compensation equal to 112° for 35% unscheduled disability for her back injury. This is in lieu of any previous awards of unscheduled disability for this injury.

ORDER

The Referee's order dated January 25, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 112° for 35% unscheduled disability for her back injury. This is in lieu of any previous awards of unscheduled disability claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-582

November 13, 1980

ARLENE SIEMS, CLAIMANT
Rolf Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Review

This case is before the Board on the SAIF Corporation's (SAIF) request that it review the Referee's order which granted claimant compensation equal to 320° for 100% unscheduled permanent partial disability. The SAIF contends that claimant's employment produced an aggravation of her pre-existing condition that was temporary only and the Determination Order should be affirmed.

Claimant, 62 years old, filed a claim on December 28, 1976 alleging back, neck and shoulder problems resulting from continuous and repetitive stress and strain from operating power sewing machines at Fairview Training Center (Fairview). The claim was initially denied by the SAIF but found compensable by a Referee in January 1978.

The Board agrees with the Referee that this case was extremely difficult. The numerous physicians were unable to agree on even so much as the cause of claimant's problem. The general consensus is that claimant had a pre-existing condition of some type which was exacerbated by her work at Fairview.

On November 1, 1975, Dr. Mueller, a radiologist, diagnosed osteoporosis and degenerative spondylosis of the thoracic spine. Dr. Sanders, claimant's treating physician, diagnosed osteoporosis and osteoarthritis with some arthritis of the cervical spine. In late 1976 he found evidence of arthritis of the right carpal interphalangeal joint on the index finger of the right hand. He noted reduction of grip in the hand resulting from the osteoarthritis. He indicated that elevation and abduction of her arms produced pain and was being aggravated by her sewing work at Fairview.

Dr. Moore, in late 1976, indicated that claimant had had back symptoms for the last ten years. He found musculoskeletal disorder of uncertain etiology which he felt was due to a combination of osteoporosis and degenerative arthritis. He indicated claimant could not work at that time and related her condition to her work based on the history given to him by claimant. He later changed his diagnosis to one of fibrositis or chronic pain syndrome. He felt this syndrome was self-perpetuating, i.e., pain begets further pain. He found claimant totally disabled.

Dr. Bolin, a chiropractor, in February 1977, indicated claimant's condition had been chronic before her work at Fairview, but it had become acute as a result of that work to the point that she had become totally disabled.

Dr. Sanders, in March 1977, limited claimant's lifting to ten pounds. He indicated she could not bend forward, could not use her arms and could not sew. He felt it was unlikely that she would ever return to gainful employment and that her job at Fairview was responsible for aggravating her osteoporosis and osteoarthritis.

Dr. Pasquesi, an orthopedic surgeon, found no limitation of motion, but considerable tenderness in the upper and lower dorsal spine areas. He felt that placing the responsibility for claimant's condition on an occupational disease would be on the basis of a remote possibility rather than probability. He recommended claimant do sedentary work only.

Dr. Moore, in October 1977, indicated Fairview should be responsible for claimant's condition based on claimant's history of increased pain and the physical finding of marked tenderness. He felt claimant's condition became incapacitating while she was working at Fairview. Dr. Sanders, in August 1978, indicated claimant would probably be symptomatic for the rest of her life. He later said he was unable to separate the symptomatic disability from the pre-existing disease and the effect that her work at Fairview had on her condition.

On November 9, 1978 the Orthopaedic Consultants found claimant had a progressive ongoing disease in terms of hypertension and osteoarthritis. They doubted whether she would ever be able to work anywhere. They felt her work had not materially contributed to her present disability. They rated her cervical and dorsal spine impairment as moderate, although it was only minimal due to this injury.

Dr. Means, a psychologist, indicated rehabilitation was guarded because claimant had been off work for three years and therapy was not doing her much good. Dr. Means found moderately severe emotional disturbance.

Dr. Holm, an orthopedic surgeon, found chronic rhomboid and trapezius strain, osteoarthritis, osteoporosis, hypertension and functional overlay. He did not feel the occupational strain caused these conditions, but merely temporarily exacerbated them. He did not recommend vocational rehabilitation since claimant had already retired. He felt she was capable of performing light to sedentary work.

In December 1978, Dr. Field, an internist, felt claimant should not work at an occupation requiring long periods of standing and reaching over her head or any degree of lifting.

On January 10, 1979, the Determination Order granted compensation for time loss only.

Dr. Mahoney, an internist, in September 1979 found claimant was suffering from three kinds of pain. He related the right parathoracic pain to her work at Fairview because of the work with her right arm. Dr. Mahoney indicated that claimant's fibrositis began at Fairview and did not pre-date her work there. He did not consider her degenerative arthritis of the neck or her osteoporosis responsible for her symptoms. He considered her completely disabled from work.

Dr. Poulson, an orthopedic surgeon, found her symptoms outweighed the findings.

Claimant has a high school education with no formal training beyond that. She started work on a regular basis in 1950 for Singer Company and went to Fairview in 1972. She quit work at Fairview because of the pain on December 5, 1975. Claimant complains that any activity brings on pain in her right arm. She hasn't sewed even for pleasure since she quit work. Her condition has affected her cooking and housework. She knows of no work she can do and, therefore, has not looked.

The Referee granted claimant compensation equal to 100%; he was unable to reach permanent total disability because of her lack of motivation.

The Board, after de novo review, modifies the Referee's order. The Board finds that claimant had a pre-existing condition which was definitely exacerbated by her work at Fairview. The aggravation was permanent to the extent that it caused the claimant to seek medical treatment. Claimant can no longer return to her previous occupation as a result of the job exposure. The consensus of the medical opinion is that claimant cannot work although this is based largely on the fact that she has retired and knows of no work she can do. The physicians were unable to agree on the cause of claimant's problems, but it was generally agreed that she had many, not all of which were the responsibility of her work at Fairview. Claimant has voluntarily retired and has no motivation to return to work. She has a high school education and a somewhat varied work background with her work at Singer Company where she sewed, did ordering, taught classes, did saleswork and bookkeeping. The Board concludes that claimant has a definite portion of the labor market open to her, considering both the medical record and her age, education and work background. The Board finds an award equal to 192° for 60% unscheduled disability would be more appropriate in this case. We would recommend that the Field Services Division of the Workers' Compensation Department make every effort to assist claimant in job placement.

ORDER

The order of the Referee dated May 13, 1980 is modified.

Claimant is hereby granted compensation equal to 192° for 60% unscheduled permanent partial disability. This award is in lieu of that granted by the Referee.

The remainder of the Referee's order is affirmed.

November 13, 1980

THEODORE L. TIMONEN, CLAIMANT
Becker, Sipprell & Hunt, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which granted additional temporary total disability from December 19, 1976 through August 10, 1977 and awarded 256° for 80% total unscheduled disability.

The majority of 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 April 10, 1980, is affirmed.

I respectfully dissent from the majority of the Board as follows:

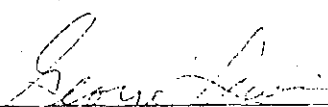
I would modify the order of the Referee and find claimant is permanently and totally disabled. As early as December 1974, claimant's treating physician found claimant unable to be gainfully employed due to pain in the left groin which was aggravated by motion and nervous tension. Dr. Berry, Associate Professor of Urology at the University of Oregon Health Sciences Center, felt that claimant would never be able to return to any work involving any motion of his left leg.

In April 1979 Dr. Berry opined that claimant was medically stationary and was unable to take long steps, walk rapidly or do any exercise involving his left leg due to pain.

From the date of injury in 1973 through 1979 claimant has been hospitalized on numerous occasions either for surgery or for recurring infections. In January 1980, claimant's treating physician, Dr. Gardner, again recommended surgery due to uncontrollable infections and constriction of the bladder neck, all of which were related to his 1973 injury. The doctor felt claimant was totally disabled from work due to left groin pain and claimant also was totally impotent and permanently and totally disabled.

Claimant is 48 years of age and spent 20 years as a welder with his only other work experience in farming and logging, all of which he is now precluded from performing. Further, claimant suffers from moderate to severe anxiety reaction directly related to his industrial injury and diagnosed by the Psychology Center in 1973.

I feel with claimant's disabling pain, psychological disability superimposed thereon and claimant's treating physician's opinion that claimant is unemployable and is physically permanently and totally disabled, that the Referee's award should be modified and claimant be granted an award of permanent total disability. I find that the medical evidence supports the award of permanent total disability without claimant having to prove motivation.


George Lewis
Board Member

WCB CASE NO. 79-4954

November 13, 1980

DONALD R. VITRO, CLAIMANT
Phil Ringle, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF Corp

The SAIF Corporation (SAIF) seeks Board review of the Referee's order entered in this case. SAIF contends: (1) The hearing should have been held in abeyance until claimant had completed his vocational rehabilitation program; and (2) the award of compensation granted by the Referee was excessive.

The Board finds the Referee correctly recited the facts of this case in her order.

After a de novo review of the record in this case, the Board modifies the Referee's order. The Board agrees with SAIF that conducting hearings when the injured worker is in a vocational rehabilitation program is futile. Upon completion of such programs the injured worker's loss of wage earning capacity is re-evaluated by the Evaluation Division. It is difficult to make a fair and just determination of an injured worker's disability until he has completed or otherwise terminated the vocational rehabilitation process. However, the Board is also aware of and bound by the Court of Appeals decision in Minor v. Delta Truck Lines, 43 Or. App. 29, ___ P2d ___ (1979). Therefore, the Board finds the Referee correctly denied SAIF's request that this hearing be held in abeyance and proceeded with the hearing in this case.

Considering SAIF's second contention, the Board finds that the Referee's award of compensation is excessive. The medical evidence indicates claimant cannot return to any occupation requiring heavy lifting, frequent bending and twisting. He is in his early twenties and has eleven-plus years of education. The only work claimant has done has been in the construction field. Dr. Berg opined claimant had a total bodily impairment equal to 35%, placing claimant in the range of low moderate residual disability. Based on the record in this case and considering the relevant factors in determining an injured worker's loss of wage earning capacity, the Board finds claimant is entitled to an award of compensation equal to 112° for 35% unscheduled disability for this injury. This is in lieu of all previous awards of compensation claimant has been granted for this injury.

ORDER

The Referee's order dated March 19, 1980 is modified.

Claimant is hereby granted compensation equal to 112° for 35% unscheduled disability for his back injury. This is in lieu of all previous awards of compensation claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

November 14, 1980

MARSHALL ACREE, CLAIMANT

Jerome F. Bischoff, Claimant's Atty.

R. Ray Heysell & David O. Horne, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Carrier

Employers of Wausau (Wausau) seeks Board review of the Referee's order entered in this case. Wausau contends claimant failed to establish he has sustained an aggravation of his 1975 industrial injury.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of the record in this case, the Board modifies the Referee's order. The Board agrees with the industrial Indemnity Insurance Company's denial of his claim for a new injury.

The sole issue left to decide is whether or not claimant has established he has sustained an aggravation of his 1975 injury. The Board finds he has not. After the 1977 injury, claimant was released to return to work without any restriction. He testified he experienced some minor problems with this shoulder. On May 17, 1979 claimant apparently was angered when a piece of wood became stuck and tried to remove it. He had difficulty, became mad and "yanked on it real hard." Claimant experienced a pulling and snapping sensation in his shoulder and felt immediate tense pain from his shoulder to his elbow. He stated he had not felt this type of pain before.

Dr. Streitz, claimant's treating physician since his 1975 injury, in August of 1979 opined claimant had experienced "a sudden onset of symptoms since this May 17, 1979 incident at work." He felt claimant had a new injury which aggravated some of claimant's symptoms of his 1975 injury.

The Board, applying the last injurious exposure rule set forth by the Court of Appeals in SMITH v. ED'S PANCAKE HOUSE, 27 Or. App. 361, 556 P2d 158 (1976) and Dr. Streitz's medical report, finds the May 17, 1979 incident constitutes a new and intervening injury relieving Wausau of responsibility in in this case. This injury would have been the responsibility of Industrial Indemnity, but claimant failed to timely request a hearing on the denial of his claim by that carrier. Therefore, the Board orders Wausau's denial reinstated and affirms it.

ORDER.

The Referee's order dated April 23, 1980 is modified..

The Referee's order remanding this claim to Employers of Wausau and granting claimant's attorney a fee is reversed.

Employer of Wausau's denial dated September 21, 1979 is restored and affirmed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 76-6895

November 14, 1980

ALDWYN C. BELL, CLAIMANT

Richard Sly, Claimant's Atty.

John S. Folawn & Bruce Bottini, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Order on Remand

This case was appealed from the Board to the Court of Appeals to the Supreme Court. The Court of Appeals reversed the Board. However, the Supreme Court reversed the Court of Appeals and affirmed the Board's decision in this case.

On August 27, 1980 the Supreme Court issued a Judgment and Mandate, remanding this case through the Court of Appeals to the Board for entry of an order conforming to its decision.

The Board, in light of the Supreme Court decision, orders that its May 1, 1979 order be reinstated and affirmed.

IT IS SO ORDERED.

FRED A. BILLINGS, CLAIMANT
Don Swink, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Remand

The claimant appealed the Board's February 15, 1980 Order on Review which reversed the Referee's order. The Referee had granted claimant an award of compensation equal to 64% for 20% unscheduled disability for his head injury.

The Court of Appeals, in an opinion dated August 18, 1980, reversed the Board's order and found the Referee's order was correct and remanded it to the Board for entry of an order affirming the Referee's order. The Judgment and Mandate in this case was received by the Board on October 13, 1980.

The Board, in light of the Court of Appeals' decision, reverses its Order on Review, reinstates the Referee's order and affirms the Referee's order.

IT IS SO ORDERED.

SAIF CLAIM NO. D 51562 November 14, 1980

NOBLE JOHN CHASTEEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 30, 1980, the SAIF Corporation (SAIF) forwarded to the Board certain information regarding this claim which was had been established for claimant's October 7, 1974 left shoulder injury. Claimant's aggravation rights have expired. After the initial injury and treatment for it, claimant continued to have pain in his left shoulder. According to SAIF, claimant was scheduled for additional surgery for this problem on or about October 29, 1980. The SAIF indicated it did not oppose an Own Motion Order recognizing this claim for that surgery.

The Board, after reviewing the information provided to it, finds that this claim should be reopened under its own motion jurisdiction. Therefore, the Board orders this claim reopened effective the date claimant was hospitalized for surgery with payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED:

WCB CASE NO. 79-7258

November 14, 1980

ARYE NELL COLBERT, CLAIMANT
Richard Sly, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Motion to Dismiss

This is an order in reply to claimant's Motion to Dismiss based on SAIF Corporation's failure to file a brief within a timely manner. There is no requirement in the Workers' Compensation law or the Board rules which indicates that a brief must be filed by the appellant before the Board will review the case. ORS 656.295(5). While briefs are a significant aid in the review process, the failure to file a brief is not grounds for a dismissal of a request for review. This matter will be placed on the review docket to be reviewed by the Board in due course. The request for an order dismissing SAIF's request for review is hereby denied.

IT IS SO ORDERED.

WCB CASE NO. 79-5584

November 14, 1980

RUBEN F. DuPONT, CLAIMANT
James Larson, Claimant's Atty.
Marcus K. Ward, Atty. for SAIF
Order on Review

The claimant seeks Board review of the Referee's order entered in this case. The claimant contends his condition has worsened since the last award or arrangement of compensation.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of the record, the Board modifies the Referee's order. On March 6, 1979 claimant was hospitalized by Dr. Beamer for traction. The diagnosis was chronic acute back strain with a hysterical component. He was discharged on March 10, 1979. This treatment was not due to any worsening of claimant's condition, but only for palliative treatment of claimant's ongoing symptoms. The Board finds claimant is entitled to temporary total disability compensation for the period of time he was hospitalized for this treatment. The Board agrees with the Referee that claimant has failed to prove a compensable aggravation under ORS 656.273.

ORDER

The Referee's order dated April 28, 1980 is modified.

Claimant is hereby granted an award of additional temporary total disability compensation for March 6, 1979 through March 10, 1979.

Claimant's attorney is hereby awarded as reasonable attorney's fee for his services in connection with this Board review an amount of 25% of the additional temporary total disability compensation not to exceed \$250.00.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-8856

November 14, 1980

REYNALDO GANZALEZ, CLAIMANT
Larry K. Bruun, Claimant's Atty.
Keith Skelton, Employer's Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which granted him an award of compensation equal to 54% for 20% unscheduled neck disability. The claimant contends this award is grossly insufficient and contrary to the evidence.

The Board finds the Referee correctly recited the facts of this case in her order.

After a de novo review of the record in this case, the Board modifies the award granted by the Referee. Due to this injury, claimant underwent a discectomy and a two-level fusion at C5-6 and C6-7. Claimant has a high school education and is trained in automobile and diesel mechanics. Claimant came to his early thirties and has worked as a mechanic and also worked in a lumber mill. The medical evidence indicates claimant is unable to return to any "heavy type" work and should not work at a job which requires overhead work or work above shoulder level. His impairment has been rated in the upper limits of mild. The Board, based on the evidence in this case, considering all the relevant factors to be used in determining an injured worker's loss of wage earning capacity, and comparing this case with other cases it has reviewed, finds claimant is entitled to an award of compensation equal to 80% for 25% unscheduled disability for his neck injury. This is in lieu of all prior awards of unscheduled disability claimant has been granted for this injury.

ORDER

The Referee's order dated April 28, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 80% for 25% unscheduled disability for his neck injury. This is in lieu of all prior awards of unscheduled disability claimant has been granted for this injury.

Claimant's attorney is hereby awarded as reasonable attorney's fee for his services at this Review a sum equal to 25% of the increased award of compensation not to exceed \$5,000.

WCB CASE NO. 78-2698

November 14, 1980

GAYLE Y. GOODMAN, CLAIMANT
Richard A. Carlson, Claimant's Atty.
Souther, Spaulding, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order on Review

The employer seeks Board review of the Referee's order entered in this case. The employer contends claimant's condition on and after August 7, 1978 was not the result of her October 1975 industrial injury and that she is not entitled to temporary total disability compensation from August 7, 1978 through July 16, 1979 less time worked and attorney fees.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the Board modifies the Referee's order. The Board concurs with the Referee's finding that claimant did not establish her condition had worsened since the last award of compensation in this case and in denying her aggravation claim. However, the Board does not agree with the Referee's awarding of temporary total disability compensation from August 7, 1978 through July 10, 1979 less time worked and his award of a \$1,750 attorney fee. The medical evidence indicates that prior to her August 7, 1978 automobile accident, claimant's condition was medically stationary and claimant was almost asymptomatic.

After the automobile accident, the Board finds the evidence clearly indicates the automobile accident was the cause of claimant's problems and disability after August 7, 1978 and constitutes an intervening injury which relieves this employer of responsibility for claimant's condition. The Board finds the evidence is overwhelming on this point.

The correspondence from the insurer's attorney clearly constitutes a de facto denial of claimant's aggravation claim. This denial was within 14 days of the claimant's aggravation claim. The Board finds that the carrier's action in this case, and under this set of facts, cannot be said to be unreasonable. Therefore, the Board reverses the Referee's awarding of temporary total disability compensation from August 7, 1978 through July 10, 1979 less time worked and the award of a \$1,750 attorney fee to claimant's attorney.

ORDER

The Referee's order dated December 1979 in WCB Case No. 78-8255 is modified.

The Referee's award of temporary total disability compensation from August 7, 1978 through July 10, 1979 less time worked and the award of \$1,750 fee to claimant's attorney is reversed. The Referee's affirmation of the carrier's de facto denial of claimant's aggravation claim is affirmed.

WILLIAM E. HOPSON, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Attys.
Lang, Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order entered in this case. The Referee found that Farmers Insurance Group (Farmers) was entitled to a hearing, dismissed the SAIF Corporation as a party to this proceeding, and remanded the case to be set for a hearing.

The Board finds that the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, a majority of the Board reverses the Referee's order granting Farmers the right to a hearing. This is a case of first impression before the Board.

The claimant was found to be permanently and totally disabled. The carrier then elected to request the Board to reconsider that award of compensation. The carrier also requested a hearing. The Board proceeded to reconsider claimant's permanent and total disability award and affirmed it. The carrier now contends it is entitled to a hearing on claimant's permanent and total disability award. A majority of the Board disagrees with this contention.

The carrier elected to proceed with the reconsideration of the award by the Board. At this point, the carrier elected which procedure it would follow to contest the award claimant had received. A majority of the Board finds it had to elect either to seek a reconsideration of the award for permanent total disability or to request a hearing on the Determination Order, but it could not do both. If insurance carriers were allowed to seek reconsideration of awards for permanent and total disability and to have a hearing on the same award, the injured worker would be faced with defending the award of compensation in two different proceedings. The evidence in each proceeding is identical. The same parties are also involved in each proceeding. To allow an insurance carrier to have "two bites at the same apple" appears to the majority of the Board to be patently unfair. Further, it appears the principal of res judicata would bar a second reconsideration of the same issue, based on the same evidence and involving the same parties. Therefore, the majority of the Board reverses that portion of the Referee's order which granted Farmers request for a hearing.

ORDER

The Referee's order dated March 24, 1980 is modified.

That portion of the Referee's order which found Farmers Insurance Group was entitled to a hearing on the extent of disability on its August 31, 1977 Request for Hearing is reversed. Farmers Insurance Group is not entitled to a hearing.

The remainder of the Referee's order is affirmed.

I respectfully dissent from the majority opinion of the Board as follows:

I find the employer has complied with the requirements of ORS 656.319 (2) and has a right to a hearing; nothing contained in this record extinguishes that right (see ORS 656.283).

I would affirm the Referee's Order.

Robert L. McCallister
Board Member

WCB NO. 78-9059 November 14, 1980

CARL A. JACKSON, CLAIMANT
Anderson, Fulton, Lavis & VanThiel, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order of Remand

Claimant appealed the Board's Order on Review in this case which denied his claim on the basis that it had not been filed timely. The Court of Appeals reversed the Board and remanded this claim to it based on McNETT v. ROY-LADD CONSTRUCTION COMPANY, 46 Or. App. 604, P2d (1980). In the McNETT case, supra, the Court stated the failure to timely file notice of a claim does not bar the claim unless the employer can show it was prejudiced. In that case, the Court found no prejudice and remanded the claim to determine the compensation to which claimant is entitled.

The Board, on October 3, 1980 received the Judgment and Mandate in this claim. The Referee, in this claim, had found the claim not barred and had ordered it accepted. The Board, with the guidance provided by the Court of Appeals, orders the Referee's order reinstated and affirms that order.

IT IS SO ORDERED.

WCB CASE NO. 79-3696

November 14, 1980

DAVID R. LeFRANCOIS, CLAIMANT
Frank J. Susak, Claimant's Atty.
Acker, Underwood, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The Employer seeks Board review of the Referee's order entered in this case. The Employer contends the award of compensation granted by the Referee is excessive.

The Board finds the Referee correctly recited the facts in this case in his order.

After a de novo review of the record in this case, the Board modifies the Referee's order. This is a scheduled injury and the test to be applied in determining the extent of disability is the loss of function of the injured body part. The impairment component of loss of function is to be determined by a medical doctor. The determination of extent of disability is an administrative function and, in scheduled injuries impairment, is the paramount consideration but not exclusively determinative. Dr. Glocum feels claimant has a "moderately severe permanent partial disability." He feels this "disability" should be equally divided between claimant's 1974 football injury and claimant's 1975 injury. Based on the medical evidence and claimant's testimony in this case, the Board finds claimant is entitled to an award of compensation equal to 45% for 30% loss of function of his right leg. This award is granted in lieu of all prior awards of compensation of scheduled disability claimant has been granted for this injury.

ORDER

The Referee's order dated April 4, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 45% for 30% scheduled disability for his right leg injury. This award of compensation is in lieu of all prior awards of scheduled disability claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

SAIF CLAIM NO. C 428161 November 14, 1980

GERALD LEWIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, in June 1980, requested the Board exercise its own motion jurisdiction and reopen this claim for his March 16, 1973 right knee injury. Claimant's aggravation rights have expired.

In early June 1980, Dr. James diagnosed chondromalacia of the patella secondary to a mild old knee injury. He suggested claimant begin conservative treatment. Dr. James "okayed" one month of time loss from June 2, 1980. Claimant gave a history of returning to work after his 1973 injury without difficulty. However, claimant, in 1980, began a different job and experienced increasing pain.

The SAIF Corporation (SAIF) advised the Board on September 22, 1980 it opposed an Own Motion Order reopening this claim. The SAIF felt claimant's current problems were not related to his 1973 injury and questioned if claimant had any time loss.

In October 1980, Dr. James reported claimant's original knee injury and treatment for it had left the knee weaker and since claimant had failed to keep up his exercises, the knee went through a degenerative change. He felt this contributed to claimant's current complaints.

The Board, after reviewing this file, does not find the evidence warrants reopening of this claim at this time under its own motion jurisdiction. The Board does find that claimant is entitled to have the treatment provided by Dr. James which is related to his original injury paid for by the SAIF pursuant to ORS 656.245.

IT IS SO ORDERED.

WCB CASE NOS. 77-2866 & 77-7847

November 14, 1980

PATRICIA PEMBLE, CLAIMANT
Emmons, Kyle, et al, Claimant's Attys.
Dean M. Phillips, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Order of Remand

Albany Frozen Foods and Liberty Mutual Insurance Company (Liberty) appealed the Board's May 11, 1979 Order on Review in this case. Liberty contends the Board misapplied the last injurious exposure rule.

The Court of Appeals in an opinion dated December 3, 1979 affirmed the Board. On January 31, 1980 the Judgment and Mandate was entered by the Court of Appeals.

Therefore, in compliance with that Judgment and Mandate, the Board orders that its May 11, 1979 Order on Review is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 79-3291

November 14, 1980

JEANETTE J. PLUMMER, CLAIMANT
Willner, Bennett, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order entered in this case. The SAIF contends that the claimant failed to establish that her back condition is compensable as an on-the-job injury or occupational disease.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of the record, the Board reverses the Referee's order. The medical evidence in this case indicates that claimant has a congenital abnormality in her back which has worsened over the last several years. However, the evidence also indicates that claimant's job did not cause this underlying congenital condition to worsen. The Supreme Court, in Gibson v. SAIF, 288 OR 45, ___ P2d ___ (1979), stated: "Since the work activity did not cause any change in the underlying disease, the claim for medical services required to treat symptoms and for any claimed disability by reason of those symptoms is not compensable." The Board, in this case, finds claimant's work did cause an increase in claimant's symptoms, but not in her underlying condition. Therefore, based on the rationale of Gibson (supra), the Board reverses the Referee's order and orders the SAIF's denial restored and affirmed.

ORDER

The Referee's order dated February 15, 1980 is reversed in its entirety.

The SAIF Corporation's denial dated April 2, 1979 is restored and affirmed.

SAIF CLAIM NO. C 339129

November 14, 1980

BRINGFRIED RATTAY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 29, 1980 the SAIF Corporation (SAIF) forwarded information regarding this claim for claimant's November 21, 1971 right leg injury. Claimant's aggravation rights have expired. Dr. Misko, on July 23, 1980, reported claimant has a neuroma of the long saphenus nerve; he believed it should be explored with possible sectioning of the long saphenus nerve in claimant's right leg. Dr. Misko related this condition and the need for the proposed surgery to claimant's original injury. SAIF indicated it did not oppose an Own Motion Order reopening this claim for the surgery which Dr. Misko had scheduled for October 24, 1980.

The Board, after reviewing the information submitted to it, finds the evidence warrants reopening of this claim under the Board's Own Motion jurisdiction. Therefore, the Board orders the claim reopened effective the date claimant was hospitalized for this October 24, 1980 surgery for payment of compensation and other benefits provided for by law until closed pursuant to CRS 656.278.

IT IS SO ORDERED.

WCB CLAIM NO. 80-7993

November 14, 1980

TIMOTHY RISKE, CLAIMANT

SAIF, Legal Services, Defense Atty.

Own Motion Order Referring for Consolidated Hearing

On October 29, 1980 claimant, by and through his attorney, moved the Board to reopen claimant's claim for his December 3, 1969 injury under its own motion jurisdiction. Claimant's aggravation rights have expired on this claim.

In his motion, claimant advised the Board that he had a "valid aggravation claim" based on Dr. Short's medical report of June 14, 1979. This report was received by the carrier, the SAIF Corporation (SAIF), and it reopened another claim for a December 17, 1976 injury which claimant had received. That claim has a claim number of GD 203622. Following the payment of temporary total disability compensation and providing of rehabilitation efforts to claimant, SAIF, on August 13, 1980, submitted the claim for closure. The Evaluation Division was then advised the vocational rehabilitation services, which had been provided, were not provided on the 1976 claim, but rather on the 1969 claim, and, therefore, it refused to issue a Determination Order on the 1976 case.

Claimant requested a hearing on the December 17, 1976 injury-aggravation claim contending that the Evaluation Division improperly handled the claim by not issuing a Determination Order as requested by the carrier. This hearing was scheduled before Referee Forrest James on October 28, 1980. After hearing opening arguments of counsel, the Referee requested that this 1976 claim be consolidated with the 1969 claim based upon the claimant's own motion request.

Based on these facts, claimant, by and through his attorney, requested that the 1969 claim, SAIF Claim No. GC 220129 be referred to the Hearings Officer to be consolidated with the claimant's 1976 claim, SAIF Claim No. GD 203622, WCB Case No. 807993, so that the entire matter may be heard.

The Board, after reviewing claimant's motion, finds that this claim should be referred to Referee Forrest James to be consolidated with the WCB Case No. 807993, SAIF Claim No. GD 203622, the December 17, 1976 injury claim. The Referee shall determine if claimant's current condition is related to either the December 3, 1969 injury and represents a worsening thereof since the last award or arrangement of compensation in that case and decide the issue raised regarding the claim for the 1976 injury. Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings be prepared and forward it along with his recommendation in this case and the other exhibits entered at the hearing to the Board. The Referee shall also dispose of the issues raised in WCB Case No. 80-7993.

IT IS SO ORDERED

WCB CASE NO. 79-7034

November 14, 1980

GERALD C. SEXTON, CLAIMANT

M. D. VanValkenburgh, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by SAIF Corp

The SAIF Corporation (SAIF) seeks Board review of the Referee's order entered in this case. SAIF contends its denial of claimant's aggravation claim should be affirmed.

The Board finds the Referee correctly recited the facts of this case in her order.

After a de novo review of the record in this case, the Board reaches a different conclusion than the Referee. The Board does not find claimant has proven his condition has worsened since the last award or arrangement of compensation. While it is true claimant was hospitalized from October 4, 1978 through October 10, 1978, the medical evidence does not establish that this hospitalization was due to any worsening of claimant's condition. Claimant was hospitalized and given only palliative care and treatment. Therefore, the Board reverses the Referee's order setting aside the SAIF's denial of aggravation claim. Claimant is entitled to the payment of temporary total disability compensation from October 4, 1978 through October 10, 1978 due to the hospitalization for the palliative care. Claimant's attorney is entitled to an attorney's fee equal to 25% of the increased temporary total disability compensation not to exceed \$500.00.

ORDER

The Referee's order dated April 11, 1980 is reversed.

Claimant is hereby granted an award of additional temporary total disability compensation from October 4, 1978 through October 10, 1978.

Claimant's attorney is hereby awarded an attorney's fee equal to 25% of the increased award of temporary total disability compensation not to exceed \$500.00

WCB CASE NOS. 79-10, 537 & 80-613

November 14, 1980

WILLIAM C. SIMMONDS, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order on Review

The claimant seeks Board review of the Referee's order entered in this case. The claimant contends his low back injury resulted in temporary total disability or in permanent partial disability.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of the record in this case, the Board modifies the Referee's order. Dr. Kauffman of the Oregon Health Sciences Center on August 7, 1979 advised claimant to stay off work and to continue with bed rest for five more days due to his back pain. The SAIF Corporation (SAIF) reviewed this report on November 12, 1979.

Dr. Kaesche, on September 10, 1979, reported claimant was not able to perform his normal job or a job requiring heavy lifting, repetitive stooping or bending forward. Dr. Kaesche felt claimant could perform light work. This report was forwarded to the SAIF on September 12, 1979.

The Orthopaedic Consultants in early November 1979 opined claimant's back condition was not medically stationary and he had minimal permanent partial disability due to his back injury.

Based on the preponderance of the evidence, the Board finds claimant's back injury is disabling and orders it to be classified as such. The evidence indicates claimant's back condition is not medically stationary. Therefore, the Board remands this claim to SAIF for processing and closure under ORS 656.268.

The medical evidence indicates claimant is entitled to temporary total disability compensation for August 7, 1979 through August 12, 1979 and from September 18, 1979 until closure. However, the Board does not find a penalty should be assessed on this compensation was not forwarded to the SAIF until November 12, 1979 and SAIF's denial was issued on November 20, 1979, and there was no unreasonable resistance or delay. Claimant's attorney is entitled to a fee in the sum of \$300.00 for prevailing in overcoming this denial.

ORDER

The Referee's order in WCB Case No. 79-10,557 is reversed.

The SAIF Corporation's denial dated November 20, 1979 is set aside.

Claim No. ED 395027 is classified as disabling and is remanded to the SAIF Corporation for processing and payment of compensation and benefits as provided by law with compensation for temporary total disability from August 7, 1979 through August 12, 1979 and from September 18, 1979 until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is hereby awarded as reasonably attorney's fee in connection with this Board review the sum of \$300, payable by the SAIF Corporation.

WCB CASE NOS. 79-2960 & 79-6387

November 14, 1980

GLENN STOSE, CLAIMANT
Richard A. Sly, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Motion to Dismiss

This is an Order in reply to claimants Motion to Dismiss based on SAIF Corporation's failure to file a brief within a timely manner. There is no requirement in the Worker's Compensation law of the Board rules which indicates that a brief must be filled by the appellant before the Board will review the case. ORS 656.295 (5). While briefs are a significant aid in the review process, the failure to file a brief is not grounds for a dismissal of a request for review. This matter will be placed on the review docket to be reviewed by the Board in due course. The request for an order dismissing SAIF's request for review is hereby denied.

IT IS SO ORDERED.

November 14, 1980

BRIAN R. STOTESBURY, CLAIMANT
William F. Thomas, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF Corp

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which awarded claimant temporary total disability compensation to April 11, 1979 and compensation for permanent and total disability effective April 11, 1979. The SAIF contends the Referee erred in granting these awards of compensation.

The Board finds that the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the Board modifies the Referee's order. Dr. Wolganott reported claimant's psychological condition was chronic and, as such, was stationary. Therefore, the Board agrees with the Referee that claimant's condition was not medically stationary until that date.

The Board finds that the medical evidence alone does not establish that claimant is permanently and totally disabled as defined in ORS 656.206. The Board must consider other relevant factors to determine claimant's loss of wage earning capacity due to this injury. Claimant is 29 years old and has three years of college education. Claimant established that he has worked only at jobs which could be classified as heavy manual labor. Claimant has proved he cannot return to any of his previous jobs. Nonetheless, ORS 656.206(3) requires claimant must also show that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment. Claimant has failed to establish that he has sought employment or attempted to return to work. The evidence does establish that claimant has the ability for retraining. Based on the record in this case and after considering all the relevant factors in determining an injured worker's loss of wage earning capacity, the Board finds claimant is entitled to an award of compensation equal to 192° for 60% unscheduled disability for his head injury and resulting psychological condition.

The Board would urge the Field Services Division to contact claimant and provide him vocational assistance, to include training or job placement. This award of compensation is in lieu of all prior awards of unscheduled disability claimant has been granted for this injury.

ORDER

The Referee's order dated April 15, 1980 is modified.

Claimant is hereby awarded compensation equal to 192° for 60% for his head injury and resulting psychological condition. This is in lieu of all prior awards of unscheduled compensation claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

CLAIM NO. D 408270

November 14, 1980

NORMAN L. WILSON, CLAIMANT
Richard T. Kropp, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 10, 1980, claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction and reopen this claim. Claimant's aggravation rights have expired in this case. Claimant contends his right knee condition is related to his November 17, 1972 right foot injury. This claim was reopened by the Board effective April 25, 1979 when claimant was hospitalized for additional surgery on his right foot. The Board closed this claim by an Own Motion Determination dated October 22, 1980 which granted claimant an award of additional temporary total disability compensation for April 25, 1979 through May 15, 1979, an award of temporary partial disability from May 16, 1979 through April 8, 1980 and an award of temporary partial disability from May 20, 1980 through August 6, 1980 and one day of temporary total disability compensation for September 2, 1980.

Dr. Martens, on April 9, 1980, performed patellectomy of claimant's right knee. He indicated that claimant's right ankle injury was probably a factor in requiring the right knee patellectomy.

On October 21, 1980, the SAIF Corporation advised the Board it opposed an Own Motion Order reopening this claim for claimant's right knee problem as it did not appear that that condition was directly related to his original industrial injury. Attached to this letter was a report from the Orthopaedic Consultants who felt that, while there was no direct relationship between claimant's right knee condition and his industrial injury of 1972, there could be an indirect relationship between the two.

The Board finds claimant's right knee condition is related to his November 1972 industrial injury and finds that this claim should be reopened under its Own Motion jurisdiction. Therefore, the Board orders this claim reopened effective the date claimant was hospitalized for the April 9, 1980 surgery performed by Dr. Martens for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278. The SAIF is entitled to credit any payment of compensation it made pursuant to the October 27, 1980 Board Order against this award of compensation. Claimant's attorney is entitled to a fee equal to 25% of the increased temporary total disability compensation not to exceed the sum of \$350.00.

IT IS SO ORDERED.

CLAIM NO. HC 455427

November 17, 1980

JOHN CHURCH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order Vacating Own Motion Order

On June 18, 1980, the Board issued an Own Motion Determination in this claim, closing it pursuant to ORS 656.278. Subsequently, the Board has been advised that a denial and a request for hearing were made within the five-year aggravation period. Therefore, the appropriate closure should have been pursuant to ORS 656.268. Therefore, the Board orders that its Own Motion Determination dated June 18, 1980 be set aside and remands this claim to the Evaluation Division of the Workers' Compensation Department for evaluation and closure pursuant to ORS 656.268.

IT IS SO ORDERED.

November 18, 1980

KEITH BERKE, CLAIMANT

Burton H. Bennett, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Board Decision

A hearing was held by the Workers' Compensation Board on November 6, 1979 at the Board Offices at Mill Creek Office Park, 555 13th Street, N.E., Salem, Oregon 97310 at 1:30 p.m. Robert L. McCallister, George Lewis and M. Keith Wilson, Board members were present. M. Keith Wilson presided. The claimant appeared by Burton H. Bennett, attorney. The Department of Justice, Crime Victim Compensation Fund appeared by Clifford A. Allison, Department of Justice, State of Oregon. The reporter was William Rowe.

The issue is the compensability of claimant's claim for crime victim's compensation, pursuant to ORS Chapter 147. The specific issue before the Board is whether the claimant's injury was substantially attributable to his wrongful act or to the substantial provocation of his assailant.

Essentially, there is no material dispute as to the factual situation involved in this matter. The Board is limited in its consideration to the facts appearing in the record certified to it by the Department of Justice (ORS 147.114(5)).

At the hearing before the Board, the following exhibits were presented and admitted into evidence without objection:

Exhibit A: Appeal to the Crime Victim Compensation Fund.

Exhibit B: Certified record of the claim from Crime Victim Compensation Program.

Exhibit C: Copy of notice of time and place of hearing before the Workers' Compensation Board.

Oral arguments were presented by Burton H. Bennett and Clifford A. Allison of Counsel.

A claim for compensation was made by claimant on April 28, 1980. On August 15, 1980 the claim was denied by the Department of Justice, Crime Victim Compensation Division. A request for reconsideration of said denial was made by claimant on August 25, 1980. On September 2, 1980 the prior denial was affirmed on reconsideration.

OPINION

The evidence in the record before the Board establishes the following factual situation: On March 13, 1980 claimant and a Tim Smith met by pre-arrangement at the premises of a grade school in Beaverton, Oregon for the purpose of the claimant selling to Smith and Smith purchasing from claimant a quantity of cocaine. Time of the meeting occurred at about 1 a.m. A plastic bag containing cocaine was shown to Smith by Berke. Smith grabbed the bag and ran without paying claimant. Claimant pursued Smith, Smith fired one shot at claimant and missed and later in the pursuit fired again and the projectile hit claimant in the abdomen. The weapon used by Smith was a .22 caliber derringer type pistol. Smith escaped and claimant was hospitalized and received medical treatment.

ORS 147.015 provides that persons are entitled to compensation under the Crime Victim Compensation Act unless barred by one or more of several subsequent provisions:

Subsection (5) of ORS 147.015 bars recovery under the Act if the injury was substantially attributable to the victim's wrongful act.

ORS 167.207 prescribes penalties for criminal activity in narcotic or dangerous drugs. Cocaine is classed as dangerous drug under Oregon law.

The pivotal question before the Board is whether claimant's injury was substantially attributable to his wrongful act. We find that it was. The wrongful and illegal act of the claimant began before his meeting with the assailant on the school grounds on March 13, 1980. The wrongful act was criminal activity in a narcotic or dangerous drug. The wrongful and criminal act did not terminate at the point when Smith grabbed the cocaine and fled. At that point claimant continued his purpose of selling the drug, either with the intent of recovering the contraband or obtaining payment therefor. His criminal and wrongful activity only ceased when he was unable to give further pursuit as the result of the gunshot wound. We find, therefore, that claimant is barred by the provisions of ORS 147.015(5) and find that claimant's injury was substantially attributable to his own wrongful act.

ORDER

It is, therefore, ORDERED and ADJUDGED that the Order on Reconsideration of the Crime Victim Compensation Fund, Department of Justice, State of Oregon denying compensation under the law be and the same is hereby affirmed, and

It is further ORDERED and ADJUDGED that Keith Berke is denied benefits under the applicable law.

November 18, 1980

ELBERT WES COX, CLAIMANT
Paul Rask, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross Request by SAIF Corp

The claimant and the SAIF Corporation (SAIF) seek Board review of the Referee's order which granted claimant an award of compensation equal to 240° for 80% (sic) unscheduled disability for his low back injury. The claimant contends he is permanently and totally disabled. The SAIF contends the Referee's award of compensation is excessive.

The Board finds that the Referee correctly recited the facts of this case in his order. The Board notes the Referee granted claimant an award of compensation equal to 240° which equals 75% unscheduled disability and not 80% unscheduled disability as recited in his order.

After a de novo review of the record in this case, the Board modifies the Referee's order. The weight of the evidence in this case does not support the award of compensation granted by the Referee. The Orthopaedic Consultant's rated the claimant's impairment, due to this injury and the subsequent treatment, in the moderate range. Dr. Franks agreed with the Orthopaedic Consultant's examination, but did not agree that claimant's impairment was due to the surgical treatment.

Based on the weight of the medical evidence, considering the relevant factors to be used in determining an injured worker's loss of wage earning capacity, the Board finds the award of compensation granted by the Referee is excessive. Based on this same evidence, the Board finds claimant is entitled to an award of compensation equal to 160° for 50% unscheduled disability for his low back injury. This is in lieu of all prior awards of unscheduled disability claimant has been granted for this injury.

ORDER

The Referee's order dated January 7, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for this injury. This is in lieu of all prior awards of unscheduled disability claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

November 18, 1980

WALTER J. DETHLEFS, CLAIMANT
Richard Sly, Claimant's Atty.
Roger R. Warren, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Order on Reconsideration

On November 6, 1980, claimant, by and through his attorney, requested the Board reconsider its Order Denying Remand. Claimant had sought to have additional documents admitted into the record for consideration by the Board.

The Board, after reconsidering its Order, affirms its denial of claimant's request to remand this case. The Board's order incorrectly provided appeal rights. The Board's Order is an interim order and is not appealable. Therefore, the Board would modify its November 4, 1980 Order by striking the appeal notice section of the Order. The remainder of the Order is affirmed.

IT IS SO ORDERED.

November 18, 1980

MAURICE L. EDWARDSON, CLAIMANT
Bloom, Ruben, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On November 6, 1980, claimant, by and through his attorney, requested the Board dismiss the SAIF Corporation's (SAIF) Request for Review in this case. Claimant contends the SAIF failed to set forth the issue or issues it was asking the Board to review and also that the SAIF had failed to file a brief in this case.

The Board denies claimant's motion. There is no requirement that the party requesting Board Review either set forth the issues to be considered by the Board or that it file a brief. The Board is required to review the record de novo with or without the briefs of the parties. Therefore, the Board denies claimant's motion.

IT IS SO ORDERED.

November 18, 1980

FLOYD HEWITT, CLAIMANT
Eric R. Friedman, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The beneficiaries of Marian Williams seek Board review of the Referee's order which determined the Referee lacked jurisdiction in this claim and could not rule on it.

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.

The Referee correctly decided he did not have jurisdiction to rule on the constitutionality of ORS 656.226. Therefore, the Referee did not decide this case on its merits. The Board agrees with the Referee's decision, but would make the following comment: The Board does not find that ORS 174.110(2) can be applied to ORS 656.226. The legislature has used very specific terms in ORS 656.226. Their intent was clearly to provide benefits only for the women and children of the men and women who had cohabitated together as husband and wife in this state for over one year. Therefore, applying this statute to this case, the Board would deny claimant's claim on the merits.

ORDER

The order of the Referee, dated May 6, 1980, is affirmed.

NOTICE TO ALL PARTIES. This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

November 18, 1980

JAMES MEADOR, CLAIMANT

John Svoboda, Claimant's Atty.

Thomas J. Mortland & David O. Horne, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Carrier

Employers of Wausau (Wausau) seeks Board review of the Referee's order which ordered it to accept claimant's low back claim, pay claimant compensation and other benefits provided for by law and awarded claimant's attorney a fee. Wausau contends claimant's low back condition does not constitute a compensable injury or if it does, it is the responsibility of the Travelers Insurance Companies (Travelers).

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the Board reverses the Referee's order. At the time of his neck injury in 1975, the employer's workers' compensation insurance coverage was provided by Travelers. Claimant testified he had episodic low back pain but did not seek treatment for his low back until 1979, and then only after Dr. Fechtel advised him his low back could be causing his ongoing upper back problems. There is no evidence that claimant's low back was injured in the 1975 fall.

Dr. Fechtel, in April 1979, felt claimant's low back problem was causing his upper back symptoms. Dr. Fechtel prescribed a back brace for claimant. The claimant began wearing it and noted a sudden onset of low back pain which radiated down into his legs.

Dr. Davis found claimant had a congenital anomaly in his low back, diagnosed as a transitional lumbar vertebra with abnormal articulation and degenerative changes. He felt claimant's back symptoms might be related to his work activities. He felt the 1975 injury could have caused some temporary increase in claimant's low back symptoms.

The Board does not find any proof that claimant's low back was injured in 1975. There is no evidence that claimant's fall aggravated his underlying congenital condition. At best, the evidence establishes only that the fall temporarily increased the symptoms of that condition. Therefore, the Board affirms the denial issued by Travelers.

Further, the Board affirms the denial issued by Wausau. The surgery and other treatment claimant received for his low back were to correct the congenital anomaly. The surgery was done to stabilize the claimant's low back in an attempt to strengthen it to enable claimant to continue working in his trade which involved medium to heavy lifting. The medical evidence nor the claimant's testimony establish that the work activity, during the period Wausau provided coverage for this employer caused or worsened his low back condition so as to require medical services or produce disability. At most, it might have increased his symptoms, but under the facts presented, that inference is not supported by the evidence. The evidence shows the treatment directed to the claimant's low back was to correct the congenital anomaly which, for reason unexplained in the report, became symptomatic after Dr. Fechtel, D.C., in April 1979, placed claimant in a low back brace. Therefore, the Board reverses the Referee's order and affirms Wausau's denial.

ORDER

The Referee's order dated March 14, 1980 is reversed in its entirety.

Employers Mutual of Wausau's denial dated November 19, 1979 is restored and affirmed.

WCB CASE NO. 79-1781

November 18, 1980

RUTH B. PAYNE, CLAIMANT
Allan H. Coons, Claimant's Atty.
SAIF, Legal Services, Defense Atty
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which granted claimant interim compensation from January 22, 1979 through February 14, 1979 and a 25% penalty on this award. Claimant contends she is entitled to an award for anxiety and resulting symptoms.

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 April 25, 1980 is affirmed.

Claimant appeals denial of claim for anxiety and resulting symptoms, allegedly occurring during the period of September 1977 through December 1978. At hearing in Roseburg, Oregon on October 16, 1979, she appeared with her attorney, Allen E. Coons; the State Accident Insurance Fund by E. Jay Perry. The issue is compensability. The hearing was continued for further medical evidence, Hearings Exhibits F, G, and H, and argument, and closed on April 21, 1980.

Claimant, a 54-year-old nurse's assistant, began work for her employer in June 1977 as a laundry worker. At that time she sought employment on the advice of her doctor to relieve her anxiety because of personal problems. Her first duties were in the laundry. She worked at this job for approximately four months and then requested a job in the nursing section, as she did not like being isolated in the laundry. She was divorced in 1975, oftentimes came to work upset and had to leave mid-shift because she was distraught, and mentioned to her supervisor that she had family problems. On the nursing staff, her duties were from 2:45 - 11:15 p.m. She performed general care in the nursing home. As a new worker she had no specific area. Flexibility was needed, and she was put on a floating job. The float person was to relieve other persons. She did her job satisfactorily at times, and other times did not appear to be able to organize herself. She had complained to her supervisor about personal problems connected with her divorce, and also complained of other employees talking about and being rude to her. In September 1978 she had requested termination from the job and then changed her mind. She oftentimes appeared nervous, and had difficulty with her job. She complained to her supervisors, but could never pin down the cause, and always felt that individuals were working against her. Her supervisor was unable to ascertain her specific problems.

Claimant has a ninth grade education. Following her divorce, she did alteration work in her home, worked as a cashier in a grocery store, operated her own dress shop, and then began working for her employer. On the float job she never knew exactly where she would work. While working in the laundry room she found a snake in the laundry which she thought someone had planted to upset her. There were two people who she felt particularly harassed her and said untrue things about her. One was a nurse's assistant, the other her supervisor. She felt they gossiped about her concerning her prior marriage. She liked her job and did not know why these people harassed her. She felt that her supervisor assigned her more work than she could do.

Claimant had a history of hospitalization for several days in November 1972 for work-up for back pain of unknown etiology, possibly anxiety situation (Hr. Ex. A-14). She was also hospitalized for one day in 1971 and again in 1972 for hyperventilation syndrome (Hr. Ex. A-12).

Dr. Alstrup N. Johnson, Jr., her family doctor, originally saw her in 1974 and he has seen her off and on since that time (Hr. Ex. G (9)). She has problems with anxiety and has many social and personal family problems. She is vulnerable and would be prone to develop an increase in anxiety reactions from trying situations (Hr. Ex. G (10)). Her general condition of anxiety stress has been present as long as he has treated her (Hr. Ex. G (15)). He concluded that she has had anxiety of one sort or another most of her life, mostly related to various situational problems, in the many kinds of situations she seems to find herself, and in the instant situation, he concluded she had anxiety, because her workers' compensation claim had been refused (Hr. Ex. A-9).

Dr. Edward M. Colbach, psychiatrist, saw claimant on March 5, 1979. In the interview, claimant was tense, frightened, and breathless and seemed to be hyperventilating. She was a difficult person to relate to and frequently misunderstood questions, appeared easily confused and had trouble remembering dates. During the interview she became openly tearful and a pause was required to let her regain her composure. She handled poorly the stress of the interview. Apparently she is the kind of employee who is teased by others and has trouble accepting directions and criticisms. She has apparently not gotten over her divorce. She is proud of her grown children. Throughout her marriage, she had not worked outside of the home, but about three years previously, had made a real effort to find a job, which was necessary for financial survival, and with the thought that it would help her forget her troubles. She worked at several different jobs before working for her employer. While working for her employer, she had trouble with fellow employees. She enjoyed being needed by the patients, although she felt too much was demanded of her. She feels that she has been cheated and states that for many years she was protected as a housewife and that suddenly she is overwhelmed by the complexity of life. Dr. Colbach concluded in psychiatric diagnosis that she was a person with elements of an inadequate, anxious and hysterical personality. In the recent past, she apparently has been undergoing an adult adjustment reaction manifested by such things as anxiety, irregular heartbeat, hyperventilation with chest pains and depression with tearfulness. While she apparently tried hard on the job, she does not have the social and personality skills to function well over any period of time. Her work with her employer was the only time she had any sustaining employment out of the home and it was a real struggle for her. He concluded that the job could not legitimately be blamed for her current condition; that if she does anything at all demanding, at this point in her life, he thought she would have trouble (Hr. Ex. A-8).

Claimant was hospitalized in October 1978. The final diagnosis was chest pain probably related to anxiety stress reaction, without evidence of acute myocardial injury, cardiac arrhythmias with multiple premature ventricular beats, possible mild hyperthyroidism (Hr. Ex. A-4).

Dr. Robert Feeney, psychiatrist, saw claimant at the Douglas County Family Service Clinic on January 3, 1979, and he has seen her once weekly since then in psychotherapy. She takes anti-depressant medicine under his supervision. Her initial complaints and symptoms were extreme anxiety and fear due to loss of income, depression, anger, feelings of worthlessness and weakness. She gave a history of constant stress at work, with teasing and tricks being played on her at work by two other employees who made insinuating remarks about her former marriage. He concluded that by history claimant's supervisor could not very well have recommended firing her, as she had a good relationship with the administrator, other employees, and patients. His diagnosis was adjustment reaction with adult life with extreme anxiety and moderate depression (Hr. Ex. C). He concluded that continued harassment and financial difficulties, not of her own doing, were keeping her from recovering from her anxiety reaction and depression (Hr. Ex. D). He released claimant to resume fulltime work on February 14, 1979 (Hr. Ex. B). On January 18, 1979, she filed a report of occupational disease from September 1977 to December 1978 (Hr. Ex. A-1).

Shelby Jean Van Arsdall first worked with claimant when claimant was working in the laundry. In November 1978 Arsdall was charge nurse and a licensed practical nurse and worked with claimant when she became an aide. She worked with claimant two to three days a week. Claimant tried very hard, was slow, but did good work (Hr. Ex. H (4)). She had family problems and several times became very upset on the job (Hr. Ex. H (5)). She had been teased by other employees (Hr. Ex. H (6)), and became upset because of it.

Claimant presently lives alone. She is not working. She has two daughters, a son-in-law and three grandchildren in the immediate vicinity. She does not know the whereabouts of her former husband. She feels that she would still be working for the employer if she had not been harassed and not do other people's work. She had complained to her supervisor about her job situation, and appeared to always have difficulty with the job and he could not pin down the cause of her complaints, except that she felt that individuals were working against her.

OPINION

Claimant alleges a disabling situation caused by anxiety and tension from the pressure of employment and harassment of co-employees. Medical evidence indicates that she has suffered many years with anxiety and is vulnerable to pressure. She seeks temporary total disability between December 23, 1978 through February 14, 1979 and payment of hospitalization in October 1978. The question here is whether or not claimant, with her pre-existing problem, vulnerabilities, and susceptibilities, experienced a compensable episode of anxiety stress reaction in her employment situation. She also asks for interim compensation between December 23, 1978 and February 14, 1979 when she was released for work by Dr. Feeney.

Claimant cites Paresi v. SAIF, 44 Or App 689 (1980); that the employer takes the worker with all latent and obvious physical and mental defects and that a claimant need not address whether an average worker would react emotionally to the particular stress of the job but rather must show disability arose out of and in the course of her employment. The employer replies citing Janette West, WCB Case No. 78-6241, 78-9042, dated March 6, 1980. In that case there was a claim for psychiatric disability due to on-the-job stress. The Board there found insufficient evidence to establish the claim for emotional disability citing James v. SAIF, 44 Or App 405 (1980) which established the test to determine compensability of emotional conditions. The Court in James held that the stimulus that generated the mental condition need not be an extraordinary, unanticipated event or events; that the conditions of employment claimed to be the precipitating cause of the mental disability need not be unusual for the claim to be compensable and that in cases where claimant had a pre-existing emotional disorder, the four point tests set forth in Weller v. Union Carbide, 238 Or 27, P2d _____ (1979) had to be met. In Knoetzel v. SAIF, 37 Or App 627, 588 P2d 89 (1978), the Court held that the "triggering" incident in that case was no more real than numerous other incidents related by claimant, either factual or clear misinterpretations of real ones or that there was in fact harassment, by fellow employees and the claim was not found compensable. In West, the Board found no evidence of an on-the-job triggering incident. Claimant perceived that she had difficulties, but there was no evidence that her work activity and conditions caused a worsening of her underlying disease condition resulting in an increase in her symptoms to the extent that it produced disability or required medical services.

Claimant asked time loss payable from the time she left work till the date of denial March 6, 1979, with penalties and attorney's fees, Jones v. Emanuel Hospital, 280 Or 147 (1977). Claimant differentiates West in that in the instant case her condition worsened to the point that she had to be hospitalized, and there was evidence that she was the butt of unkind remarks from co-workers.

Physical disability, because of emotional or psychological problems, is as compensable as purely physical conditions. Marek v. Portland Jeep, Inc., 21 Or App 386, 534 P2d 1137 (1975), however, compensation cannot be awarded unless there is competent medical evidence that a medical-causal relationship exists between the employment and resulting disability or need for medical services. Ruitta v. Mayflower Farms, 19 Or App 275, 527 P2d 424 (1974). A claim for compensation for a mental disorder is considered an occupational disease. The etiology of a mental disability will generally, if not always, require an expert diagnosis to determine a disabling mental condition due to conditions of employment and to identify the source of stress, James v. SAIF, supra. On claimant's hospitalization on October 25, 1973, Dr. John D. Spradford notes that claimant has developed a chest pain problem; that she has also been

under an increasing emotional stress apparently at her job and this will be evaluated further. Dr. Johnson, claimant's family doctor, has seen her off and on since 1974 for anxiety problems and her general condition of anxiety stress had been present as long as he had treated her. Dr. Colbach, in his psychiatric diagnosis concluded that her job could not legitimately be blamed for her current desperate condition. Dr. Feeney's psychiatric diagnosis was adjustment reaction of adult life with extreme anxiety and moderate depression; that harassment and financial difficulty, not of her own doing, were keeping her from recovering from her anxiety reaction and depression. I find the medical evidence insufficient to establish the requisite medical-causal relationship.

The claimant is entitled to receive interim compensation from the date her claim was filed until she was released for work on February 14, 1979, with the first installment being due in fourteen days. Jones v. Emanuel Hospital, 203 Or 147, 570 P2d 70 (1977). The employer received the claim of occupational disease on January 22, 1979. The denial is not made within fourteen days of notice, consequently, interim compensation is payable from January 22, 1979 to February 14, 1979.

ORDER

IT IS NOW THEREFORE ORDERED that claimant be awarded interim compensation from January 22, 1979 to February 14, 1979, and in addition, an amount equal to 25% of the interim compensation for this period.

IT IS FURTHER ORDERED that claimant's attorney be allowed the sum of \$500 as a reasonable attorney's fee to be paid by the State Accident Insurance Fund.

November 18, 1980

THEODORE D. RAZ. CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On October 29, 1980, the Board issued an Own Motion Determination granting the claimant additional temporary total disability compensation from October 29, 1979 through August 4, 1980. This was based on the recommendation of the Evaluation Division. The Evaluation Division on November 14, 1980 advised the Board its original was incorrect. It recommended claimant be granted temporary total disability compensation from October 29, 1979 through February 10, 1980 and no additional permanent partial disability compensation. The Board, after reviewing this file, finds that this recommendation is correct. Therefore, the Board amends its October 29, 1980 Own Motion Determination and grants the claimant an award of temporary total disability compensation from October 29, 1979 through February 10, 1980 instead of August 4, 1980 and no additional permanent partial disability compensation.

IT IS SO ORDERED.

November 19, 1980

KENNETH L. WARD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Order of Dismissal

This Amended Order of Dismissal is to correct the Order of Dismissal dated November 7, 1980 in which the mailing addresses of the interested parties were incorrectly shown.

IT IS SO ORDERED.

November 20, 1980

CHARLES G. ASHE, CLAIMANT
Rick McCormick, Claimant's Atty.
David O. Horne, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer seeks Board review of that portion of the Referee's order which granted claimant an award of compensation equal to 64° for his neck and right shoulder injury. The employer contends this award is not supported by the evidence in this case.

The Board finds the Referee correctly recited the facts of this case in his order.

The majority of the claimant's complaints are purely subjective in nature. There are no objective findings to substantiate these complaints. The claimant's current work requires repetitive use of his hands, arms and shoulders. After considering all of the evidence in this case, the Board does not find claimant has suffered as great a loss of wage earning capacity as the Referee found. The evidence as a whole indicates the claimant has suffered only a small loss of wage earning capacity. We conclude claimant is entitled to an award of compensation equal to 32° for 10% unscheduled disability for his neck and right shoulder injury.

ORDER:

The Referee's order dated April 24, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 32° for 10% unscheduled disability for his neck and right shoulder injury. This is in lieu of all prior awards of unscheduled disability claimant has received for these injuries.

The remainder of the Referee's order is affirmed.

November 20, 1980

ADRIAN T. BOYCE, CLAIMANT
Bloom, Ruben, et al, Claimant's Attys.
McMenamin, Joseph, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order

On October 23, 1980, claimant's attorney, requested the Board review his contention that he was entitled to a fee for successfully appealing this claim from the Board's Order on Review to the Court of Appeals and attaining reinstatement of the award of compensation granted by the Referee. Claimant's attorney requested that the Board issue an order granting him a fee, or in the alternative, that this matter be set for hearing so it could be processed through the administrative procedures necessary to pursue it, if necessary, back to the Court of Appeals.

The employer and its attorney responded that there was no statutory authority for payment of additional attorney fees to claimant's attorney in this case. Further, it contends that the reclarification for appeal as requested by claimant's attorney was not timely. It noted that it paid claimant's attorney the fees he was entitled to and that any further litigation of this issue appeared to be moot.

The Board, after being fully advised in this case, denies claimant's motion. Claimant's attorney's argument has been presented to the Board previously and also presented to the Court of Appeals. On both occasions, claimant's attorney was denied any additional fee. The Board at this time sees no reason to change its prior order and feels that that order does not need reclarification. Therefore, the Board denies claimant's motion.

ORDER

The claimant's motion dated October 23, 1980 is denied.

November 20, 1980

ESTRADA H. CORTEZ, CLAIMANT
Eddy R. Swearingner, Claimant's Atty.
Dennis S. Reese, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed the carrier's closure of this claim. Claimant contends the claim was prematurely closed and he is entitled to temporary total disability compensation from October 29, 1979 to the date of the hearing.

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 May 12, 1980, is affirmed.

A hearing was held on April 14, 1980 at Salem, Oregon before Harold M. Daron, Referee. Claimant was present and represented by Eddy R. Swearingner, attorney. The employer, Dula's Nursery, and its insurer, Northwest Farm Bureau Insurance, were represented by Dennis S. Reese of Schwabe, Williamson, Wyatt, Moore & Roberts, attorneys. The hearing was closed on April 14, 1980.

ISSUES

I. The basic issue presented in this hearing is whether the carrier properly terminated temporary disability compensation payments before claimant was medically stationary and his claim was closed under the provisions of ORS 656.262.

II. However, claimant was allowed to amend the issues to present the issue as to whether claimant was actually entitled to receive temporary disability compensation from October 29, 1979 to the present date of the hearing because he was not able to perform regular work on a regular basis, even if the termination of time loss by the carrier was held to be proper at the time as a unilateral termination because claimant's treating physician had released him to return to regular work.

FINDINGS

Claimant sustained a compensable injury to his right index finger but which has affected the use of his hand. Claimant also contends that he has lost most of the strength of his right arm and loss of feeling in his right forearm although there is little documented medical evidence of those problems.

On October 29, 1979, claimant's treating physician, Dr. John Tongue, released claimant to return to work without restriction (Ex. 24), although Dr. Tongue specifically stated that claimant was not medically stationary (Ex. 25). It is a reasonable inference from the evidence that Dr. Tongue did not really know the exact nature and requirements of claimant's job at the nursery where he was employed.

Claimant returned to the nursery and tried to obtain work. He was tested and it was decided by the nursery owner that claimant was unable to perform any work that they had available for him, according to claimant's supervisor who received her instruction from the employer owner. Claimant was not rehired and still has not returned to his former job or any other job at the nursery although he has attempted several times to obtain work from the nursery. He has returned to his doctor with the information that the nursery did not have work available for him but the doctor continues to assert that claimant would be able to tolerate his regular job as soon as work was available to him (Ex. 25). Claimant has tried to get other nursery jobs at other places and has been unsuccessful except for one job. He worked at one job for one or two days and was released on the third day because he was unable to lift rolls of wire.

His claim has not been closed under the provisions of ORS 656.263 because he is not yet medically stationary.

When the employer's insurance carrier received notice of the doctor's release to return to regular work without restriction, it stopped payment of temporary disability compensation to claimant effective October 29, 1979.

OPINION

The unilateral termination of temporary disability payments by the insurance carrier was proper, as claimant's treating physician had released claimant to return to regular work. Jackson v. SAIF, 7 Or App 109. A general release to return to regular work without restriction is effective even though it does not specifically release an injured worker to return to his former job. Raymond Seymour, Claimant, WCB Case No. 75-722. In the Seymour case the Workers' Compensation Board held that it is sufficient if claimant returns to regular work of any nature or is released by his doctor to return to regular work of any nature. This was the nature of claimant's release in the instant case. Furthermore, claimant did return to regular

employment of a similar nature, even though he was subsequently terminated because he could not or would not lift some rolls of wire. The Board's reasoning seems to be supported by the Court of Appeals decision in Phillips v. Peco Manufacturing Co., 32 Or App 589. There is no evidence in this case that claimant could not do regular work of other nature, i.e., work in a different capacity for the same hours and the same wages.

In claimant's case, assuming that he is physically unable to work as he testified, this rule does seem harsh because, as claimant contends, it would require claimant to go back to work at a regular job even though not able to work, because he would no longer be receiving time loss benefits. On the other hand, it has been held on several occasions by the Court of Appeals, concerning permanent total disability issues, that an injured worker's statements or feelings that he or she could not perform regular work was not sufficient but must be supported by medical evidence. That rule may also be applicable to the issues presented in the temporary disability situation we have before us. The medical evidence in support of claimant's contention that he is unable to do regular work is lacking in this case.

I conclude that the termination and continued termination of time loss under the existing decisions is proper.

ORDER

IT IS HEREBY ORDERED that claimant's request to order the insurance carrier to resume temporary disability compensation and to provide temporary disability compensation for the period between October 29, 1979 and the date of the hearing, or thereafter as applicable, is denied.

WCB CASE NO. 79-9710

November 20, 1980

JOSEPH F. EARLEY, CLAIMANT
Lindsay, Nahstoll, et al, Claimant's Attys.
Roger Warren, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer and its insurance carrier seek Board review of the Referee's order. They contend the Referee erred in finding claimant's claim for an esophageal hiatal hernia compensable.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of the record in this case, the Board reverses the Referee's order. The medical evidence does not establish that claimant's emotional distress relating to his employment with this employer resulted in or aggravated his esophageal hiatal hernia.

The medical evidence indicates that in the opinion of Dr. Reinold, claimant's emotional distress caused claimant's symptoms arising out of his employment. However, Dr. Reinold does not explain the mechanism by which this could have occurred, nor how it could have resulted in the type of hernia condition claimant had.

Dr. Lipshutz, on the other hand, was quite thorough in his explanation, not only on the mechanism by which an esophageal hiatal hernia develops, but also explain why emotional stress cannot cause this type of problem. Additionally, Dr. Lipshutz indicates that the medical literature would not support such a contention.

Further, Dr. Reinold's reports contain inconsistencies between the history given to him by claimant and claimant's testimony. Dr. Reinold felt claimant did heavy lifting to account for his condition, and claimant could not explain where the doctor got this information. The doctor reported that claimant's flight to Chicago went smoothly; claimant testified concerning the flight a story of many delays, a thunderstorm and being stacked up over Chicago for one and one-half hours. The doctor reported that claimant on this flight took very few Valiums; claimant testified he took many Valiums on this flight.

Based on the persuasive opinion of Dr. Lipshutz and the inconsistencies and lack of explanation for Dr. Reinold's opinion regarding medical causation, the Board finds that claimant failed to carry his burden of proving his condition arose out of his employment in any way.

ORDER

The Referee's order dated April 30, 1980 is reversed in its entirety.

The denial dated November 6, 1979 is restored and affirmed.

November 20, 1980

DEBORAH A. HART, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF Corp

This Amended Order on Review is to correct the Order on Review dated November 7, 1980 which omitted a provision for attorney's fee.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with the Board review in the amount of \$300.00, payable by SAIF Corporation.

IT IS SO ORDERED.

November 20, 1980

ROBERT HENSLEY, CLAIMANT
Doblie, Bischoff, et al, Claimant's Attys.
MacDonald, Dean, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation seeks Board review of the Referee's order which remanded claimant's claim for a malignant left kidney to SAIF 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 Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated May 21, 1980, 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 SAIF Corporation.

Hearing was held in Astoria, Oregon on April 3, 1980. Claimant was present and represented by James L. Francesconi and Jerry K. McCallister represented the State Accident Insurance Fund. The record closed on April 29, 1980, after receipt of articles and waiver of submission of an analysis of claimant's blood.

The sole issue is the compensability of claimant's malignant left kidney. Claimant contends that the carbon monoxide fumes and other exhaust chemicals such as ethylene dibromide (EDB), to which he was exposed while working as a bridge tender on the Astoria Bridge, together with the effects of his smoking, caused his cancer. The medical evidence, from claimant's treating urologist, Dr. Stull, supports claimant's contention, even though the levels of carbon monoxide were tested and found to be within acceptable limits. Claimant was a smoker and tobacco has been determined to be a causative agent.

The evidence is undisputed that claimant has been a pack and a half a day smoker for over thirty years, since age 16. He has worked as a toll collector for ten years and four months or since December 1969. Prior to that time he was in the grocery business, was movie projectionist and worked aboard a ship. As a toll gate operator claimant's duties included taking money and giving information. He worked eight hours a day on five different shifts. His shifts changed every twenty eight days. He had no lunchbreak and ate on the job.

After he had worked as a toll bridge operator for four or five years, he became tired and listless. This became progressively worse. He had a breathing problem. In early April 1978, about a week before his surgery claimant felt a continuous stabbing pain in his back. He saw Dr. Nikes, who gave claimant pain medication and a pyleogram. He then referred claimant to Dr. Stull, a urologist. Claimant first saw Dr. Stull on April 20, 1978. Dr. Stull operated on claimant within days for what was diagnosed a collecting system left kidney cancer. As part of his surgery, claimant had his left kidney removed and part of his bladder. He still sees Dr. Stull every two to three months.

The fumes on the bridge were described by various witnesses as nauseating and over powering, depending on the wind and the amount of traffic at the time. Fellow employees who testified supported claimant's testimony that there was a nauseating sulphur smell that was worse when there was no wind. At that time the gases hung around the area. There have been altogether five requested tests by various employees to determine the level of carbon monoxide. The last test was 1979. Each of these tests have shown that the carbon monoxide levels are within allowable limits of Oregon standards of 50 ppm, although tests by a SAIF Safety consultant revealed samples that exceed the Oregon standard and the federal standards of 35 ppm. He recommended that ventilation be installed in the toll booths.

Claimant was off work recovering from his surgery from April 1978 to November 1978. When he returned a fan duct had been installed in the booth. This was installed, however, at the instigation of the Oregon Highway Department and not dictated by the results from various test that had been done on the booth.

Claimant filed a form 801 on June 6, 1978. Interim time loss was paid and after claimant's treating neurologist Dr. Stull, in response to a question from The State Accident Insurance Fund, reported it was uncertain whether claimant's claim work exposure from exhaust fumes either materially or causally aggravated claimant's cancer, The State Accident Insurance Fund on August 22, 1978 denied claimant's claim for his malignant left kidney. Another denial was issued on August 24, 1978.

Following the denial, Dr. Stull, who has always felt the claimant should not have returned to his toll booth, where he was exposed to fumes, did some research and solicited information from various government agencies on collecting system cancers. Based on his treatment his past experience, investigation and the information received from the government, Dr. Stull determined that based on a reasonable degree of medical probability claimant's work exposure from December, 1979 to April 1978, especially his exposure to EDB and carbon monoxide was a material contributing factor to the development of claimant's renal cancer. Dr. Stull came to this conclusion despite the fact that claimant had smoked over a pack a day since age sixteen and tobacco was known to be a cause of collecting system cancers such as claimant's. Dr. Stull testified that within medical probabilities the work environment either caused or aggravated claimant's condition and may have interacted in ways not known with his smoking to produce the final result. Dr. Stull did not change his opinion even knowing that the levels of carbon monoxide may have been lower than the standards set for tolerable limits, because of the interplay of claimant's smoking with the toxic materials such as carbon monoxide, EDB, present in the booth. He also felt the accumulated affect of low level exposure likely played a part in development of claimant's cancer. There is no medical opinion to the contrary. Therefore claimant has sustained his burden of proving that his renal cancer was connected to his work.

IT IS THEREFORE ORDERED that The State Accident Insurance Fund's denials are not approved and The State Accident Insurance Fund accept claimant's claim for his malignant left kidney and pay compensation in accordance with the Workers' Compensation Law.

IT IS FURTHER ORDERED that claimant's attorney be paid \$1500.00 in addition to and not out of claimant's compensation, as a reasonable attorneys' fee.

November 20, 1980

PHILLIP D. MOYER, SR., CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF Corp
Cross Request by Claimant

The SAIF Corporation (SAIF) and the claimant seek Board review of the Referee's order. SAIF contends the Referee erred in: (1) Reversing its partial denial of September 5, 1978 regarding the rendering of psychological services by Dr. Hickman at the Psychology Center and awarding claimant's attorney a fee for \$200 in prevailing in overcoming a partial denial; (2) reversing its denial of February 23, 1979 in finding the incident of January 31, 1979 constituted an aggravation of the April 19, 1976 injury; and (3) granting an attorney fee of \$2,200 to claimant's attorney. Claimant contends the Referee erred in: (1) Failing to find that claimant had sustained both an aggravation and a new injury; (2) erred in WCB Case No. 78-6419 by failing to grant claimant temporary total disability compensation from February 13, 1978 through the date of EBI's denial of March 16, 1978 plus penalties and attorney's fees; (3) erred by failing to award claimant temporary total disability compensation from January 31, 1979 through the date of SAIF's denial of February 23, 1979 plus penalties and attorney's fees; (4) erred by failing to reverse EBI's denial of March 16, 1978 and by failing to hold that claimant had sustained a new injury of February 13, 1978; and (5) erred by refusing to rule on the extent of permanent disability granted to claimant on the Determination Order of August 8, 1978.

The Board finds the Referee correctly recited the facts of this case in his well-written order.

After de novo review of the record in this case, the Board modifies the Referee's order. The Board finds that the services rendered by Dr. Hickman at the Psychology Center were in the area of vocational rehabilitation efforts to return claimant to work. Claimant was not referred to

Dr. Hickman for treatment by any physician in this case. As such, the Board does not find that SAIF is responsible for payment of Dr. Hickman's bill. Therefore, the Board modifies the Referee's order by reversing the Referee's ordering that SAIF pay for the psychological services rendered by Dr. Hickman and awarding claimant's attorney a fee of \$200.

ORDER

The Referee's order dated January 14, 1980 is modified.

The SAIF Corporation's partial denial of September 5, 1978 denying responsibility for payment of the bills for psychological services rendered by Dr. Hickman is restored and affirmed.

The remainder of the Referee's order is affirmed.

CLAIM NO. C 192037

November 20, 1980

MITCHELL ROSE, CLAIMANT
Samual A. Hall, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

This Amended Own Motion Order is to correct the Own Motion Order dated September 24, 1980 which established an attorney's fee of \$250.00.

Based on the time claimant's attorney spent on this case, the Board amends the attorney's fee in this case to an award of \$500.00 for his services in connection with this Board review, payable by SAIF.

IT IS SO ORDERED.

WCB CASE NO. 79-3567

November 20, 1980

PATRICIA HORNER SILVEIRA, CLAIMANT
Willaim G. Purdy, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which granted claimant an award of compensation for permanent total disability. The SAIF contends claimant failed to prove she is permanently and totally disabled within the meaning of ORS 656.206.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the majority of the Board modifies the Referee's order. The majority of the Board finds the opinion of Drs. Gardner and Thompson are entitled to be given full weight. They feel that claimant does not have any permanent psychological disability related to her industrial injury. The majority of the Board finds their opinions on this issue to be persuasive and does not find claimant has any psychological disability related to her industrial injury.

Based on this finding, the Board must determine if claimant's physical disabilities alone establish she is permanently and totally disabled. The evidence establishes that claimant is capable of light sedentary work but is unable to return to any of the former jobs she had performed--bar tending and grocery checking. Finding the medical evidence alone does not establish claimant is permanently and totally disabled, the Board must consider other relevant factors in determining claimant's loss of wage-earning capacity. Claimant is in her late thirties and has a GED and some business training. Considering all the evidence in this case, the majority of the Board does not find claimant has established she is permanently and totally disabled.

Based on the evidence in this case, the majority of the Board finds claimant's loss of wage-earning capacity attributable to her back injury entitles her to an award of compensation equal to 240° for 75% unscheduled disability. The majority of the Board does not find claimant is entitled to any award of permanent partial disability for her psychological condition based on the weight of the evidence in this case. This award of unscheduled disability is in lieu of all previous awards claimant has been granted for this injury. The Board would refer claimant to the Field Services Division to again offer its services to claimant.

ORDER

The Referee's order dated March 31, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 240° for 75% unscheduled disability for her back injury. This is in lieu of all prior awards of unscheduled disability claimant has been granted for her back injury.

The remainder of the Referee's order is affirmed.

I respectfully dissent from the majority opinion and would affirm the Referee's Order.

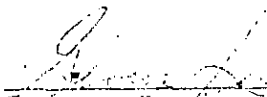
1. Mr. Blair, a psychologist, is the person most familiar with the claimant's long history of treatment. He has seen and evaluated her continuously for almost five years and has seen her at least 40 times between March 1978 and February 1, 1980.

He feels that claimant is in a precariously balanced state of equilibrium at the moment and that the necessity to cope with employment would affect this condition in a negative manner.

2. I find that this case is similar to the factual situation existing in Miller v. I. P. Miller, Inc., 11 Or App 730. In that case the Court of Appeals affirmed a finding of permanent total disability in a situation where the claimant's problems were in a large part emotional, stemming from the industrial injury and with a poor prognosis for improvement. Because of the poor prognosis, the claimant remained unemployable. A psychologist had stated that it would be very difficult to rehabilitate Mr. Miller to full time gainful employment, a conclusion almost identical to that made by Mr. Blair in this case.

3. At the hearing, the Referee observed that claimant appeared extremely disturbed, both in her manner and testimony, so much so that he asked for written arguments in order to minimize the affects such discussion could have on her condition.

It is for the above stated reasons that I would affirm and adopt this order of the Referee.


George Lewis
Board Member

FINDINGS

The claimant is 38 years old. He worked for The Ringside as a restaurant cook. At age 12 the claimant had both of his feet frostbitten. This resulted in severe deformities of both feet, including the loss of the great toe and the second toe on the right, and the loss of the second and third toes on the left. Following his recovery he was able to walk - and was able to run during gym classes in high school. Because of the way in which he must walk, however, he has developed calluses along the metatarsal heads of his feet.

From 1971 to early 1974, the claimant worked at The Ringside off and on. While he had some problems with his feet during that period, his time off work was principally due to personal problems. He returned to employment at The Ringside in October 1975 and remained there until February 1979. In 1977 he started to have further problems with his feet. He then went to Dr. Richard L. Harris, an internist, who referred him to Dr. Michael R. Marble, an orthopedic surgeon, who in turn referred him to Dr. MacGregor Church. Dr. Church performed some corrective surgery, including the removal of a bone spur on the claimant's left foot. (The record contains no chart notes or medical reports on this 1977 treatment.)

Following that surgery the claimant continued to work at The Ringside. His job as a cook required him to be on his feet almost all of the time, standing and walking on a linoleum or tile-surfaced floor. He worked eight hours a day, sometimes longer. On February 17, 1979, the claimant left his job at The Ringside. He told his employer that he could no longer stand on his feet for long periods of time (Ex. 1). He did not then file a claim. On February 26, upon referral from Dr. Harris, he went to Dr. Marble. Dr. Marble suggested a trial of special footwear or a metatarsal bar and "probably a job change", but Dr. Marble's chart note of that visit does not indicate that he believed, or told the claimant, that the claimant was suffering from an occupational disease (Ex. 4).

The claimant remained off regular work until mid-August, when he returned to The Ringside to work for about two weeks as a vacation replacement. During the period that he had been off work his feet had improved. They became painful almost immediately upon his return to work in August, but he continued, despite the pain, until the people that he had replaced had returned.

On August 31, 1979, the claimant's counsel wrote to The Ringside (Ex. 1-A) and forwarded a form 801 claim form (Ex. 1). The record is not clear as to just when the employer received that letter and form, but the employer's portion of the form 801 was completed on September 6, 1979 (Ex. 1). In the absence of other evidence, I conclude that the claim was received on September 6.

The claimant's counsel obtained a letter report from Dr. Marble, who did not believe that the claimant's employment had anything to do with his foot problems - other than causing pain when he was up and about on his feet. Dr. Marble believed that the claimant could return to restaurant work if he could "put up with the discomfort", but agreed with the claimant that a change to a more sedentary job was "a good idea". Dr. Marble did not believe that there was "a strong causal relationship" between the claimant's foot problems and his work, nor that the claimant's condition had been "materially worsened" by his restaurant employment. SAIF received this letter report on October 15, 1979 (Ex. 3).

Dr. Harris saw the claimant on October 11. Among other findings Dr. Harris noted thick callus formations over the metatarsal heads of both feet, and that pressure upon these calluses caused the claimant intense pain. In his report to the claimant's counsel he concluded:

"It is my feeling that Mr. Turley has managed to earn his occupation by a sheer act of will. I feel that the day in and day out walking about on his feet in the pursuance of his occupation has contributed to his callous formation and pain syndrome. I feel that he has a compensable disability. I think, further, that he should not return to his previous occupation, or to any occupation, which involves eight hours of standing and walking...." (Ex. 6, p. 2).

Dr. Harris' report was received by SAIF on November 19, 1979. (See date-stamp on Ex. 6.)

SAIF arranged to have the claimant examined by Dr. Jack B. Blumberg, a surgeon. (Dr. Blumberg's particular specialty is not established in the record, but he was referred to as a vascular specialist in defense counsel's opening statement.) The examination was first scheduled for October 2 (Ex. 2) but was later rescheduled for December 11 (Ex. 7). Dr. Blumberg was asked by SAIF for an opinion as to whether there was a relationship between the claimant's condition and his work, and was specifically asked: "If this is a pre-existing condition do you feel that his work activities have materially and permanently worsened the condition?" (Ex. 2.) Dr. Blumberg saw the claimant on December 11 and wrote to SAIF on December 18. He believed that the claimant's calluses were largely related to the manner in which the claimant had to walk, would have developed no matter where the claimant walked, and were not "necessarily related" to the claimant's work at The Ringside. Dr. Blumberg believed that the claimant may have to seek more sedentary work if the claimant's pain becomes too great. With respect to SAIF's specific question Dr. Blumberg said:

November 20, 1980

STEVE SOULDER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 7, 1980, the SAIF Corporation (SAIF) forwarded various reports in this claim for the Board's consideration of reopening of this claim for claimant's January 13, 1973 back injury under its own motion jurisdiction. Claimant's aggravation rights have expired.

On August 8, 1980, claimant underwent a left exploratory tympanotomy with repair of the round window fistula and buttressing of the fractured stapes. The need for this surgery was connected to claimant's 1973 injury. The SAIF indicated it had no opposition to an Own Motion Order reopening this claim effective the date of the surgery.

The Board, after reviewing the information provided to it, finds the evidence warrants reopening of the claim under its own motion jurisdiction effective August 8, 1980 for payment of compensation and other benefits provided for law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

November 20, 1980

GORDON D. TURLEY, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF seeks Board review of the Referee's order which remanded claimant's claim for an occupational disease to SAIF for acceptance and payment of compensation along with granting penalties and attorney fees.

The majority of 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 25, 1980, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection the Board review in the amount of \$300 payable by the SAIF Corporation.

I respectfully dissent from that part of the majority opinion which found this claim compensable.

I find the opinions of Dr. Marble and Dr. Blumberg persuasive and adopt those opinions as controlling. I further find that this claim is not compensable within the meaning of the occupational disease statutes.

I would reverse the Referee on the compensability issue and affirm on the issue of penalty and the attorney fee flowing from that finding.

Robert L. McCallister
Board Member

A hearing on the above-captioned case was held in Portland, Oregon, on January 4, 1980, before William H. Peterson, the undersigned referee. The claimant was present and was represented by Brian L. Welch of the claimant's attorneys, Welch, Bruun & Green. The employer, The Ringside, Inc., and its insurer, the State Accident Insurance Fund (SAIF), were represented by Robert J. Yanity, Associate Counsel (SAIF). The record was closed at the end of the hearing.

ISSUES

The primary issue is the compensability of an occupational disease claim. The claimant contends that his pre-existing foot condition was aggravated by his work for The Ringside.

As a secondary issue the claimant contends that he should receive penalties and payment of an attorney fee for SAIF's failure to institute temporary total disability benefits (TTD) pending acceptance or denial of the claim.

There is also a threshold issue: SAIF contends that the claim should be dismissed on the ground that it was not filed within the 180-day time limit established by ORS 656.807(1).

"....Certainly this is a pre-existing condition and I would be hard-pressed to say that his employment at Ringside, Inc., has materially or permanently worsened his condition."
(Ex. 3, p. 1).

SAIF mailed the claimant a formal denial on December 20, 1979 (Ex. 9). There is no direct evidence that the claimant did not receive TTD compensation pending SAIF's denial but, from the opening statement and closing argument presented by SAIF's counsel, it is obvious that it was not paid.

OPINION

The Timeliness of the Claim

ORS 656.807(1) requires that an occupational disease claim be filed "within 180 days from the date the claimant becomes disabled or is informed by a physician that he is suffering from an occupational disease whichever is later." The claimant first left work in mid-February 1979 and filed his claim in early September 1979 after his last two-week period of employment. SAIF contends, since that involved a period of over 180 days, that the claim was not timely filed. I do not agree. Although the claimant left work in February complaining of problems with his feet, there is no evidence from which I can conclude that either he, or for that matter, his employer, knew at that time that there was any basis for an occupational disease claim. The thrust of ORS 656.807(1) is that the claimant must file a claim within 180 days of his knowledge that he may have an occupational disease. Dr. Marble, whom the claimant saw in February, certainly did not inform the claimant that he was suffering from an occupational disease. The first doctor to express a positive opinion on that was Dr. Harris. And there is no evidence that Dr. Harris specifically expressed that opinion before his examination of the claimant on October 11 - which was after the claim had been made. From the evidence in this case, the claim was timely.

The Interim Compensation Issue

ORS 656.262(4) requires that a claimant be paid his first installment of compensation no later than the 14th day after the employer's notice or knowledge of the claim. In this case the claim was received by the employer on September 6, 1979, but at that time there was no medical verification that the claimant's inability to work was related to his alleged occupational disease. I do not interpret ORS 656.262(4) to require the payment of TTD based solely on the claimant's allegation that he is unable to work. Medical verification was received by SAIF, however, from Dr. Harris on November 19, 1979, while the claim was still in a deferred status. Dr. Harris' report clearly supported the need for TTD. SAIF should have made a TTD payment within 14 days of November 19 - i.e., by December 3, 1979 - and the payment should have been retroactive from receipt of the form 301 claim. This would not have been necessary if SAIF had denied the claim before December 3, but SAIF delayed its denial until December 20 - 31 days after receiving Dr. Harris' report. SAIF's delay was unreasonable, and warrants the imposition of a penalty and the payment of an attorney fee. An appropriate penalty would be 15 percent of the TTD that should have been paid to the claimant for the period from September 6 through December 19, 1979. A reasonable attorney fee to be paid by SAIF to the claimant's attorney on this issue is \$200.

The Compensability Question

I conclude that the claim is compensable. The claimant was required by his work to stand and walk, for eight hours a day, on a hard floor. This was more than was required by his off-the-job activities. It aggravated a pre-existing condition by accelerating the development of calluses on his feet and causing disabling pain. If a pre-existing condition is aggravated by a work activity to which a claimant is not ordinarily subjected outside of his employment, the aggravated condition is compensable: Beaury v Winchester Plywood Co., 255 OR 503 (1970).

The defense relies upon Henry v SAIF, 39 Or App 795 (1979). There are parallels between this case and Henry, but the cases are distinguishable. For one thing, there was no exact etiology established by the treating physician in Henry, while in this case the etiology is clearly defined by Dr. Harris. The real problem with Henry as authority, however, is that it was decided between the Weller v Union Carbide decisions at the Court of Appeals and Supreme Court levels: Compare 35 Or App 355 (1978) with 233 Or 27 (1979). In Henry the Court of Appeals relied upon its Weller decision. But, in reviewing Weller, the Supreme Court specifically disapproved the requirement that a claimant's underlying condition must have been materially and permanently worsened to establish a compensable aggravation. It is now enough if the work activity has worsened the underlying condition to such an extent as to require medical services or result in disability. The claimant here needs the tests now established by Weller.

There are conflicting medical opinions. I am persuaded by Dr. Harris. The contradictory opinions are from Dr. Marble and Dr. Blumberg. But each of them do recognize that the claimant's condition would improve with more sedentary employment. However, the most serious problem with the opinions of those physicians is that they were apparently asked questions predicated on the Court of Appeals decision in Weller. Dr. Marble said that he could make no case for the claimant having been "materially worsened" by his employment. Dr. Blumberg said that he would be "hard-pressed to say" that the claimant's employment had "materially or permanently worsened his condition". Dr. Marble's and Dr. Blumberg's opinions must be given less weight because of those statements, since a "material and permanent worsening" is no longer a valid test.

From the evidence I conclude that the effective date of the claimant's aggravation should be the date that he last worked at The Ringside - i.e., the last date worked during his two weeks of re-employment in the latter half of August 1979. The precise date is not clear from the record, but can be determined by SAIF. It is probably August 30 or August 31, 1979.

ORDER

IT IS THEREFORE ORDERED that the claimant's occupational disease claim be accepted by SAIF, with an effective date corresponding to the claimant's last day of employment in August 1979, and that compensation be paid to the claimant as provided by law.

IT IS FURTHER ORDERED that SAIF pay to the claimant's attorney the sum of \$900, in addition to and not out of compensation, as a reasonable attorney fee for prevailing on the denied claim.

IT IS FURTHER ORDERED that SAIF pay to the claimant, as a penalty for failing to institute TTD pending SAIF's delayed denial of the claim, 15 percent of the TTD due the claimant for the period from September 6 through November 19, 1979, inclusively.

IT IS FINALLY ORDERED that SAIF pay to the claimant's attorney, in addition to and not out of the penalty, the sum of \$200 as a reasonable attorney fee for prevailing on the penalty issue.

November 20, 1980

LOIS WATSON, CLAIMANT
Dwayne R. Murray, Claimant's Atty.
Richard L. Lang, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed the Determination Order's award of compensation for claimant's left injury. Claimant contends she is entitled to a greater permanent partial disability award.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the Board modifies the Referee's order. The medical evidence indicates claimant had pre-existing osteoarthritis in her left knee. Dr. Cassell feels the osteoarthritis was the primary cause of the deterioration of claimant's knee. However, he also feels the meniscal tear and the repetitive trauma associated with claimant's work did contribute to the deterioration of her knee. Dr. Cassell opined that the meniscal tear "weakened" claimant's knee.

The Board finds that claimant's underlying arthritis condition was only temporarily aggravated by this injury. However, the Board does not find, due to this temporary aggravation, that claimant suffered any permanent disability.

Based on the fact claimant's work related injury and related surgery resulted in a "weakened" left knee, the Board finds claimant is entitled to an additional award of compensation equal to 15° for 10% loss of her left leg, making a total award of compensation equal to 30° for 20% loss of the left leg. This represents the loss of function claimant has experienced in her left leg due to this injury.

ORDER

The Referee's order dated April 23, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 30° for 20% loss of her left leg. This is in lieu of all prior awards of scheduled disability compensation that claimant has been granted for this injury.

Claimant's attorney is granted a fee equal to 25% of the increased compensation not to exceed \$3,000.00.

November 20, 1980

SHARON S. WEBSTER, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed the denial of claimant's aggravation claim. Claimant was awarded temporary total disability from October 8, 1979 through December 6, 1979 along with a penalty and attorney fees.

The majority of 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 May 21, 1980, is affirmed.

I respectfully dissent from the majority opinion of the Board as follows:

The Referee's finding that the claimant's claim of aggravation be denied should be reversed.

The uncontradicted medical evidence establishes a worsened condition resulting from the industrial injury. The Referee bases his denial on a failure to show a "pathological" change. The law does not require such proof; indeed, it would be a rare finding in cases such as this involving psychological illness. To establish an aggravation claim, it is only necessary to show a worsened condition from the industrial injury. This has been established by the treating doctor's medical opinion that the claimant's condition had deteriorated to the point that she had become increasingly psychotic and needed inpatient hospitalization and electroshock treatment, a type of treatment never before given to her.

The Referee also requires a showing of greater loss of earning capacity than awarded at last closure. This test only applies when the extent of disability is again determined and is not a necessary consideration in determining whether an aggravation has occurred.

The type of treatment prescribed by Dr. Petroske involving inpatient electroshock can hardly be likened to chiropractic therapy available under ORS 656.245. After a certain point of recovery, it may be that outpatient electroshock therapy could be provided under ORS 656.245, but the critical period involved in this aggravation claim pre-dated any possibility of ordinary maintenance treatment.

This claim should be reopened as a September 13, 1979, the date claimant was hospitalized by Dr. Petroske, and should be paid benefits provided by law until the claim is again closed. In addition, the claimant should be paid 20% of all time loss payable from September 13, 1979 to the date of hearing on April 21, 1980 as penalty for failure to pay interim compensation and failure to accept or deny claimant's claim of aggravation. An attorney fee of \$400 should likewise be paid by The SAIF Corporation. An additional attorney fee of \$1,600 should be paid to claimant's attorney for prevailing on a de facto denial at the Hearing and Board levels.

M. Keith Wilson
Chairman

Pursuant to Notice, hearing was held in Portland Oregon on April 21, 1980. Claimant was present and was represented by Mr. Peter O. Hansen. The employer, Pacific Power and Light Company, and its insurer, State Accident Insurance Fund, were represented by Mr. Gene L. Platt. The matter was submitted for determination on the basis of Hearing Exhibits 1 through 22.

ISSUES:

Claimant appeals the de facto denial of her claim for aggravation. Claimant contends she is entitled to medical services and temporary total disability as of September 12th, 1979. Claimant seeks penalties and attorney fees for unreasonable resistance to pay interim compensation and medical expenses.

FINDINGS:

On December 5, 1973, claimant, then 28, received a compensable injury when she sprained her ankle. She developed acute thrombophlebitis which was successfully treated. From the time of the injury until the first hearing, claimant developed low back and leg pain, psychiatric problems and then later, developed arm, shoulder and upper back symptoms. She has not worked since December 5, 1973.

By an Opinion and Order of October 13, 1978, all medical conditions except for the ankle and psychiatric problems, were denied. The Order found claimant was permanently and totally disabled, stating: "(3) Claimant has been treated for her psychiatric problems by Dr. Petroske since June 10, 1974 and she has since been examined by Dr. Arlan Quan, Dr. E. M. Golbach and Dr. Parvaresh. It is conclusively established claimant's psychiatric illness is causally related to her compensable injury. Various psychiatrists have expressed varying impressions of claimant's disability. On January 14, 1975 Dr. Petroske prophetically stated: 'It is my opinion that this woman is not able to return to her regular work and in her present condition it is my opinion that she will never be able to return to her former employment.' Although, four years later, Dr. Petroske is still treating claimant, he is of the opinion claimant still cannot tolerate any degree of stress or responsibility. Because claimant has not improved in spite of more than four years of psychiatric treatment it would be folly to believe she will ever improve. Because her present psychiatric disability would not permit her return to work and since that disability is unlikely to improve, I find claimant is permanently and totally disabled as a result of her psychiatric disability caused by her compensable injury of December 5, 1973."

In April, 1979, claimant was hospitalized twice for severe depressive neurosis.

An Order on Review was issued on August 22nd, 1979 which found that the examining and treating physicians were at variance as to the degree of claimant's impairment and modified the Referee's order by awarding 30% for unscheduled psychiatric disability.

On September 13, 1979, claimant was again hospitalized for depressive reaction, being depressed, crying, withdrawn and having suicidal ruminations. As medication has not been entirely successful, electrotherapy was tried. Dr. Petroske released claimant on October 23, 1979 with a diagnosis of psychotic depressive reactions, improved (Ex. 11). Reports by Dr. Petroske of October 8th, 1979 (Ex. 12) and October 22nd, 1979 (Ex. 13) directed to SAIF, expressed that claimant's depression had worsened. By letter of December 10th, 1979, Dr. Petroske noted the worsening and claimant's inability to work.

Again in January, 1980, claimant was hospitalized for recurrence of severe depression and electrotherapy was performed.

On April 14th, 1980, the Court of Appeals for the State of Oregon issued their opinion, affirming the Workers' Compensation Board, stating: "Upon de novo review, we agree with the Board and find that the medical evidence, taken as a whole, does not establish claimant's entitlement to permanent total disability. We concur in the Board's conclusion that, considering claimant's age, education and job experience, an award of 30% psychological disability adequately compensates her for any loss in earning capacity due to her psychological condition."

The evidence establishes that claimant had not worked since the initial injury of December 5th, 1973 until the time of the hearing in August, 1978. There was no evidence presented that claimant has been employed since the hearing.

For claimant to prevail on an aggravation claim, she must prove by the preponderance of the evidence that her condition has worsened since the last award or arrangement of compensation. ORS 656.273(1).

OPINION:

Aggravation: The date of the last award or arrangement of compensation is the date of the issuance of the Opinion and Order which would be October 13th, 1978. Although this Order was later modified by a reduction of permanent disability by the Order on Review, and affirmed by the Court of Appeals, it remains as the last award as the evidence of claimant's medical condition was only considered to the time of the Referee's hearing by the reviewing bodies.

The finding of facts by the Referee, Workers' Compensation Board and Court of Appeals are controlling and are the basis in determining whether claimant's condition worsened since October 13th, 1978.

The Opinion of the Referee, acknowledging varying impressions of the psychiatrist, relied both upon Dr. Patroske's medical reports of January, 1975, which opined that claimant, in her present condition, would never be able to return to her former employment, and upon the passage of four years without improvement, to determine that claimant was permanently and totally disabled. The Workers' Compensation Board and the Court of Appeals did not accept such finding.

Noting that Dr. Petroske was the only physician that found claimant was permanently and totally disabled, the Workers' Compensation Board and Court of Appeals determined that the medical evidence, taken as a whole, did not establish such fact of total disability, and taking into consideration her age, education, work experience and psychological impairment, awarded claimant 40% for psychological and disability. In effect, this decision discounted Dr. Petroske's opinion that claimant was totally disabled and unable to work in her then present condition. Greater reliance was placed on other medical opinions. The Court of Appeals' decision commented on portions of the evidence that claimant had difficulty coping with life, was withdrawn, dependent, her social life restricted, had pain in her back and elsewhere, was hospitalized, had become severely depressed, needed household help, was frequently psychotic and had withdrawn into her home. The Court of Appeals was aware of Dr. Parvaresh report in June, 1978 noting improvement and of Dr. Petroske's report a month later, relating to a psychotic episode.

The evidence since the Opinion and Order of October 13, 1978 reflects hospitalizations on April 10th, 1979, April 18th, 1979, September 13th, 1979 and January the 25th, 1980. The diagnoses have all been depressive reaction or psychotic depressive reaction. The history on admissions to the hospital comment on claimant's difficulty in functioning, being progressively depressed, withdrawn, having suicidal remonstrations, being unable to do much of her household activities, having vague pain and staying in her home.

Although Dr. Petroske has reported that claimant's condition has worsened and she is unable to work, he stated in his report of January 28th, 1980, after claimant had another relapse, that "I feel that it (relapse) is a recurrence of the same illness that she has had all along and not anything new." (Ex. 16). This is not deemed to be evidence of a pathological change.

I therefore find that there is little, if any, difference in claimant's present psychological condition to that of her condition existing in October, 1978. The degree and frequency of the remissions and exacerbations of claimant's condition has been similar to past occurrences and the present findings of Dr. Petroske are almost identical to the findings as considered by the Workers' Compensation Board and Court of Appeals.

There being no satisfactory evidence of a worsening of claimant's disability and no other evidence of any greater loss of earning capacity from the time of the last award, claimant has not carried her burden to prove an aggravation.

Temporary Total Disability: An employer must pay interim compensation fourteen days after receiving notice of a medically verified inability to work resulting from a worsened condition. ORS 656.273. SAIF had satisfactory notice of the claim for aggravation and claimant's inability to work by Dr. Petroske's letter of October 8th, 1979, (Ex. 12), which related to the exacerbation of claimant's condition and her hospitalization. Inability to work would necessarily be presumed by the hospitalization. There is no evidence to support a conclusion that Dr. Petroske's opinion was inaccurate or "inherently incredible", In Re Silsby, 39 Or App 555, to justify non-payment of temporary total disability. Interim compensation was therefore due not later than fourteen days after this notification by Dr. Petroske and each two weeks thereafter until the claim was denied. As no formal denial was made by SAIF, the provisions of OAR 435-83-520 and ORS 656.262(5) will be used to determine the de facto denial date, as occurring 60 days after Dr. Petroske's letter of October 8, 1979. Therefore, claimant is entitled to temporary total disability payments from October 8, 1979 through December 7, 1979.

Penalties: A penalty, pursuant to ORS 656.262(8) is appropriate for unreasonable refusal to pay temporary total disability benefits.

Attorney Fees: Unreasonable resistance in paying compensation is subject to assessment of attorney fees. ORS 656.382(1). As it has been found that SAIF unreasonably refused to pay interim compensation, attorney fees are also appropriate.

ORDER.

IT IS HEREBY ORDERED that:

1. The claim for aggravation is denied.
2. Claimant is awarded temporary total disability from October 8, 1979 through December 7, 1979.
3. Claimant is entitled to a penalty for unreasonable refusal to pay interim compensation in the amount of 20% of the amount now due.
4. Claimant's attorney is awarded the sum of \$400.00, to be paid by SAIF, for its unreasonable resistance in payment of compensation.

BARBARA COLWELL, CLAIMANT

Brink, Moore, et al, Claimant's Attys.

Souther, Spauling, et al, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Order on Remand

The claimant appealed the Board's February 26, 1980 Order on Review which affirmed the denial issued by Aetna Casualty Company on behalf of one of claimant's employers. A claim for this same condition was filed and accepted by another employer. Claimant received an award of temporary total disability compensation and compensation equal to 9.6% for 58 loss of her right arm in that case.

In an opinion filed August 18, 1980, the Court of Appeals reversed the Board. It found the last injurious exposure rule did not apply to this situation where the claimant was involved in concurrent employment. The Court remanded this claim to the Board to award claimant appropriate compensation. The Judgment and Mandate was issued in this case on October 10, 1980.

The Board, in light of the Court of Appeals' decision, remands this case to Referee Fink to determine what an appropriate award of compensation would be. The sole issue decided by the Referee and before the Board was the compensability of this claim. No evidence was presented as to the extent of disability due to claimant's employment with this employer. Therefore, the Board remands this claim to Referee Fink to determine what compensation claimant is entitled to. The Board notes a Determination Order has already been issued and it was not appealed. It appears to the Board, since the award granted by the Determination Order is final, the extent of disability due to claimant's epicondylitis of the right elbow has been determined.

November 24, 1980

HAROLD CURRY, CLAIMANT
Welch, Brunn, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 6, 1980 the SAIF Corporation (SAIF) forwarded to the Board various information concerning this claim. Claimant had originally injured his back on October 25, 1968 and underwent surgery. The claim was closed and claimant's aggravation rights have expired.

Claimant was hospitalized on September 26, 1980 with complaints of low back pain. He underwent a myelogram which was interpreted as being normal outside of the residuals from his surgeries. Drs. Cherry and Berkeley felt a decompression at L3-4 was indicated to be followed by a fusion, if necessary.

The SAIF indicated it did not oppose an own motion order reopening this claim as of September 26, 1980.

The Board, after reviewing the evidence in this claim, finds it warrants reopening of this claim effective September 26, 1980 for payment of compensation and other benefits provided for by law until closed, pursuant to ORS 656.273.

IT IS SO ORDERED.

WCB CASE NOS. 79-2040 & 79-4874

November 24, 1980

IVAN E. DAUGHERTY, CLAIMANT
Franklin, Bennett, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order on Review

The SAIF Corporation (SAIF) requested the Board review the Referee's order entered in this case. SAIF contends: (1) The claimant failed to prove he suffered a compensable injury while employed at D Sands Condominium; (2) the employer had no actual knowledge of the claimed injury; (3) the employer and SAIF were prejudiced by claimant's failure to give timely notice; and (4) even if claimant established good cause for failure to give notice, the employer was still prejudiced.

claim against this employer until after Gates' denial of his aggravation claim, but still within one year of the July 1978 incident. The Board finds this constitutes good cause, and claimant's claim is not barred as untimely. The board does not find SAIF or the employer has established it was prejudiced by this late filing.

On the merits of this case, the Board does not find that the claimant suffered a new and intervening injury while employed at D Sands Condominiums. The evidence establishes that claimant's back pain resulted from his coughing. The issue to be decided is did this cough arise out of or in the course of his employment. This issue was recently discussed by the Oregon Supreme Court in Rogers v. SAIF, an opinion filed on September 9, 1980. The Court in that case adopted a unitary "work-connection" approach in place of the customary mechanistic two-pronged method of analysis of this issue. The test set forth is if the injury has sufficient work relationship, then it arises out of and in the course of employment. In this case, the Board does not find sufficient work relationship between claimant's work and his cough. The cough cannot be traced to claimant's work or to some risk to which he was exposed while employed by this employer. The cough was only incidental to claimant's work. Therefore, the Board reverses the Referee's finding of a new injury.

The Board finds the Referee correctly recited the facts of this case in her order.

After a de novo review of the record in this case, the Board reaches a different conclusion than the Referee. In July 1978, claimant, while sawing a piece of plywood, coughed and felt immediate low back pain which radiated down his left leg. Claimant's uncontradicted testimony was that he told the manager of the condominiums he was going home because his back hurt. Claimant did not file a claim with this employer until March 28, 1979. However, the employer, through its manager, did have actual notice or knowledge that claimant had hurt his back.

The Board finds that even if the employer did not have actual notice or knowledge, claimant established good cause for failure to timely advise this employer of his injury. Previously, claimant had suffered a low back injury while employed by a different employer whose workers' compensation claim service agent was Gates-McDonald (Gates). After the July 1978 incident, claimant's medical bills were paid by Gates under the old claim. In February 1979, Gates denied claimant's aggravation claim on the basis that claimant had suffered a new injury. The Board finds that under these facts, claimant was led to believe his aggravation claim had been accepted and therefore did not file a

ORDER

The Referee's corrected order on reconsideration which reinstated her order issued on November 30, 1979 is modified.

The SAIF Corporation's denial of this condition on the basis that there was no causal relationship between claimant's condition and his employment in July 1980 is restored and affirmed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-10, 988

November 24, 1980

GEORGE A. EVERTS, CLAIMANT
Robert L. Engle, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed SAIF's denial of the compensability of the claimant's hypertension condition.

The majority of 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, made a part hereof.

ORDER

The order of the Referee, dated May 13, 1980, is affirmed.

I respectfully dissent from the majority opinion of the Board as follows:

I find that claimant's hypertension condition is compensable and give the greatest weight to the opinion of Dr. Asper who has treated this claimant for over 20 years. Dr. Asper's records indicate that claimant had no pre-existing hypertension condition before this industrial injury. Claimant did, however, have periods of time when his blood pressure was elevated, but always at these times claimant was under stress, i.e., claimant contemplating cataract surgery.

Dr. Aspen's opinion is that claimant's hypertension condition is related to his injury and secondary to the effects from that traumatic injury. I feel that the entire record in this case substantiates this opinion. After his injury, claimant returned to his regular occupation, a job with a great deal of stress and claimant managed to perform this work for two years before he was forced to retire, unable to handle the stress any longer. After this injury and secondary thereto, claimant developed hypertension that is permanent in nature. It isn't necessary that the injury be the sole reason for this condition. It is enough, under the law, that it contributed thereto. Dr. Aspen supports the conclusion that it did.

I give very little weight to the opinion of Dr. Bruton for two reasons: First, claimant testified he only saw this doctor for ten minutes, and this testimony was unrefuted. Secondly, Dr. Bruton had no prior experience with this claimant nor with his blood pressure testing. The doctor makes an opinion that claimant's hypertension was a natural progression with age and gives no basis why he voices this opinion nor does he give any explanation why Dr. Aspen's conclusion may not be correct.

For these reasons, I feel that claimant's hypertension condition is a compensable consequence of his industrial injury and that the order of the Referee should be reversed.

George Lewis
Board Member

Pursuant to Notice, this matter came on for hearing in Salem, Oregon on April 15, 1980 before Kevin L. Mannix, Referee. The claimant appeared and was represented by his attorney, Mr. Robert L. Engle. The employer, Gem Equipment of Oregon, Inc., is insured by the State Accident Insurance Fund (Fund), which was represented by Association Counsel Lester R. Huntsinger. The record was closed at the conclusion of the hearing.

ISSUE

The issue is the compensability of claimant's hypertension condition.

FINDINGS

1. On September 15, 1974 claimant, then a 58-year-old vice-president in charge of sales for the employer, was assaulted in a parking lot at Portland International Airport upon his return from a sales trip. He was struck on the head and he injured his right hand. A possible concussion was diagnosed and he was hospitalized for two days. Exs. 2, 3, 8.

2. On October 2, 1974 claimant's wife returned him to the hospital because he had been intermittently confused since the assault; she reported that he was not acting like himself. He also had difficulty speaking. He was admitted to the hospital for observation and testing; these revealed little, but he was discharged on October 21 in much improved condition. At that time, he still had some difficulty in expression. He also suffered from neckache. Exs. 4, 6-10, 15.

3. Claimant subsequently suffered some problems in his neck and right shoulder, but these resolved by April 1975. Ex. 17. Dr. Robert C. Buza, M.D., who treated claimant at the hospital, performed a closing evaluation on July 1, 1975. His impression was stable residual, mild upper monoparesis from probable cerebral contusion and anxiety or tension state. Dr. Buza also reported that claimant still had some difficulty with expression that seemed to be based on anxiety. Ex. 13.

4. Thereafter, claimant suffered continued difficulty in his right hand, particularly in the middle finger. Over the next two years claimant made numerous visits to physicians and underwent several surgical procedures to stabilize the problems in his right hand. By October 1977 his right hand condition was stationary and his claim was closed. Exs. 15, 17, 21-26, 28-35, 37-39, 41-44, 46-49, 51, 52, 54, 55.

5. By Determination Orders of July 14, 1975, August 6, 1975, and March 12, 1978 claimant received 22.5 degrees for 15 percent loss of his right hand and 32 degrees for 10 percent unscheduled disability resulting from his head injury. Exs. 19, 20, 52.

6. In regard to claimant's hypertension, the pattern of medical reports is spotty. Most reports subsequent to the September 1974 injury make no reference to hypertension. However, the reports do reflect elevated blood pressure readings on September 23, 1974, shortly after claimant's injury; in October 1974, when he was admitted to the hospital in a confused state, and, in June 1975, January 1976, and December 1976. Exs. 5, 23, 40, 41, 62.

7. Dr. Paul Asper, M.D., who has been claimant's family physician since 1960, recorded elevated blood pressure readings in September 1966 and December 1970, associated with stress reaction to acute bursitis and anticipation of cataract surgery, respectively. Dr. Asper reported normal blood pressure readings in June 1973 and April 1974 associated with a complaint of pleuritic chest pain and a life insurance physical examination, respectively. Ex. 63.

8. Dr. John Burr, a neurosurgeon, performed the surgeries upon claimant's right hand and otherwise treated his right hand condition. In a history given to Dr. Burr in 1976, claimant recalled a "heart condition" or "heart attack" of 20 years before that was not a coronary or anything significant; claimant related that he had no problems since then. Dr. Burr reported on June 20, 1976 that claimant's cardiovascular system was normal. Exs. 22, 33.

9. Claimant testified that, before September 1974, he worked in many stressful situations for over 20 years. He engaged in union negotiations; he dealt with salesmen and engineers in planning major equipment development projects and sales; he had to constantly meet deadlines; he traveled extensively and was often out on his own in dealing with others and making decisions. Before his September 1974 injury, he never experienced any symptoms associated with hypertension, he never had a diagnosis of hypertension, and he never received medication for hypertension.

10. Claimant further testified that, following his injuries, he found that he would tire out quickly and he would experience a clammy, sweaty feeling, with dizziness, when dealing with stressful situations. He began taking medication for hypertension about eight months after the September 1974 injury and has been taking such medication ever since. The symptoms of clamminess, sweatiness, and dizziness only appeared thereafter when he would forget to take his hypertension medication. He returned to full employment about one year after his injury and he continued working for two years. After two years on the job, he still found that he was too easily upset, so he sold his stock in the company. He now only does occasional consulting work, although he remains a vice-president of the company.

11. The record reflects three medical opinions regarding the causal relationship between claimant's September 1974 injuries and his hypertension condition. Dr. Joe C. Much, M.D., a medical examiner for the Fund, reviewed claimant's file and opined that it is possible that hypertension could result from a head injury but such a situation would be unusual. Dr. Much added that he did not feel that there was any direct connection made between claimant's head injuries and his hypertension condition. Ex. 58. Dr. Asper notes that claimant's head injuries and protracted right finger problems coincided with onsets of anxiety and high blood pressure. Ex. 57. Dr. Asper stresses that claimant's chronic hypertension did not develop until after his injury and notes that claimant's pattern of hypertension had been one of reacting to stress with brief elevations until the head trauma of September 1974. Dr. Asper relates that claimant's level of stress has been much greater since September 1974 due to his injuries and opines that the hypertension problem "is directly related to the September 1974 injury and the resultant stress." Exs. 61, 62. Dr. Orin E. Bruton, a cardiologist, reviewed claimant's records, provided by the Fund, and examined claimant on November 21, 1979. Dr. Bruton reports that he finds very little evidence that claimant's hypertension is related to his industrial accident. Dr. Bruton states that hypertension can be aggravated at the time by acute stress or trauma, but this is usually a transient thing and easily comes under control. Dr. Bruton opines that claimant's hypertension is a chronic condition which has progressed with age as the natural history of hypertension. He concludes that the claimant's hypertension is not related to claimant's accident. Ex. 59.

12. Claimant stresses that Dr. Bruton's history contains one incorrect item, to wit, a reference to claimant smoking two or three packs of cigarettes a day until a few months before the examination. Claimant testified he only smoked a few cigarettes a day. I note that Dr. Burr reported in June 1976 that claimant smoked a pack a day. Ex. 33. In any event, this is a relatively insignificant element of Dr. Bruton's report and opinion. Ex. 59.

13. I find the claimant to be a credible witness. His testimony regarding his cigarette smoking may reflect a misunderstanding as claimant appears to have been relating his current cigarette smoking rather than his past cigarette smoking. He impressed me as being very candid and straightforward.

OPINION

The claimant bears the burden of establishing the compensability of his hypertension condition. He must do so by a preponderance of the evidence. In the present case, I am faced with a mixture of medical opinions which cannot be reconciled. On the one hand, claimant's family physician favors the compensability of claimant's hypertension. Dr. Asper stresses the time element in regard to the development of this condition as well as the relationship to stressful situations. On the other hand, Dr. Bruton, a cardiologist, rejects any relationship between the hypertension and the September 1974 accident; he sees the development of hypertension in this case as being one of progression with age not affected by the accident. Dr. Much did not have an opportunity to examine the claimant, but he did review the files. He does not rule out the possibility of hypertension being related to an accident, but he says such a situation would be unusual and he does not see any such situation in this case.

In deciding the compensability of claimant's hypertension condition I do not simply count noses on one side or the other. The rationale expressed by the physicians is an important element. I believe Dr. Asper relies too heavily upon the coincidence of time elements in this case. I find it significant that claimant himself related that he previously suffered a "heart condition" some 20 years before, and there were incidents before September 1974 when claimant had elevated blood pressure. It is true that claimant suffered episodes of anxiety after his injury, and these episodes may have led to occurrences of high blood pressure. This, however, reflects more of an extension and continuation (i.e. progression) of claimant's pre-existing problem than a new problem. I would not presume to place any significance on these factors but for the fact that Dr. Bruton, a cardiologist, stresses the progressive nature of hypertension -- at least in regard to this claimant -- when he opines that claimant's hypertension is not causally related to the September 1974 accident. Weighing all of the evidence and all of the opinions, and considering these factors, I conclude that claimant has failed to meet his burden of proving the compensability of his hypertension condition.

ORDER

IT IS THEREFORE ORDERED that the State Accident Insurance Fund's denial of the compensability of claimant's hypertension condition is affirmed and claimant shall take nothing by these proceedings.

November 24, 1980

GAYLE Y. GOODMAN, CLAIMANT

Richard A. Carlson, Claimant's Atty.

Schwabe, Williamson, et al, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Employer

This Amended Order on Review is to correct the Order on Review dated 14 November 1980 which incorrectly showed the WCB Claim No. to be 78-2698.

IT IS SO ORDERED.

November 24, 1980

WILLIAM MABE, CLAIMANT

SAIF, Legal Services, Defense Atty.

Own Motion Order Referring for Expedited Hearing

On July 10, 1980, Wausau Insurance Companies (Wausau) advised the Board that the claimant's aggravation rights in this claim had expired and it could not reopen this claim. It advised the Board that it was providing certain information to the Board in the event that the claimant wished to petition the Board to reopen this claim under its Own Motion jurisdiction.

The medical reports from Dr. Wilson indicated that the claimant had been working on a part time basis for an Oregon county but had not worked since February 1980. Dr. Wilson reported that the claimant had experienced continuing low back pain. The claimant had undergone a lumbar laminectomy in 1976 for his back injury. Conservative treatment was tried. However, the claimant's back pain continued to increase. Therefore, Dr. Wilson had the claimant undergo a myelogram which revealed a nerve root impingement which was secondary to an overgrowth of the claimant's spinal fusion or the prolapse of the L3-4 disc. Dr. Wilson related this to the claimant's previous injury. A lumbar laminectomy was performed on August 8, 1980.

Subsequently, the claimant obtained an attorney who filed a request that the Board exercise its Own Motion jurisdiction and reopen this claim.

On October 13, 1980, Wausau advised the Board that it opposed an Own Motion Order reopening this claim. It felt that this case should be referred to the Hearings Division to be set for a hearing.

The Board, after reviewing the information furnished to it, finds that it would be in the best interests of the parties if this claim were referred to the Hearings Division to be set for an expedited hearing. The Referee shall determine if the claimant's current condition is related to his original injury and represents a worsening of it since the last award or arrangement of compensation in this claim. Upon conclusion of the hearing, the Referee shall cause a transcript of the hearing to be prepared. This shall be forwarded along with the other evidence introduced at the hearing and the Referee's recommendation in this case to the Board.

IT IS SO ORDERED.

WCB CASE NOS. 78-5681 & 79-5698

November 24, 1980

MARION MABOU, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Clark, Marsh & Lindauer, Employer's Attys.
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 SAIF Corporation, and said Request for Review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the Order of the Referee is final by operation of law.

November 24, 1980

JOHN MARLEY, CLAIMANT
John Svoboda, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

The Board referred claimant's request that the Board exercise its Own Motion jurisdiction in this claim to the Hearings Division to be consolidated with a pending hearing on the SAIF Corporation's (SAIF) denial of continuing responsibility for claimant's back condition. The Referee recommended the Board reopen this claim under its Own Motion jurisdiction. The Referee also ordered that claimant was entitled to medical services pursuant to ORS 656.245 and granted claimant's attorney a fee for prevailing on that issue. The SAIF has requested Board review on that portion of the Referee's order. A copy of the Referee's order is attached hereto and by reference incorporated in the Board's order.

The Board, after reviewing the record in this case, finds the evidence is sufficient to warrant reopening of this claim under its Own Motion jurisdiction when and if claimant undergoes the surgery recommended by Dr. Stainsby for payment of compensation less time worked and other benefits provided for by law until closed pursuant to ORS 656.278. Claimant's attorney is entitled to a fee equal to 25% of the increased temporary total disability compensation awarded by this order not to exceed \$750.

IT IS SO ORDERED.

November 24, 1980

MARIE B. MYERS. CLAIMANT
Stanley Fields, Claimant's Atty.
Scott M. Kelley, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Order on Review

The claimant seeks Board review of the Referee's order entered in these cases. The claimant contends: (1) She is entitled to a greater award of compensation for her lumbar spine injury; (2) she is entitled to an award of greater compensation for her injury to her cervical spine; and (3) claimant is entitled to an assessment of penalties against the employer for its failure to pay interim compensation within fourteen days of the employer's knowledge of her industrial injury.

Claimant, a 52-year-old lead girl with this employer, on October 1, 1976, injured her back when she tripped over a cable and fell against a post. This injury was diagnosed as a back sprain with pain radiating down the right leg. Claimant continued to work after this injury and did not miss any time from work.

Dr. Poole found that claimant's condition was medically stationary as of October 20, 1976. He felt that claimant would have no permanent impairment due to this injury.

In February 1977, Dr. Bolin began treating claimant. He reported that claimant continued to have pain in her low back which radiated down into her right leg, pain behind the neck area at the level of the skull, tenderness and soreness between her shoulder. Claimant continued to work and did not miss any time from work due to these complaints.

In March 1977, Dr. Bolin reported claimant's condition was much improved without impairment. He released claimant for regular work as of February 18, 1977 and found her condition to be medically stationary as of May 4, 1977.

Claimant was referred to Dr. Poulson in June 1977. Dr. Poulson diagnosed claimant's condition as a chronic lumbar degenerative disc which he felt was probably giving her trouble whenever she overstressed it. He recommended that claimant continue with back exercises and avoid "aggravating" her condition. He found that claimant had a full range of motion of her cervical spine.

On May 18, 1977 claimant was seen by Dr. Bolin again. He reported that she had no disability impairment and, therefore, recommended closure of the claim.

In August 1977 Dr. Poulson reported that claimant continued to work and had intermittent episodes of back pain. He felt that claimant would have a very small permanent disability based on pain. Later, on November 1, 1977 Dr. Poulson reported claimant's condition was stationary and the claim could be closed. He felt that claimant had some disability based on pain, but very little based on any loss of motion.

On January 20, 1978 claimant suffered a second injury while lifting a box of shades. She reported that she injured her neck in this incident. Dr. Poulson saw claimant after this injury and reported that she continued to do light work. He felt that claimant's symptoms would subside and that claimant would have very small amount of impairment due to this injury. He noted that claimant continued to work and did not miss any work because of this injury.

On April 30, 1978, claimant again injured her back while moving some heavy boxes. This injury was diagnosed as a lumbar sprain. Claimant was released on May 12, 1978 for her regular work.

In July 1978; Dr. Poulson reported that claimant had continued to work throughout these injuries. He felt that claimant had less than a 5% impairment due to her injury.

On September 21, 1978 a Determination Order was issued on the October 1, 1976 injury, and claimant was awarded no compensation for that injury.

Dr. Poulson, in November 1978, reported that he continued to treat claimant conservatively for her cervical lumbar sprain. He noted that claimant had improved somewhat but essentially remained about the same. He felt the prognosis for claimant was continued and recurrent pain on a permanent basis. He felt that any disability claimant received should be based on pain only which did limit her activity. He noted that claimant was working on a job which did not require repetitive bending or lifting. His diagnosis was degenerative lumbar disc and a chronic cervical sprain.

On March 6, 1979 a Determination Order was issued on the April 30, 1978 injury. Claimant was awarded period of temporary total disability compensation for that injury.

On March 30, 1979, claimant sustained injury to her right knee. Dr. Poulson reported that claimant's knee injury also aggravated her back condition. Claimant was unable to work after the March 30, 1979 injury.

In July 1979 when Dr. Anderson examined claimant, he found evidence of chronic strain of the cervical and lumbosacral spine. He also found evidence of strain of the right knee. He felt that claimant's condition was stationary on all her injuries. He felt the total loss of function of the lumbosacral spine was minimal, no loss of function in claimant's neck and only minimal loss of function in her right knee.

Dr. Poulson in August 1979 felt that claimant continued to have limitation of motion in her dorso lumbar spine. He felt that the claimant had an impairment equal to 4% of the whole person, a result of the injury to her dorso lumbar spine.

In September 1979 claimant underwent a right knee arthrogram. This is interpreted as indicating a partially torn lateral meniscus. Dr. Poulson felt this should be removed surgically to prevent any traumatic arthritis from developing in claimant's right knee. Dr. Poulson found that claimant was now precluded from her regular job but could perform sedentary work.

In December 1979, Dr. Burr reported that he had reviewed the arthrogram and concurred with the diagnosis of a torn posterior horn of the lateral meniscus. He felt that if claimant continued to have significant discomfort in the knee to the extent she was unable to function, surgery should be performed on the knee.

Dr. Poulson in January 1980 reported that claimant did not have surgery on her knee. He felt that claim could be closed and rated claimant's impairment at 5% due to the torn medial meniscus of the right knee.

The evidence indicates the March 30, 1979 injury was reported to her employer by claimant on April 5, 1979. Claimant was paid temporary total disability compensation from April 3, 1979 through April 19, 1979. However, this payment was not made until April 26, 1979.

At the time of the hearing, claimant was 54 years old and had a tenth grade education. She indicated that she had worked most of her life as non-skilled and semi-skilled jobs. She testified that after the October 1976 incident she lost no time from work and continued on the same job. However, after the April 30, 1978 incident she said she lost time from work and was unable to do some of the work as she did before. She stated that she cannot walk very far without her legs and back giving out. She indicates that since the March 1979 injury, she has had difficulty sleeping and her activities have been greatly restricted.

The Referee found that claimant had minimal disability regarding her neck and back injuries. Therefore, the Referee granted an award to claimant of 5% unscheduled disability for her October 1, 1976 injury to her back and a like award for her back injury of April 30, 1978. The Referee also ordered the claimant be referred for evaluation to determine if she was vocationally handicapped and for proper vocational assistance if she was found to be vocationally handicapped. The Referee granted claimant's attorney a fee out of the increased award of compensation. On reconsideration of this order, the Referee granted claimant's attorney a fee of \$150 for the employer's unreasonable delay in the payment of interim compensation. The Referee found no basis on which to assess a penalty.

After de novo review of the record in this case, the Board modifies the Referee's order.

We find the Referee correctly compensated claimant for any loss of wage earning capacity she has due to her October 1, 1976 injury and her April 30, 1978 injury. However, we do not agree with the Referee that there is no basis on which to assess a penalty in this case. After the March 30, 1979 injury, claimant was able to work. The first payment of compensation for this injury was made on April 26, 1979. The injury, however, had been reported to the employer on April 5, 1979. The first payment of compensation is due to be paid to claimant within 14 days of the date the employer has notice or knowledge of the injury. In this case, this statutory rule was not complied with and the Board would assess a penalty equal to 25% of the temporary total disability compensation due from April 18, 1979 through April 26, 1979 for the carrier's late payment of compensation in this case.

ORDER

The Referee's order dated March 27, 1980 and the order on reconsideration dated May 5, 1980 are modified.

Claimant is hereby granted an additional award of compensation equal to 25% of the temporary total disability compensation due claimant from April 18, 1979 through April 26, 1979 as a penalty of carrier's late payment for temporary total disability in this case.

The remainder of the Referee's orders are affirmed.

November 24, 1980

BUERNELL L. SEIBEL, CLAIMANT

Thomas M. Evans, Claimant's Atty.

Thomas Tongue & Frank Mosato, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Order Denying Reopening

On October 30, 1980, claimant, by and through his attorney, moved the Board to reopen this claim under its own motion jurisdiction. Claimant contends fraud had been committed by his employer. Claimant stated that at hearing his employer indicated he could return to a permanent full time position. However, after the Opinion and Order was issued, he was terminated from his job.

The employer and its insurance carrier responded contending claimant's motion was not a justified reason for the Board to consider claimant's contention under its own motion jurisdiction. Further, it was noted the evidence claimant seeks to have the Board consider was discoverable prior to the Board reviewing his case. The Board also was advised that a civil case against the employer on this same point was dismissed upon the employer's motion.

The Board, after reviewing claimant's motion and affidavit, denies his motion. The Board does not feel that this information justifies reopening this claim.

ORDER

The claimant's motion to reopen is denied.

SAIF CLAIM NO. A 843336

November 25, 1980

HERBERT B. HOWELL, CLAIMANT

SAIF, Legal Services, Defense Atty.

Own Motion Order

In October 1980 claimant requested the Board reopen this claim for his January 27, 1961 right knee injury. This claim had been closed and claimant's aggravation rights have expired.

On October 16, 1980, Dr. Swanson reported that claimant was suffering from post traumatic arthritis of his right knee. He felt that a total knee replacement would be required. This had been scheduled, and while waiting for this surgery, Dr. Swanson reported that claimant's right knee had given out underneath him, causing him to fall and strike his head, resulting in a fracture of the odontoid process. Dr. Swanson requested this claim be reopened and felt that the primary contributing cause to claimant's post traumatic arthritis of the knee and claimant's fractured cervical spine of the odontoid process was the 1961 injury.

Later in October 1980, Dr. Burget reported that claimant had had continuing difficulty with his knee since the original injury. He noted that this had become progressively worse as time went by. Dr. Burget reported that because of the painful and unstable knee, claimant had fallen in 1980, fracturing his odontoid process.

On November 13, 1980, the SAIF Corporation advised the Board that it would not oppose an Own Motion Order reopening this claim from the date the proposed surgery was scheduled for claimant's right knee.

The Board, after reviewing information submitted to it, finds that this claim should be reopened under its own motion jurisdiction effective the date claimant fell, suffering an injury to his cervical spine. Claimant indicates this occurred on June 28, 1980. Therefore, the Board orders this claim reopened effective June 28, 1980 for payment of compensation less time worked and other benefits provided for by law until closed pursuant to QRS 656.278.

WCB CASE NO. 79-10, 374

November 28, 1980

WILEY F. COLE, CLAIMANT
Benton Flaxel, Claimant's Atty.
Paul L. Roess, Atty. for SAIF.
Request for Review by Claimant

On November 18, 1980 the Board received from the claimant's attorney a request for reconsideration of its Order on Review dated November 13, 1980.

The request for reconsideration contends that the issue of extent of disability was not before the Referee, having been withdrawn at the hearing by a stipulation. Despite this, the Referee eliminated the 10% award granted by the Determination Order of July 20, 1979 on the basis that the claim was open for an authorized program of vocational rehabilitation.

After giving due consideration to this request, the Board concludes that claimant's request has merit. The Court of Appeals in Minor v. Delta Truck Lines, 43 Or. App. 29, held that a worker, if medically stationary, is entitled to have the extent of his disability rated even if the worker is in an authorized program of vocational rehabilitation. The Board finds that its Order on Review was in error based on this court decision.

The Board now concludes that claimant is entitled to compensation for temporary total disability from June 25, 1979 through September 23, 1979, the date he became medically stationary, and that claimant is entitled to an award of 10% unscheduled disability.

ORDER

The order of the Referee dated May 1, 1980 is modified.

The July 20, 1979 Determination Order's award granting claimant 10% unscheduled disability is hereby reinstated.

In all other respects the Referee's order is affirmed.

CLAIM NO. C 306803

November 28, 1980

JAMES J. OXFORD, CLAIMANT

Foss, Whitty, Roess & Mr. Tichenor, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Own Motion Order

On October 30, 1980, claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction and reopen this claim for his June 3, 1971 back injury. This claim had been closed by Determination Order dated November 17, 1971 which awarded claimant compensation equal to 16% for 5% unscheduled disability for this injury. Claimant's aggravation rights have expired.

On August 12, 1980, Dr. Collins reported that claimant had been experiencing potency problems as well as urological difficulties. They were related to claimant's original back injury and treatment for it. Claimant underwent additional testing. Dr. Collins authorized time loss beginning on August 13, 1980.

Dr. Adams, on November 4, 1980, reported that claimant had continuing difficulty with his back. He reported that claimant had been off work for approximately two months and had not improved. Dr. Adams felt that claimant should undergo a myelogram and possibly additional surgery.

The SAIF Corporation (SAIF) on November 12, 1980, advised the Board it did not oppose an Own Motion Order reopening the claim for time losses verified by claimant's treating physician.

The Board, after reviewing the evidence submitted to it, finds the evidence sufficient to warrant reopening of this claim effective the date claimant was hospitalized for the additional testing performed on August 12, 1980 for payment of compensation less time worked, if any, and other benefits provided for by law until closed pursuant to ORS 656.278. Claimant's attorney is entitled to a fee equal to 25% of the increased award of temporary total disability compensation not to exceed the sum of \$300.

IT IS SO ORDERED.

CLAIM NO. 481441

November 28, 1980

GARY PEYTON, CLAIMANT

Bischoff, Murray & Strooband, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Own Motion Order

On October 27, 1980, claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction and reopen this claim for his December 12, 1973 back injury. This claim had been originally closed by Determination Order dated September 5, 1974 which awarded claimant temporary total disability compensation and an award of compensation equal to 80% for 25% unscheduled disability for his injury. Claimant's aggravation rights have expired. Attached to this request were various medical reports.

In April 1980, Dr. Bolton reported that claimant had been seeing him because of increasing complaints of back pain. He felt claimant was "showing signs of further degenerative disc disorder at the lumbosacral area below the area of spondylolisthesis." He suggested claimant begin a period of conservative treatment. In August 1980, Dr. Bolton reported he felt claimant needed a spinal fusion to stabilize his back. This was scheduled for October 28, 1980. He felt that claimant's condition would continue to worsen. Dr. Bolton felt the claimant's need for this surgery was related to claimant's 1973 injury.

In November 1980, the Orthopaedic Consultants reported claimant was desirous of having a spinal fusion. They diagnosed a chronic lumbosacral sprain as a result of the December 1973 injury which had been superimposed upon a congenital spondylolisthesis grade 1 at the L-5 - S1 level. They felt the claimant's condition was not stationary at that time and that it should improve. It was their opinion that surgery suggested by Dr. Bolton would increase claimant's chances of returning to employment and keeping him employed.

On November 12, 1980, the SAIF Corporation (SAIF) advised the Board it would not oppose an Own Motion Order reopening this claim as of the date the surgery suggested by Dr. Bolton was performed.

The Board, after reviewing the evidence submitted to it in this case, finds that this case should be opened under the Board's Own Motion jurisdiction effective the date claimant is hospitalized for the surgery recommended by Dr. Bolton for the payment of compensation and other benefits until closed pursuant to ORS 656.278. Claimant's attorney is entitled to a fee equal to 25% of the increased temporary total disability compensation not to exceed the sum of \$300.

IT IS SO ORDERED.

December 1, 1980

RICKY D. ALLEN, CLAIMANT**Ringo, Walton, et al, Claimant's Attys.****Schwabe, Williamson, et al, Employer's Attys.****SAIF, Legal Services, Defense Atty.****Request for Review by SAIF**

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which remanded this claim to it for acceptance and payment of compensation and other benefits provided for by law. The SAIF contends that Employee Benefits Insurance Company (EBI) is responsible for the claimant's current condition.

The Board finds that the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the Board affirms the Referee's order. We find that the evidence in this case does not establish that the claimant's low back problems are the responsibility of SAIF. The injury the claimant suffered on either June 21 or 22, 1978 was to his right arm and shoulder. This was accepted by SAIF. The claimant returned to work as a welder after this injury. There was no mention of any back pain or problems after this injury until February or October 1978.

Dr. Melgard was given a history by the claimant of returning to work after his arm and shoulder injury, an experiencing problems with his right arm, shoulder and developing left hip and low back distress. The claimant was hospitalized and eventually underwent surgery for his back condition. Dr. Melgard opined that the claimant had a second degree "spondylo" at the L4-5 level which was probably congenital, but had probably been fractured in the course of the work and the claimant had been doing.

Dr. Tilley opined that the most significant aggravating factor in the claimant's case was his work as a welder. He felt that carrying heavy weights up a ladder in the awkward position was required in doing this type of a job and probably aggravated the claimant's spondylolisthesis.

Dr. John opined that the claimant's condition, diagnosed as traumatic arthritis with spondylolisthesis at the L4-5 level with degenerative disc disease, was not caused by any exercises that had been prescribed to him, but was caused by his heavy work. He felt it was due to the congenital defect that the claimant had which had been aggravated or aggravated by the claimant's heavy work.

We find that the greater weight of the evidence is that the claimant's work as a roofer caused his pre-existing back condition to worsen to the point where he became disabled and required medical care and treatment of his back. Further, we find that the evidence clearly establishes that the claimant returned to work as a roofer after his right arm and shoulder injury and worked as a roofer while EBI was providing workers' compensation insurance coverage for his employer. Applying the last injurious exposure rule to the facts of this case, we find that EBI and not the SAIF is the responsible carrier for the claimant's low back problems. Therefore, the Board reverses the Referee's order and remands this claim to EBI for acceptance and processing.

As a separate comment, the Board finds that the Referee's reliance on the testimony of the claimant in determining a complex medical question was incorrect. In such cases, the resolution of complex medical issues or questions must be made based upon the medical evidence presented in the case.

ORDER

The Referee's order dated May 21, 1980 is reversed.

The SAIF Corporation's denial dated January 18, 1980 is restored and affirmed.

Employee Benefit Insurance Company's denial dated August 10, 1980 is set aside and this claim is remanded to it for acceptance and processing. The attorney fee granted by the Referee is to be paid by Employee Benefit Insurance Company.

The SAIF Corporation is entitled to reimbursement by Employee Benefit Insurance Company of all sums it has paid pursuant to the Referee's order and the Order Designating Paying Agent.

Claimant's attorney is hereby granted a reasonable attorney's fee for prevailing at Board level in the amount of \$250, payable by the Employee Benefit Insurance Company.

December 1, 1980

GEORGE W. ANDERSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On April 9, 1959, claimant suffered a compensable injury to his right leg. This injury required surgery on the leg including the use of screws to stabilize the fractures. This claim was closed and claimant's aggravation rights have expired.

The Board ordered this claim reopened under its Own Motion jurisdiction effective May 28, 1980 for surgery which had been performed by Dr. Platner. Dr. Platner had removed portions of the three screws used to stabilize the fractures in claimant's right leg. Claimant returned to his regular job on June 15, 1980.

On October 21, 1980 the SAIF Corporation (SAIF) requested determination be made in this case. The Evaluation Division of the Workers' Compensation Department on November 10, 1980 recommended this claim be closed with an award of additional temporary total disability compensation from May 28, 1980 through June 14, 1980 and recommended no additional award of permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from May 28, 1980 through June 14, 1980 less any time worked.

December 1, 1980

RICHARD A. BULT, CLAIMANT
Emmons, Kyle, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

The claimant's request for the Board to exercise its Own Motion jurisdiction and reopen this claim was referred to the Hearings Division to be set for a hearing. The Referee was to determine if the claimant's current condition was related to his April 28, 1970 industrial injury and, if so, whether his condition had worsened since the last award or arrangement of compensation. After a hearing, the Referee found that the claimant's current condition was due to his 1970 injury and had worsened. The Referee recommended the Board vacate its February 2 (sic), 1980 Own Motion Order, enter an Own Motion Order reopening this claim effective September 6, 1979 remanding it to the SAIF Corporation for processing and the payment of compensation, and awarded claimant's attorney a fee.

The Board, after reviewing this record, agrees with the Referee's conclusions. The Referee incorrectly stated the date of our February 1980 order. The Own Motion Order was dated February 15, 1980 and not February 2, 1980. However, we do not agree that our Order has to be vacated. The order referring this case for a hearing had the effect of vacating that order. With these corrections, the Board would affirm and adopt the Referee's order entered in this case. A copy of the Referee's order is attached hereto and by reference incorporated into this order.

A hearing on the above-captioned case was held in Salem, Oregon, on September 8, 1980, before William H. Peterson, the undersigned Referee. The claimant was present and was represented by J. David Kryger of Emmons, Kyle, Kropp & Kryger, P.C. The employer, Portland Wire and Iron Works (Portland Wire), and its insurer, the State Accident Insurance Fund (now SAIF Corporation), were represented by Allen W. Lyons, Associate Counsel, SAIF.

The hearing was held pursuant to an Own Motion Order Referring for Hearing entered by the Workers' Compensation Board (Board) on August 1, 1980. A transcript of the hearing was prepared. On October 2, 1980, the parties were mailed copies, and the matter was considered submitted for findings and recommendations.

The issue is "whether claimant's current condition is related to his April 28, 1970 industrial injury and, if so, whether his condition has worsened since the last award or arrangement of compensation" (Ex. 50, p.1).

The claimant contends that the low back condition for which he obtained medical treatment beginning in September 1979 is a worsened condition resulting from his April 1970 compensable injury. Since the alleged worsening occurred after his aggravation rights under ORS 656.273 had expired, the claimant seeks a reopening of his claim by the Board pursuant to its authority under ORS 656.278. By an Own Motion Order of February 15, 1980, the Board denied the requested reopening (Ex. 47). The claimant's counsel requested reconsideration of that decision (Ex. 49). The Board then ordered this hearing.

FINDINGS

On April 28, 1970, the claimant, then age 25 and employed by Portland Wire as a structural-steel welder, compensably injured his back lifting a heavy bottle of welding gas. The initial treating physician, a chiropractor, reported that the injury was to the "low dorsal spine" (Ex. 1). After one treatment, the chiropractor referred the claimant to an osteopath physician, Dr. Robert Ho, who remained the attending physician until after the claim was closed in June 1971. Dr. Ho's treatment was conservative.

When Dr. Ho first examined the claimant on May 7, 1970, only nine days after the injury, he diagnosed a "lumbodorsal strain" (Ex. 2, p.2). In a hospital report written the next day, Dr. Ho diagnosed a "lumbosacral strain and lumbar adhesive capsulitis" (Ex. 5). There are numerous other medical reports that refer to a "lumbodorsal" injury. The Determination Order issued in June 1971 granted a permanent disability award for unscheduled low back disability (Ex. 29). In a September 13, 1971, Opinion and Order that followed a hearing on that Determination Order, the Hearing Officer found that the claimant had "sustained a compensable low back injury", and increased the "low back disability" award (Ex. 31). The evidence is overwhelming that the 1970 injury involved the lumbosacral spine as well as the dorsal spine - and I so find.

The claimant was the only witness called at the hearing. He was credible, but had a poor memory for dates and names. From his testimony, I find that he had continual low-back symptoms in the years following the injury and claim closure. Before the closure, while still under Dr. Ho's care, he tried to return to his regular job on at least three occasions. These efforts were very short-lived. In October or November 1971, however, he did return to his regular welding work at Portland Wire - and lasted about a year, leaving for the warmer climate of Arizona because a physician told him that would be better for his back. In the next six-plus years the claimant moved from Arizona to California to Washington to Oregon and worked for a variety of different employers, usually at welding jobs. These employments, which generally involved some heavy physical labor, ranged in length from a few days to a year. He was off work between them for varying lengths of time, some as long as six months. His back symptoms were present throughout this time. His usual reason for leaving a job was that the work was too heavy for his lower back, he could not continue, and he had "to lay up for a while". Periodically, he was treated by chiropractors. He last worked in July 1979.

Although there may have been a gradual increase in the claimant's low back symptoms throughout those years, there was a more significant increase, including radiating leg symptoms, over a period of about six months in 1979. He had not sought further medical attention when he tried, informally and unsuccessfully, in July or August, 1979, to have his claim reopened (Ex. 37 and Ex. 38). He finally did seek treatment, and was seen on September 5, 1979, by Dr. Don Paulson, who diagnosed a degenerated disc in the lumbar area and recommended a myelogram (Ex. 39). The myelogram was done on November 1. The reports are conflicting as to whether the myelogram revealed any abnormality (cf. Ex. 41 with Ex. 42), but Dr. Paulson recommended surgery. A lumbosacral laminotomy was performed on December 19, 1979. The pre-operative and post-operative diagnoses were the same: a degenerated lumbosacral disc (Ex. 44).

From the foregoing, there is little question that the claimant's low back condition worsened - and I so find. I also find that the worsening occurred "after the last award or arrangement of compensation": The Referee's Opinion and Order of September 15, 1971, noted above, was based on a hearing of August 26, 1971. The Referee's decision was reversed by the Board on March 23, 1972, and reinstated by a Circuit Court on July 17, 1972. Regardless of which of those dates is considered the "last award", the most significant worsening of the claimant's low-back condition occurred long after the latest of those "decision" dates. (If it was necessary to do so, I would no doubt conclude that a worsening that occurs after the hearing record has closed is sufficient to satisfy ORS 656.273(1). It is that hearing upon which the Opinion and Order and all subsequent appellate action is based. The choice of one of the later "decision" dates would create an artificial,

post-hearing, medical hiatus.) The problem, then, is not whether there has been a worsening, but whether it resulted from the 1970 compensable injury.

That is a factual question to be decided upon the basis of expert medical opinion. The only such opinions are from Dr. Poulson. On October 10, 1979, he wrote that the claimant's lumbar pain went back to the 1970 injury (Ex. 39, p.1). On October 29, after reviewing the prior medical reports on the claim, Dr. Poulson wrote that he had "no difficulty in relating" the claimant's complaints to the original injury (Ex. 40, p.1). Dr. Poulson goes on in that report to speak of a degenerating lumbar disc, aggravated by the 1970 lifting injury. (An earlier report from a doctor the claimant saw once in April 1972, two years after the injury, contains a diagnosis of "early" degenerative arthritis, related to the 1970 injury; Ex. 33.) Finally, in July 1980 Dr. Poulson wrote that, based on the history provided by the claimant, he believed "within reasonable medical certainty" that the present lumbar problems are related to the 1970 injury (Ex. 48).

SAIF argues that there was a degenerative disc condition before the 1970 injury, and that it is that continuing degenerative condition - after the 1970 aggravation of it had leveled off - that led to the need for surgery. The problem with that argument is that it is based almost solely on SAIF's interpretation of Dr. Poulson's reports, and speculation. There is no evidence of either diagnosis or treatment of a degenerative lumbar spine before the 1970 injury. The claimant did have some low back pain in 1964 from pulling lumber in a saw-mill, but there is no evidence that that was any more than a minor transitory incident. The 1972 diagnosis of "early" degenerative arthritis suggests a traumatic arthritis resulting from the injury, which was in its "early" stages two years after the injury. I believe that SAIF's view of Dr. Poulson's reports is a tortured interpretation for which there is no factual pre-injury basis in the record.

There is no persuasive evidence of intervening, post-1970 injuries as a cause for the claimant's worsened condition. He was in an automobile accident in 1976 and in March 1979, but in neither case did the claimant suffer injury or receive medical treatment.

I find, therefore, that the claimant's worsened condition in 1979 did result from the 1970 compensable injury.

RECOMMENDATIONS

I recommend that the Board:

1. Vacate its Own Motion Order of February 2, 1980.

2. Enter an Own Motion Order which reopens the claim, effective retroactively from September 6, 1979, and remands it to SAIF for processing and the payment of compensation.
3. Award the claimant's attorney an attorney fee of 25 percent of and out of the additional temporary total disability benefits resulting from the reopening, not to exceed \$750, plus 25 percent of and out of any additional permanent disability compensation awarded by the Board upon reclosure of the claim, the combined total not to exceed a fee of \$2,000.

With respect to the recommended attorney fee, I am unable to find a fee agreement in the case file. The Board will no doubt wish to ask Mr. Kryger to supply a copy of his fee agreement with the claimant.

CLAIM NO. TC 288027

December 1, 1980

BESSIE M. BUSH, CLAIMANT

Pozzi, Wilson, et al, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Own Motion Order

On February 2, 1971, claimant suffered a compensable injury to her left knee. This claim was initially closed by a February 23, 1971 Determination Order. Claimant's aggravation rights have expired. This claim was subsequently reopened and closed resulting in claimant being awarded compensation equal to 120° for 80% loss of her left leg.

This claim was reopened by the Board under its Own Motion jurisdiction effective February 5, 1979 when claimant sought medical treatment for continuing problems with her left leg.

Dr. Witt, on September 8, 1980 reported claimant's condition was again medically stationary. He felt claimant could perform office work, but she could not walk well or stand for prolonged periods of time.

On September 20, 1980, claimant was examined by Dr. Weinman at the SAIF Corporation's (SAIF) request. Dr. Weinman felt claimant's condition was stationary. He found claimant had solid left knee fusion with some malrotation.

On October 16, 1980 the SAIF requested this claim be closed and a Determination Order be entered. The Evaluation Division of the Workers' Compensation Department on November 10, 1980 recommended this claim be closed with an award of additional temporary total disability compensation from February 5, 1980 through September 8, 1980 and one day on September 20, 1980 and an additional award of permanent partial disability equal to 7.5% for 5% of her left leg. This last award was based on a one-inch shortening of claimant's leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from February 5, 1979 through September 8, 1980 and for one day on September 20, 1980 less time worked and additional compensation equal to 7.5% for 5% loss of her left leg.

Claimant's attorney has been compensated in the Board's Own Motion Order.

WCB CASE NO. 79-8395

December 1, 1980

ROBERT V. CONDON, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
Reiter, Bricker, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which set aside its denial of this claim and granted the claimant's attorney a fee. The employer contends that its denial should be restored and affirmed.

The Board finds that the Referee correctly stated the facts of this case in his order.

The Referee found that the claimant proved by a preponderance of the evidence that he injured his right knee July 4, 1979 while emptying a garbage can for his employer. We do not agree. We find the record establishes that the claimant's testimony is not credible. He provided various versions of the events of July 4, 1979 to different people. Based on this record, we find the evidence establishes material inconsistencies regarding the alleged garbage can incident sufficient to overcome the deference normally accorded the Referee in matters of credibility. We find it more probable than not that the claimant did not injure his right knee in any garbage can incident as we doubt that incident ever occurred. If the incident did occur, then no injury has been proven.

We do not agree with the Referee's conclusion regarding the compensability of any right knee injury claimant may have suffered while playing basketball (shooting baskets or playing "horse") later in the day of July 4, 1979. We find such activity was prohibited by the employer. We further find no evidence to show that the employer acquiesced in such activity by employees during working hours.

The record establishes that on August 12, 1979, while playing basketball (shooting baskets and/or playing "one on one"), the claimant injured his right knee. This injury occurred when claimant was not working and is clearly not compensable. The evidence establishes that this August 12, 1979 incident caused disability and the need for medical treatment. This off-the-job incident clearly contributed more than slightly to the claimant's right knee problem--to what extent beyond slight has not been established. Had the employer any responsibility for the right knee condition up to that time and we have found they did not, then the August 12, 1979 incident extinguished that responsibility.

ORDER

The Referee's order dated April 29, 1980 is reversed in its entirety.

The employer's denial dated September 20, 1979 is restored and affirmed.

December 1, 1980

STUART J. DAVIS, CLAIMANT

SAIF, Legal Services, Defense Atty.

Own Motion Determination

On April 22, 1968, the claimant sustained a compound fracture of distal tibia with bi-malleolar fracture of his left ankle. The claim was initially closed by Determination Order dated June 6, 1969 which awarded claimant temporary total disability, temporary partial disability compensation and an award of compensation equal to 20% loss of the left foot. After the original claim closure, additional surgery was performed and the claim was again opened and closed on two occasions. The claimant also entered into a stipulation. The claimant has received a total award of compensation equal to 55% loss of his left foot for this injury.

Dr. Larson, on December 13, 1979 performed an arthrodesis of the left ankle due to the continued deterioration of the ankle. The Board issued an Own Motion Order reopening this claim effective the date of the surgery. Claimant returned to work on May 15, 1980. Dr. Larson reported that claimant had a solidly fused ankle and subtalar area and the foot was in a neutral position.

On October 27, 1980, Weyerhaeuser Company requested a determination be made in this case. The Evaluation Division of the Workers' Compensation Department on November 10, 1980 recommended this claim be closed and claimant be granted an additional award of temporary total disability compensation from December 13, 1979 through May 14, 1980, an additional award of 10% for partial disability of the left foot, making a total award of 65% loss of the left foot.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from December 13, 1979 through May 14, 1980 less time worked and an additional award of compensation equal to 10% loss of his left foot.

JAMES EBER, CLAIMANT

Roger D. Wallingford, Claimant's Atty.

Lang, Klein, et al, and, Cheney & Kelley, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

Cross Request by Employer

The claimant and Industrial Indemnity (Industrial) seek Board review of the Referee's order which affirmed Industrial's and Royal Globe Insurance Company's denial for claimant's left knee osteotomy and found claimant's carpal tunnel syndrome related to his industrial injury and remanded it to Industrial for acceptance and payment of compensation. The Referee also granted claimant's attorney a fee for prevailing in overcoming the denial on the carpal tunnel syndrome issue. The claimant contends his left knee condition is the responsibility of one of the insurance carriers. Industrial contends its denial of claimant's carpal tunnel syndrome should be restored and affirmed.

The Board finds the Referee correctly recited the facts of this case in his order.

After de novo review of this record, the Board modifies the Referee's order. We agree with the Referee's affirming the two carriers' denials of claimant's left knee condition. However, we do not agree with the Referee's finding that the carpal tunnel syndrome is related to his industrial injury. The claimant feels he was required to use crutches due to his "knees" and not just because of his right knee condition. There is no medical evidence that claimant was required to use crutches because of his right knee injury. Dr. Hopkins indicates claimant used crutches because of his knees, not just his right knee. Dr. Hopkins does not state an opinion on the connection, if any, between claimant's right knee injury and claimant's carpal tunnel syndrome. We do not find that claimant has met his burden of proof that his carpal tunnel syndrome was related to his industrial injury or treatment for it. Therefore, the Board modifies the Referee's order by reversing his finding that Industrial is responsible for the claimant's carpal tunnel syndrome and his awarding the claimant's attorney a fee.

CRIER

The Referee's order dated February 12, 1980 is modified.

Industrial Indemnity's denial of responsibility for claimant's left carpal tunnel syndrome is rescinded and affirmed.

The Referee's affirmation of the denials of Industrial Indemnity and Royal Globe Insurance Company for claimant's left knee osteotomy is affirmed.

WCB CASE NO. 79-4401

December 1, 1980

PATRIC ANN GOODWIN, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which set aside its denial of this claim, remanded it to the SAIF for acceptance and payment of compensation and other benefits that claimant is entitled to pursuant to law effective October 31, 1978, assessed a penalty equal to 10% of the temporary total disability compensation for the period October 31, 1978 to January 25, 1979 for the SAIF's improper processing of this claim and late denial, and awarded an attorney's fee to claimant's attorney. The SAIF contends this was error on the part of the Referee.

The Board finds that the Referee correctly recited the facts of this case in his order.

After de novo review of the record in this case, the Board modifies the Referee's order. The Board concurs with the Referee that claimant has proven her claim, and that the Referee correctly set aside the SAIF's denial of it.

The Board also agrees with the Referee that a penalty must be assessed for the SAIF's unreasonable refusal to pay compensation and its unreasonable delay in denying this claim. The SAIF failed to accept or deny this claim within 60 days. Further, it paid one day of temporary total disability compensation timely, but did not pay any more. We do not find there are any mitigating circumstances that justify assessing a penalty less than a maximum amount in this case. Therefore, the Board would assess a penalty equal to 25% of the temporary total disability compensation due claimant from October 31, 1978 through January 25, 1979 for the SAIF's unreasonable acts in processing this claim. This is in lieu of the penalty granted by the Referee.

ORDER

The Referee's order dated May 14, 1980 is modified.

The claimant is hereby awarded as a penalty for the SAIF Corporation's unreasonable refusal to pay compensation and its unreasonable delay in denying this claim a sum equal to 25% of the temporary total disability compensation due claimant for the period of October 31, 1973 through January 25, 1979. This is in lieu of the penalty assessed by the Referee.

The remainder of the Referee's order is affirmed.

Claimant's attorney is granted a fee of \$300 at the Board level.

WCB CASE NO. 79-5734

December 1, 1980

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

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which granted claimant an award of compensation equal to 124% for 70% unscheduled disability for his neck and head injury. The SAIF contends the award is excessive and asks the Board to affirm the Determination Order award of compensation equal to 64% for 20% unscheduled disability for claimant's injuries.

The Board finds the Referee correctly recited the facts of this case in his order.

After considering all the evidence in this case, we modify the Referee's award of unscheduled permanent disability compensation. The medical evidence establishes claimant has very limited motion of his neck on a functional basis. The following restrictions have been placed on claimant: no heavy lifting, pulling or tugging with his arms, no work requiring a great deal of neck motion, and no driving since claimant is unable to move his head quickly. Claimant is capable of performing a desk job if he is able to take frequent breaks in order to allow him to change positions. The impairment of claimant's cervical spine has been rated in upper range of mildly/moderately.

Claimant is 39 years old and has a 12th grade education. He had worked for this employer for approximately ten years at the time of his injury. Claimant has generally average intelligence with a bright-normal performance intelligence. We note, as did the Referee, that claimant is highly motivated to work and his employer has provided a job within his limitations. The "desk job" to which claimant has been transferred has been characterized as "a very sheltered position." Even if this is true, the job provided is a bona fide job necessary in the employer's day-to-day business. We do not choose to speculate that but for the fact this employer has transferred claimant to a "desk job" that claimant would be unable to secure similar gainful and suitable employment in the general labor market.

Based on the evidence in this case, we find claimant is entitled to an award of compensation equal to 160% for 50% unscheduled disability for his head and neck injuries. This award of compensation is in lieu of all prior awards of unscheduled disability claimant has received for these injuries.

ORDER

The Referee's order dated February 29, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 160% for 50% unscheduled disability for his neck and head injuries. This is in lieu of all prior awards of unscheduled disability claimant has received for this injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-4345

December 1, 1980

KENT L. HALEY, CLAIMANT
Olson, Hittle, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation seeks Board review of that portion of the Referee's order which remanded claimant's claim for his mental condition to SAIF for acceptance and payment along with a fee for claimant's attorney.

The majority of 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 April 23, 1980, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services at Board review in the amount of \$300, payable by the SAIF Corporation.

Board Member McCallister dissents as follows:

I do not agree with the opinion of the majority. I would modify the Referee's order by reversing that portion which found the mental stress condition compensable.

Taking the evidence as a whole and relying heavily on the analyses and opinions of Dr. Quan, together with the claimant's testimony, I find a lack of proof that claimant's contentions establish compensability under ORS 656.802.

I find a preponderance of the evidence establishes that claimant's mental stress condition arose out of the nonwork related health problems which he testified had been devastating to his ability to carry out his work-related duties in the manner his personality dictated. The evidence indicates the internal politics and developing policies of the National Church were the portent of change, that, absent the non work related health problems, devastating as they were to the claimant, he probably would have continued to function in his usual capacity as priest regardless of the "winds of change." He may not have agreed nor "liked" the position he found himself in vis a vis the National Church stance; nonetheless, as he testified, he probably would have continued to serve in his capacity as a priest until regular retirement.

INTRODUCTION

Pursuant to notice hearing convened on January 17, 1980 in Salem, Oregon and was continued for closing arguments. The claimant was present and was represented by Mr. Rolf Olson. The State Accident Insurance Fund was represented by Ms. Merrily McCabe. The record was closed on February 25, 1980 after receipt of closing arguments.

ISSUE

The compensability of claimant's claims for conditions diagnosed as depression and anxiety neurosis and "a worsened physical condition", i.e., an irritated colitis and an aggravated ileostomy.

FINDINGS OF FACT

Claimant, a 62-year-old priest, entered the priesthood during 1949. During the term of claimant's active employment, he served in the ministry at St. Marks Episcopal Church located in Portland, Oregon, for one year, at St. Peters Church located in Portland, Oregon, for 16 years, at St. Marys Church located in Eugene, Oregon, for 4 years and at St. Timothys Church located in Salem, Oregon from September 1970 to October 1978. Claimant then terminated his job, or retired, because of the increased pressures of his priesthood duties at St. Timothys Church, i.e., an increased work load and claimant's philosophical or theological attitude which was in conflict with the policies established by the National Episcopal Church. Contributing factors to claimant's job termination, or retirement, were certain physical difficulties he experienced, i.e., ileostomy problems, arthritic problems and back problems.

On April 2, 1979, claimant filed a Form 801 alleging that the reason for his job termination, or retirement, was because of his long-term job activities. Claimant alleged, although it is not clear from the Form 801, that mental stress, due to the job, coupled with his ulcerated colitis condition and ileostomy condition, also aggravated by his job activities, caused the job termination and were compensable conditions. The employer, under the signature of Bishop Matthew Bigliardi, reported on the claim form:

"Back injury, 1965/ileostomy, 1969:
Physical condition aggravated by job
tensions and stress situations in per-
formance of priestly duties until
employee was no longer able to serve."

The State Accident Insurance Fund denied the claims on May 4, 1979 because the representative of SAIF felt that claimant's conditions were not causally related to his employment activities.

Dr. Michael Fleming, a clinical psychologist, has examined and treated claimant regarding his mental condition. He first saw claimant on March 26, 1979. He diagnosed claimant's condition as a modest, severe, anxiety neurosis. The doctor recommended treatment in the form of psychotherapy and reported, on April 10, 1979, that claimant's mental condition prevented his return to regular employment. Also, the doctor causally related claimant's anxiety neurosis to his pre-existing ileostomy condition and the normal stress, long-term stress, of his work activities as an Episcopal priest. Dr. Fleming's opinions are based on the history given him by claimant and certain diagnostic tests which include the Rorschach, Minnesota/Multiphasic Personality Inventory test and the Thematic Apperception Test.

Claimant's pre-existing physical and mental conditions, those which existed before October 1978, were: an ulcerated colitis, severe, which resulted in a total colectomy with ileostomy; a bad back, i.e., possible herniated lumbar disc which was somewhat symptomatic; a prostrate problem; general fatigue and mental stress which increased with the passage of time; a mild osteoarthritic problem; a mild allergy characterized by chronic post-nasal drip; and, skin lesions on the right and left forearms, possibly pre-cancerous.

Dr. Daniel F. Hogan, a family physician, examined and/or treated claimant for multiple physical problems beginning at least February 20, 1974. Dr. Hogan, on June 5, 1979, reported that he felt there was strong evidence that claimant demonstrated severe anxiety and some element of depression. The doctor also reported that he felt claimant's mental stress was caused by the demands of his profession and the worries of his health and prompted claimant, advisedly so, to proceed with retirement because of his disability. Later, on December 21, 1979, Dr. Hogan opined that he concurred with the opinion set forth, concisely, in Dr. McCullouch's report that claimant's work as a parish priest did contribute a great deal to the development of his mental condition.

Dr. Michael J. McCullouch, a psychiatrist, examined claimant on June 19, 1979 on referral from Dr. Fleming. Dr. McCullouch diagnosed claimant's condition as a depressive reaction. On June 26, 1979, the doctor reported:

"Reverend Haley's depressive reaction does affect his ability to be re-employed in a gainful way. At this point in time, he has very little confidence that he can sustain employment. His depression has gradually worsened as time has gone on. It has made it very difficult for him to take any risks for fear of worsening his gastrointestinal condition. He is by nature an intense person and because of this, his depression takes the form of preoccupation with guilt, that he is letting people down. I feel that in his present condition that it would be very difficult for him to sustain any meaningful employment. As I said previously, I do feel that he should be in treatment."

Thereafter, on August 21, 1979, in order to clarify his prior report, the doctor opined that claimant's work activities as a parish priest was a material contributing factor to aggravating his colitis condition and causing his gradually worsening depression. The doctor reported that the probable cause of the condition diagnosed as a depressive reaction was the nature of claimant's pressures, i.e., but for the nature of claimant's work activities he would not have experienced the degree of depression he experienced on and after October 15, 1978.

Dr. Arlan Quan, a psychiatrist, examined claimant on April 27, 1979 at the request of the State Accident Insurance Fund. By report of April 27, 1979, Dr. Quan reported that he felt claimant demonstrated no significant psychiatric disorder. He also felt that claimant was an obsessive-compulsive, tense individual and that such traits had been life-long. The doctor reported:

"Under the stresses he spoke of, I speculate that he did have symptoms which might have been diagnosed as depressive in nature."

The doctor reported that claimant was a capable individual, however, he did not feel that claimant would again resume active work as a parish priest.

Dr. Quan testified at hearing. His testimony, in large part, about claimant's lack of psychiatric disorder and the reasons therefor was not essentially different than the information set forth in his report of April 27, 1979. The doctor, however, conceded: that a person with claimant's personality was more likely to have an ileostomy; that a person with claimant's personality was more likely to be affected by a colectomy; and, that a person with claimant's personality was more likely to react adversely to ideological differences, i.e., the conflict with the church policies and changes, because of his underlying personality of being unable to adapt to stresses. The doctor also testified that he felt claimant's decision to retire from the church during October 1978 was related to combined factors of: stress of his work activities; stress of the ileostomy; general fatigue and tiredness; the back and left leg problems; the osteoarthritic problems; and, the ideological difference with the church, i.e., those dictated at the national level. The doctor also conceded that claimant may have been frustrated, upset and unhappy, but, he did not feel claimant was significantly depressed. The doctor also conceded that a Rorschach test and MMPI test were recognized diagnostic tools and could have been factors in the diagnosis of depression.

All lay and expert testimonies contained in the record are credible.

CASE LAW

A workers' compensation claim involving a mental disorder only may be compensable as an occupational disease. James v. SAIF, 44 Or App 405, ___ P2d ___ (1980).

In workers' compensation claims involving a mental disorder only, claimant need only prove causal relationship between the mental disorder and the work activities by a preponderance of the evidence, i.e., by establishing that the facts asserted are more probably true than not. Hutcheson v. Weyerhaeuser, 283 Or 51, ___ P2d ___ (1979).

In workers' compensation claims involving a mental disorder only, claimant need not prove that the employment environment was unusual or excessive to the point that the average worker would experience an adverse emotional reaction. James v. SAIF, supra, and Paresi v. SAIF, 44 Or App 689, ___ P2d ___ (1980).

In workers' compensation claims involving mental disorders only, the employer must accept the worker as he finds him with all the latent and obvious physical and mental deficiencies under the Workers' Compensation Act, for the purpose of determining compensability. Weller v. Union Carbide, 288 Or 27, ___ P2d ___ (1979); James v. SAIF, supra, and Paresi v. SAIF, supra.

CONCLUSIONS OF LAW

Claimant has proven, by a preponderance of the evidence, that his mental condition diagnosed as anxiety neurosis and depression, is a compensable claim. Dr. Fleming, clinical psychologist, and Dr. McCullouch, a psychiatrist, both agree that claimant's usual work activities were sufficient stress factors to cause, or materially contribute to, claimant's condition diagnosed as anxiety neurosis, including depression. Dr. Hogan, a family practitioner, agreed with the diagnosis and conclusions of Drs. Fleming and McCullouch. Drs. Fleming and McCullouch recommended medical treatment (psychotherapy and counseling) for claimant's condition. Drs. Fleming and McCullouch reported that claimant's mental condition, diagnosed as anxiety and depression, is disabling, i.e., that claimant should not work as a parish priest. The only medical evidence to the contrary is presented by Dr. Quan. In view of the historical facts of this case, coupled with the diagnostic procedures utilized by Dr. Fleming, I see no reason to defer to the opinion of Dr. Quan. In reporting, Dr. Quan used the terminology that claimant experienced no significant psychiatric disorder. He used the same terminology when he testified at hearing. Dr. Quan also conceded, when he testified, that the answers given by claimant to the Cornell Medical Index test, which he administered, were consistent with the presence of emotional disorder. Additionally, he conceded that the Rorschach test, MMPI test and the Thematic Apperception test, those tests given by Dr. Fleming, were recognized diagnostic tools and could have been factors considered in reaching the diagnosis of depression. Lastly, Dr. Quan testified to the reasons which contributed to claimant's job termination, or retirement, during October 1978. In addition to unrelated job factors, the doctor testified to at least two work factors, i.e., stress of his general work activities and the stress conflict related to ideological differences with the national church which he felt contributed to claimant's decision to retire. Claimant's burden of proof in this case is that he prove his claim by a preponderance of the evidence, i.e., establish that the facts asserted are more probably true than not. On the entire record, I am of the opinion that claimant has met the burden of proof. The claim presented to the State Accident Insurance Fund for claimant's disabling mental state diagnosed as anxiety neurosis and depression is allowed.

Claimant has failed to prove, by a preponderance of the evidence, that his claim for a worsened physical condition, i.e., an irritated colitis in relationship to his ileostomy, is a compensable claim. The compensability or non-compensability of claimant's claim for his "worsened physical condition" is primarily a medical question. Dr. Fleming and Dr. Hogan, as I interpret the record, expressed no opinion about causal relationship between claimant's colitis condition, his ileostomy problems and the job activities, except to report, historically, that claimant felt these conditions were aggravated by his job activities. Likewise, Dr. Quan did not, by a reasonable medical probability, causally relate claimant's colitis condition or ileostomy problems to his work activities. The doctor, by written report, reported only that claimant felt the stress of his work activities had increased his problems with regard to the ileostomy. At hearing, when Dr. Quan testified, he specifically indicated that he did not know if claimant's job activities or claimant's disabling mental condition had aggravated claimant's colitis condition or ileostomy problems. At most, the doctor conceded that claimant's basic personality structure was consistent with an ileostomy problem and he also conceded that, medically, an emotional problem could affect the gastrointestinal area as well as other physical areas of the body. The only evidence contained in the record to support claimant's claim about his "worsened physical condition" is that presented by Dr. McCullouch. On August 21, 1979, the doctor reported that claimant's work as a parish priest was a material contributing fact to aggravating claimant's colitis condition as well as causing depression. From the context of the reports submitted by Dr. McCullouch, it is clear that Dr. McCullouch examined or interviewed claimant with regard to his emotional state only (Exhibit 7). There is no indication that Dr. McCullouch conducted a physical examination of claimant or that he saw any medical records relating to claimant's colitis or ileostomy. This being so, Dr. McCullouch's opinion on causal relationship about claimant's colitis condition and ileostomy problems and his job activities is entitled to no weight. On the entire record, I am of the opinion there is a failure of proof as it relates to claimant's claim for his "worsened physical condition". Claimant's claim for his condition related to his colitis condition or ileostomy problems is denied.

ORDERS

NOW, THEREFORE, IT IS HEREBY ORDERED that the denial of claimant's claim for his physical condition (the colitis condition and ileostomy problems), issued by the State Accident Insurance Fund on May 4, 1979, be and is approved.

IT IS FURTHER ORDERED that the denial of claimant's claim for his mental condition which has been diagnosed as anxiety neurosis and depression, issued by the State Accident Insurance Fund on May 4, 1979, be and is disapproved.

IT IS FURTHER ORDERED that claimant's claim for his mental condition diagnosed as anxiety neurosis and depression be and is remanded to the State Accident Insurance Fund for acceptance as a compensable claim and for the payment of compensation to which claimant may be entitled as provided by the Workers' Compensation Laws.

IT IS FURTHER ORDERED that the State Accident Insurance Fund pay to Dye & Olson, claimant's attorneys, as a reasonable fee, \$1,500.00, pursuant to this Opinion and Order under ORS 656.326.

CLAIM NO. C 377803

December 1, 1980

ALFRED HANDSAKER, CLAIMANT
Evohl Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Reconsideration

On October 16, 1980, the Board issued an Own Motion Determination which granted claimant an additional award of compensation equal to 32° for 10% unscheduled disability for his June 27, 1972 back injury. This determination was made based on the Board's review of the information it had been supplied with and a review of the file in this case.

The claimant, by and through his attorney, on November 10, 1980, requested the Board reconsider its order. The claimant contends he is permanently and totally disabled. He contends a fair evaluation of his disability cannot be made without him appearing and testifying as to the extent of his disability. For this reason, claimant requested this case be referred to the Hearings Division to be set for a hearing.

The Board, after reconsidering this case, finds no reason to change its prior order or to refer this case to the Hearings Division to be set for a hearing. We do not find that claimant is permanently and totally disabled based on the evidence in this case. Therefore, the Board affirms its October 16, 1980 Own Motion Determination.

IT IS SO ORDERED.

December 1, 1980

LORETTA A. JONES, CLAIMANT
Mitchell Crew, Claimant's Atty.
Schwabe, Williamson, et al, Employer's Attys.
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 employer, and said request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of the law.

December 1, 1980

MORTON J. KANTOR, CLAIMANT
Janice B. Hall, Claimant's Atty.
William Replogle, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which ordered it to accept this claim. The employer contends that this claim was not timely filed, the claimant did not establish "good cause" for his failure to make a timely filing, and it was prejudiced by the late filing.

The Board finds that the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the Board reverses the Referee's order. We find that this claim was not timely filed. The Referee found that this claim had not been timely filed, but also found that the claimant had established good cause for failing to timely file his claim, and that the employer had knowledge of the claimant's injury in terms of the date the claimant first became disabled, September 1978. The Referee found that the claimant's fear of losing his job constituted good cause for not filing this claim earlier. Our review of the evidence in this case does not lead us to this conclusion. The claimant was hospitalized in September 1978 and had told Dr. Griffin that he was fearful of being fired if he was hospitalized. The claimant returned to work after the hospitalization and was not reprimanded or otherwise disciplined. We do not feel that whatever fear the claimant had can excuse his failure to file his claim. Fear can excuse a late filing of a claim, but the fear must be supported by some reasonable justification. This record does not indicate that that was true in this case. We do not find the Riddle case cited by the Referee is applicable to this case.

The claimant had been advised or at least had discussed the idea that his work was contributing to his condition with Dr. Griffin as early as September 1978. He did not file his claim until April 12, 1979, long after the 180-day limitation imposed by statute.

We agree with the Referee that the claimant has proven by a preponderance of the evidence that this claim is compensable. However, since it was not timely filed and he failed to establish a good cause to excuse his late filing, we reverse the Referee's order.

ORDER

The Referee's order dated April 30, 1980 is reversed in its entirety.

The insurance company's denial dated June 4, 1979 is restored and affirmed.

December 1, 1980

PATRICIA KEZAR, CLAIMANT

Galton, Popick & Scott, Claimant's Attys.

Schwabe, Williamson, et al, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Own Motion Order

On October 21, 1980, claimant, by and through her attorney, requested the Board exercise its Own Motion jurisdiction and reopen this claim for her March 30, 1972 injury. The claim was originally closed by a Determination Order dated January 5, 1973 and claimant's aggravation rights have expired. Subsequent claims have been reopened and closed a number of times.

In September 1980, Dr. Post reported claimant had a severe headache. Claimant was hospitalized for this on September 29, 1980. She was discharged from the hospital on October 8, 1980 and released for part-time work on October 13, 1980. Dr. Post felt claimant's headaches were caused by tension due to a recurrent cervical thoracic strain. He did not feel claimant had any increase in her permanent impairment.

The carrier advised the Board that claimant has returned to full-time work according to Dr. Post and is experiencing no difficulty. It did not oppose an Own Motion Order reopening this claim. Claimant is scheduled for a "closing" exam early in December 1980.

The Board, after considering the evidence submitted, it, finds the evidence is sufficient to warrant reopening of this claim under its Own Motion jurisdiction. Therefore, the Board orders this claim reopened effective September 13, 1980 for payment of compensation less time worked and other benefits provided for by law until closed pursuant to ORS 656.273. Claimant's attorney is entitled to an attorney's fee of 25% of the temporary total disability compensation not to exceed \$200.

IT IS SO ORDERED.

December 1, 1980

CHARLES OHLER, CLAIMANT
Frank Moscato, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order Referring for Consolidated Hearing

On November 11, 1980, claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction and reopen this claim for claimant's February 11, 1971 injury. Claimant's aggravation rights have expired.

On March 8, 1980, claimant fell at work and his back pain increased. EEI, the insurer of his employer, denied his claim for that injury, alleging that claimant's condition was related to a 1978 injury. A hearing is pending on this denial (WCB Case No. 80-7236).

The SAIF Corporation (SAIF) opposes reopening of this claim under the Board's Own Motion jurisdiction because it feels claimant's current problems are related to the March 1980 fall.

The Board, after reviewing the evidence in this case, finds it would be in the best interest of the parties if it remanded claimant's request for Own Motion relief to the Hearings Division to be consolidated for a hearing with Workers' Compensation Board Case No. 80-7236. The Referee shall determine if claimant's current condition is related to his February 11, 1971 injury and represents a worsening thereof since the last award or arrangement of compensation in this case. At the end of the hearing, the Referee shall cause a transcript of the hearing to be prepared and forward it, along with his recommendations in this case, with the other exhibits introduced at the hearing to the Board. The Referee shall enter an appealable order in WCB Case No. 80-7236.

IT IS SO ORDERED.

December 1, 1980

LAWRENCE W. PARSONS, CLAIMANT
Cynthia L. Barrett, Claimant's Atty.
Lang, Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 29, 1980, claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction and reopen this claim for his March 18, 1971 back injury. The claimant's aggravation rights have expired.

In January 1977, Dr. Harder reported the claimant had been complaining of back pain. The diagnosis was a re-current back sprain. Dr. Harder, in September 1978, reported the claimant was complaining of left leg pain.

On July 2, 1979, the claimant was hospitalized by Dr. Bell because of back pain. The diagnosis was degenerative disc disease at the L5-S1 level with probable recurrent herniated disc at the L4-5 level on the left side. Dr. Bell felt the claimant's old injury to the "lumbosacral nerve root" was probably going to give the claimant continuing problems.

Dr. Waldram, in July 1980, reported that he felt the claimant should undergo a myelogram. It was his feeling the claimant would likely need additional back surgery to excise a herniated disc.

The claimant's attorney, on October 27, 1980, advised the Board the claimant had decided not to undergo the myelogram suggested by Dr. Waldram.

Dr. Waldram advised the carrier's attorney that the claimant had advised him that his condition had improved. Therefore, Dr. Waldram did not perform the myelogram.

After reviewing the evidence in this file, the Board does not find the evidence sufficient at this time to warrant reopening of this claim under its Own Motion jurisdiction. The claimant is entitled to continuing medical care and treatment for his condition, related to his original injury, provided for by the carrier pursuant to ORS 656.245.

ORDER

The claimant's motion that the Board exercise its Own Motion jurisdiction and reopen this claim is denied.

December 1, 1980

HAROLD O. PETERSON, CLAIMANT
James F. Larson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which granted claimant an award of compensation for permanent and total disability. SAIF contends this award is excessive.

Claimant, then a 61-year-old truck driver, sustained an injury to his back while driving a truck. Claimant testified that on August 5, 1978, while completing his second run of the day, he experienced low back pain. This injury was originally diagnosed as an acute lumbar sacral strain. Claimant continued to have persistent back and right hip pain.

Dr. Miller hospitalized claimant on November 3, 1978 and a myelogram was performed which revealed a defect at the L4-5 level. Dr. Miller performed a bilateral partial laminectomy at the L4-L5 level with removal of the protruded disc and a bilateral foraminotomy of the L5 nerve roots. Subsequent to this surgery, claimant was fitted with a lumbosacral corset. The surgery relieved his leg pain and most of his back pain. His hip pain also subsided.

Dr. Miller found that claimant's condition was medically stationary as of May 1, 1979. He felt that claimant could perform work that did not require repetitive bending at the waist or lifting of more than 25 pounds on a repetitive basis. Dr. Miller felt that claimant should not perform any type of heavy work.

This claim was initially closed by Determination Order dated August 21, 1979 which awarded claimant a period of temporary total disability compensation and 20% unscheduled disability for his low back injury.

Claimant was referred for vocational assistance. The vocational counselor felt claimant was in "great distress medically" and it was not feasible to place him in employment. Claimant has completed roughly the fifth grade and has been classified as functionally illiterate. He has worked in the logging industry for a total of 43 years and worked for his last employer 13 years driving log truck.

In January 1980, Dr. Miller reported that claimant had had degenerative lumbar disc disease with lumbar spondylosis. He felt that after the lumbar laminectomy, claimant had progressed fairly well. He felt that claimant should not engage in any work that required prolonged sitting, such as driving a logging truck, repetitive bending at the waist or lifting anything weighing over 25 pounds. Dr. Miller felt claimant could perform sedentary work.

The Orthopaedic Consultants in February 1980 examined claimant and felt that his condition was stationary. They felt that he was vocationally handicapped. However, it was their opinion that it was unlikely that claimant would return to work in view of his age and his type of job skills. They rated total loss of function of his back at that time as mildly moderate and related this to his injury.

Claimant has not yet returned to work. The vocational counselor testified at the hearing that, based on claimant's age, education, work history and physical restrictions, there is no employment which claimant was capable of performing. Claimant testified that he has marginal reading skills, cannot add or subtract and has worked in the logging industry all his adult life. He indicates that his injury has required substantial modification of his daily activities. He feels that he can no longer drive for long periods of time or do other such activities.

The Referee found claimant permanently and totally disabled considering claimant's age, education, work history, and physical restrictions, concluding that he was totally foreclosed from the labor market. He felt that claimant did not have any skills or other abilities which would allow him to be vocationally retrained and had no transferrable job skills. Therefore, the Referee granted claimant an award of permanent and total disability effective May 22, 1979.

After de novo review of the record in this case, the Board modifies the Referee's order. We do not find that the medical evidence in this case alone establishes that claimant is permanently and totally disabled as defined in CRS 656.206. Dr. Miller, claimant's treating physician, feels that claimant is capable of sedentary work, that is, work not requiring repetitive lifting over 25 pounds, repetitive bending at the waist or prolonged sitting. Based on this finding, the Board must consider other relevant factors in determining claimant's loss of wage earning capacity due to this injury. We noted that claimant has not returned to work nor has he made reasonable efforts to find any other employment. He has since been found to be disabled by the Social Security Administration and is receiving those benefits. We find that claimant has elected to retire. We cannot excuse his lack of motivation to seek gainful and suitable employment on the basis of an inference that such would be "futile;" the record does not support that inference.

The Board, in this case, finds claimant has not proven he is permanently and totally disabled as defined in ORS 656.206.

After considering and weighing all relevant factors, the Board finds claimant is entitled to an award of compensation equal to 160° for 50% unscheduled disability for this injury.

ORDER

The Referee's order dated May 23, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for his August 5, 1978 back injury. This award of compensation is in lieu of all prior awards of unscheduled disability claimant has been granted for this injury.

The SAIF Corporation is entitled to offset any payments that it made pursuant to the Referee's order against this award for compensation.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-10, 403

December 1, 1980

ADELMA POTTERF, CLAIMANT

Malagon, Velure & Yates, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Order Withdrawing Own Motion Determination

On August 15, 1980, the Board issued an Own Motion Determination in this claim closing it and awarding the claimant an additional period of temporary total disability. Subsequently, the Board was advised that the claimant's attorney in this case had timely filed a Request for Hearing prior to the claimant's aggravation rights expiring. While this request was pending, the SAIF Corporation (SAIF) reopened this claim. The Board, based on these facts, finds that its Order was entered in error. Therefore, the Board orders that its August 15, 1980 Own Motion Determination be withdrawn and that this claim be remanded to the carrier for further processing and closure pursuant to ORS 656.263.

IT IS SO ORDERED.

December 1, 1980

VELMA RASMUSSEN, CLAIMANT

Hilson & Eder, and, Haessler, Stamer, et al, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which granted claimant an award of compensation for permanent and total disability. The SAIF contends that claimant is not permanently and totally disabled.

The Board finds that the Referee correctly recited the facts of this case in his order.

After review of the evidence in this case, we cannot find that the claimant is permanently and totally disabled as defined in ORS 656.206. The Court of Appeals in the case of Wilson v. Weyerhaeuser, 30 Or. App. 403, P2d (1978), discussed permanent and total disability. The Court stated that there are two types of permanent total disability: (1) Those that arise strictly from medical or physical incapacity, or (2) those that arise from a physical condition of less than total incapacity plus other relevant factors, such as age, training, aptitude, the condition of the labor market, adaptability to non-physical labor and emotional condition. We cannot say in this case that claimant's injuries, though severe, are such that it could be said that regardless of motivation, this claimant was likely not to be able to engage in gainful and suitable employment. Therefore, the Board must consider other relevant factors in determining claimant's loss of wage earning capacity due to this injury. Claimant is 63 years old and has less than a high school education. She has worked as a farm laborer and as a homemaker. Claimant's loss of function due to this injury has been rated in the minimal to mild category. The Orthopaedic Consultants felt that claimant could return to her same occupation with limitations or to some other occupation. They felt that claimant was capable of performing a light manual type of employment.

Claimant was also evaluated by Dr. Cobach to determine if she had any psychological disorders or difficulties due to this injury. Dr. Cobach felt that claimant did have some symptoms of depression which were not severe and were minor in nature and stationary.

Claimant was also contacted by Mr. Rollins, Ph.D., vocational counselor. Dr. Rollins tested claimant and found that she had low average intelligence. He felt that based on the medical reports and her test results that claimant was not likely to return to gainful employment in the future considering her physical condition, age, education, transferable skills and abilities, learning potential and emotional and psychological factors. No efforts were made to find employment by claimant or by Dr. Rollins.

We find that medical evidence alone does not establish that claimant is permanently and totally disabled. Claimant has not willingly sought regular and gainful employment nor has she made reasonable efforts to obtain such employment. Therefore, after considering claimant's physical impairment, and other relevant factors to determine her loss of wage earning capacity due to this injury, we cannot find that she is permanently and totally disabled. Based on the record in this case, we find that claimant is entitled to an award of compensation equal to 256° for 80% unscheduled disability for this injury. This award of compensation is in lieu of any prior awards of unscheduled disability claimant has been granted for this injury.

ORDER

The Referee's order dated January 16, 1980 is modified.

Claimant is hereby granted an award of compensation equal to 256° for 80% unscheduled disability for her injury. This award of compensation is in lieu of all prior awards of unscheduled disability for this injury.

The remainder of the Referee's order is affirmed.

CLAIM NO. C 192037

December 1, 1980

MITCHELL ROSE, CLAIMANT

Samual A. Hall, Jr., Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Amended Own Motion Order

This Amended Own Motion Order is to correct the payment of attorney's fee as stated in the November 20, 1980 as being payable by SAIF to properly read:

"Based on the time claimant's attorney spent on this case, the Board amends the attorney's fee in this case to an award of 25% of the increased compensation for temporary total disability granted by this Order not to exceed \$500 payable out of the increased compensation due claimant."

IT IS SO ORDERED.

WCB CASE NO. 79-3919

December 1, 1980

CHARLES R. SMITH, CLAIMANT

Malagon & Yates, Claimant's Attys.

Merten & Saltveit, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant. Cross Request by Employer.

The claimant and the employer seek Board review of the Referee's order entered in this case. The claimant contends he is entitled to reimbursement for travel expenses. The employer contends that it is not obligated to pay for an electro cyclo massage chair.

The Board finds that the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the Board modifies the Referee's order. We agree with the Referee that the claimant is not entitled to reimbursement for travel expenses between Venita and Molalla, Oregon (240 miles round trip) after April 27, 1979. However, we do not agree with the Referee that the claimant is entitled to have the electro cyclo massage chair paid for by this employer. Dr. Butt, a chiropractor, reported that the claimant had asked that he approve the claimant's use of such a chair. Dr. Butt indicated that he found such chairs to be comfortable and felt that it would give the claimant relief from the symptoms he was experiencing. He did not feel that this would result in any permanent improvement in the claimant's condition. However, Dr. Pasquesi, a medical doctor, stated that the cyclo massage chair was not necessary on either a palliative or a curative basis. We do not find any medical evidence that the cyclo massage chair was prescribed as a form of medical treatment for the claimant. We do not find that under the facts of this case, that such a chair could be classified as "medical services" within the meaning of ORS 656.243. Therefore, the Board reverses the Referee's order setting aside the employer's denial of responsibility for the electro cyclo massage chair and the attorney's fee awarded to the claimant's attorney for prevailing on that issue.

ORDER

The Referee's order dated May 30, 1980 is modified.

The employer's denial dated December 28, 1979 of the claimant's request that it authorize the purchase of a Niagara Cyclo Massage Chair is restored and affirmed.

The remainder of the Referee's order is affirmed.

CLAIM NO. RC 162857

December 1, 1980

LISLE R. STEELE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 8, 1968, claimant suffered a compensable injury to his left wrist. This claim was accepted, closed and claimant's aggravation rights have expired. Claimant received a total award of compensation equal to 45% loss of his left forearm for this injury.

Dr. Peterson, advised the SAIF Corporation (SAIF) on March 7, 1979 that claimant might need a wrist lesion. Claimant was referred to Dr. Wilson for consideration of such surgery. Dr. Peterson requested this claim be reopened.

Dr. Wilson reported on March 19, 1979 that claimant had been complaining of increasing pain in his left wrist over the last four months. He also recommended that this claim be reopened for treatment.

By an Own Motion Order dated August 22, 1979, the Board remanded this claim to SAIF to be accepted and commence payment of compensation and other benefits provided for by law effective March 7, 1979 until the claim was closed pursuant to the provisions of ORS 655.278, less time worked.

Dr. Wilson, on August 6, 1979, reported that claimant had pain in his left wrist. Claimant had been fitted with a multiplastic wrist support. Dr. Wilson did not feel that claimant was capable of performing fulltime work.

The claimant underwent a radiocarpal-intercarpal-carpometacarpal arthrodesis of the left wrist on October 31, 1979. This surgery was performed by Dr. Morgan. The claimant was released for light work on June 10, 1980 by Dr. Morgan. Claimant returned to work in a sales assembly capacity on July 14, 1980 with a different employer.

On September 17, 1980, Dr. Hersch reported that claimant returned to work assembling walter components. He reported that claimant's condition was stationary at that time. He felt that claimant had experienced a loss of motion and loss of grip strength of the left wrist and also had surgical scars. He felt that claimant might be limited in performing repetitive grasping or repetitive lifting of heavy objects with his left arm.

The SAIF, on October 27, 1980, requested a determination be made in this case. The Evaluation Division of the Workers' Compensation Department, on November 14, 1980, recommended that this claim be closed and that claimant be granted an award of temporary partial disability from August 6, 1979 through October 30, 1979, temporary total disability from October 31, 1979 through June 15, 1980 and temporary partial disability from June 16, 1980 through September 17, 1980 and an additional award of compensation of 20% loss of the left forearm.

The Board concurs with this recommendation.

ORDER

The claimant is hereby granted an award of temporary partial disability from August 6, 1979 through October 30, 1979, temporary total disability from October 31, 1979 through June 15, 1980 and temporary partial disability from June 16, 1980 through September 17, 1980, less time worked, and an additional award of compensation of 20% loss of the left forearm.

CLAIM NO. C 191526

December 1, 1980

OPAL LILLIAN VETTER, CLAIMANT
William B. Wyllie, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 6, 1980, the claimant, by and through her attorney, requested the Board exercise its Own Motion jurisdiction and reopen this claim for her May 21, 1969 back injury. This claim had been closed and the claimant's aggravation rights have expired.

Dr. Gallagher, in August 1979, reported that claimant had been complaining of low back pain. He noted that claimant was obese. Dr. Gallagher felt that the claimant's back pain was related to degenerative arthritis of her spine combined with her obesity. It was his feeling that the arthritis was due to the aging process and not related to the claimant's original injury. He did feel that "technically" the claimant did have disability and some impairment of function. He felt that claimant could work if she avoided certain activities.

On November 13, 1980, the SAIF Corporation (SAIF) advised the Board that it opposed an Own Motion Order reopening this claim. This was based on its interpretation of the medical reports that the claimant's current condition was not related to her original industrial injury.

The Board, after reviewing the information submitted to it, does not find that the evidence warrants a reopening of this claim at this time under its Own Motion jurisdiction. The evidence does not establish that claimant's current condition is related to her original injury. Therefore, the Board denies the claimant's request.

IT IS SO ORDERED.

WCB CASE NO. 79-9332

December 1, 1980

ARDEAN WOODFIN, CLAIMANT

Douglas S. Green, Claimant's Atty.

Marshall C. Cheney, Employer's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed the October 15, 1979 Determination Order. The claimant contends the Referee erred in finding that substantial permanent partial disability was not caused by her work.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the Board modifies the Referee's order. This is an accepted claim. We do not find that the claimant had a pre-existing condition which was aggravated by her work with this employer. The medical evidence establishes that the claimant developed contact dermatitis while working for this employer. Further, the medical evidence indicates this condition is permanent and has resulted in her having a permanent hypersensitivity to pine products and glue. She cannot work in an environment where she is exposed to these substances.

Claimant is 53 years old and has a ninth grade education. She has worked as a waitress, bartender and nursing home aide. The evidence establishes the claimant cannot return to any job in this employer's mill or other work where she would be thus exposed.

We conclude, based on the record in this case, the claimant has suffered a loss of wage earning capacity due to the development and permanency of this condition. Therefore, the Board grants the claimant an award of compensation equal to \$112⁰⁰ for 35% unscheduled disability for her contact dermatitis condition.

ORDER

The Referee's order dated May 2, 1980 is modified.

Claimant is hereby granted an award of compensation equal to \$112⁰⁰ for 35% unscheduled disability for her dermatitis condition.

Claimant's attorney is granted a fee equal to 25% of the increased permanent partial disability not to exceed \$3000.00.

WCB CASE NO. 79-5278

December 2, 1980

KARL W. ADAMS, CLAIMANT

Steven D. Gerttula, Claimant's Atty.

Jerry K. McCallister, Atty. for SAIF.

Request for Review by SAIF

The SAIF Corporation seeks Board review of the Referee's order which granted the claimant an award of 50% loss of the left hand. The SAIF Corporation (SAIF) contends that the increased award is excessive and not supported by the evidence in this case.

The claimant, then 38 years old, was employed as custom service manager responsible for the supervision of field installations, field service, start up, overhaul, repairs of machinery and ship loading equipment for this employer. On May 16, 1978, he caught his left hand between two wrapping machine rolls. This injury was diagnosed as a compression injury to the left hand.

Dr. Nathan, in June 1978, began treating the claimant. He found that the claimant had a crush injury to his left hand with subsequent minimal dystrophic changes. A course of active physical and occupational therapy was prescribed for the claimant by Dr. Nathan.

On April 18, 1979, Dr. Nathan reported that the claimant's condition was medically stationary. It was his opinion that the appropriate total impairment would be 25% of the left hand.

A Determination Order dated May 11, 1979 granted the claimant an award of compensation equal to 30% for 20% loss of his left hand. The claimant had not missed any work because of this injury.

At the hearing, the claimant testified that he has difficulty lifting things with his left hand. He said he does not feel he has the strength or power he used to have in the hand. He also has trouble working in tight areas or with small objects. Further, he feels the hand tires due to not having normal circulation in it; and the hand becomes discolored and cold.

The Referee found that, based on the record in this case, the claimant had suffered a severe crushing injury to his hand and had a severe loss of function of the hand. Therefore, he granted the claimant an increased award of compensation equal to 50%.

The Board, after a de novo review of this record, modifies the Referee's order. This is a scheduled injury and the test to be applied in determining an injured worker's disability is the loss of function of the injured body part. Such a determination can be made based on the medical reports and the lay testimony. In this case, Dr. Nathan has opined that the claimant has a total impairment in his hand equal to 25% of the whole hand. The claimant's testimony corroborates this opinion. Based on the evidence in this case, we find that the award of compensation granted by the Referee was excessive. Based on the medical reports of Dr. Nathan and the testimony of the claimant, we find that he is entitled to an award of compensation equal to 37.5% for 25% loss of function of his left hand.

ORDER

The Referee's order dated April 30, 1989 is modified.

The claimant is hereby granted an award of compensation equal to 37.5% for 25% loss of his left hand. This is in lieu of all prior awards of scheduled disability compensation that the claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-8992

December 2, 1980

BEVERLY A. CARLSON, CLAIMANT

Knappenberger, Tish & Shartel, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's (SAIF) denial of responsibility for her claim.

The claimant, a 43-year-old secretary with the Oregon Department of Fish and Wildlife, alleges that the repeated heavy typing she was required to do in her job caused her to develop tenosynovitis in her left hand and wrist. She worked at this position for six months. The personnel officer stated claimant had injured her wrist at home sawing limbs after the January 1979 ice storm. The claimant left work on June 4, 1979 and went on a honeymoon. She did not return to work. A claim form 801 was filed by claimant on July 12, 1979.

Dr. Biska felt the claimant's work did cause the tenosynovitis condition.

Dr. McVay, in August 1979, could not find that claimant had suffered any industrial injury. Dr. McVay did find a resolving bruise of the dorsum of the claimant's left hand.

Claimant was offered a modified job at the end of August 1979, but she did not wish to return to work and asked to be terminated.

In September 1979, Dr. Button diagnosed the claimant's condition as tendonitis of the left hand. He felt this condition was not related to claimant's work but rather "to an underlying inflammatory process." No restrictions were placed on claimant's work activities. On September 14, 1979 Dr. Button concurred with the opinion of Dr. McVay.

The claimant's supervisor and the personnel officer both stated she had developed pain in her left arm in February 1979. The claimant indicated she had done a lot of sawing of some big limbs off trees in her yard.

Dr. Biska, in September 1979, indicated both he and Dr. Cruikshank had examined the claimant. They concurred with Dr. McVay's evaluation.

On September 14, 1979, Dr. Button again reported he did not feel the claimant's hand problem was related to her work. He felt the claimant had a basic underlying inflammatory process of an unknown etiology. The claimant had told him she had injured her wrist during the ice storm of January 1979. Dr. Button felt this might have been the original episode triggering the continuing inflammatory process of her left upper extremity.

The SAIF, on October 1, 1979, denied this claim. It felt that claimant's condition did not arise out of her employment but was due to underlying conditions.

Dr. Biska, in March 1980, reported he had treated claimant in June 1978 for tenosynovitis of the left wrist and hand due to overuse. The claimant reported she had moved and had been doing an unusual amount of lifting. In January 1979 Dr. Biska again saw the claimant. She reported that following an ice storm in January 1979, she had been sawing and piling wood when she noticed the onset of pain in her left hand. Dr. Biska diagnosed an inter-osseous strain and recurrent extensor tenosynovitis. In June 1979, the claimant had returned, complaining of left hand pain. The claimant felt this was due to typing at work. Again, the diagnosis was acute tenosynovitis of the left hand. Dr. Biska opined the claimant had mild chronic tenosynovitis of the left hand and wrist that would be aggravated by typing for long periods of time.

The Referee found there was no evidence that claimant's typing actively affected her underlying condition. Therefore, the Referee affirmed the SAIF's denial of this claim.

After a de novo review of this record, the Board affirms the Referee's order. We find the claimant has failed to meet her burden of proving that her typing aggravated her underlying condition within the meaning of Weller v. Union Carbide, 288 Or 27, ___ P2d ___ (1979). The Supreme Court set forth the following test to be applied in determining the compensability of an occupational disease. The claimant would have to prove by a preponderance of the evidence that (1) his work activity and condition (2) caused a worsening of his underlying disease (3) resulting in an increase of his pain (4) to the extent that it produced disability or required medical services. We do not find the claimant has proven her work activities caused a worsening of her underlying disease. Therefore, we affirm the Referee's order.

ORDER

The Referee's order dated April 30, 1980 is affirmed:

WCB CASE NO. 79-4715

December 2, 1980

MARK W. FLINT, CLAIMANT
Robert L. Chapman, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which granted the claimant an award of compensation equal to 19.2° for 10% loss of use of his right arm and an award of compensation equal to 32° for 10% unscheduled disability for his shoulder injury. The SAIF contends that these awards of compensation are excessive.

The Board finds that the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the Board modifies the Referee's order. We agree with the Referee's award of scheduled permanent disability compensation for the residuals of the claimant's right arm injury. We find that the evidence in this record does not support the Referee's award of unscheduled permanent disability compensation for the right shoulder condition.

The evidence in this case establishes that the claimant has continuing pain in his right shoulder. This has been described as minor in nature. Dr. James, in August 1977, reported that because of this pain the claimant might have to avoid certain types of vigorous activities for a period of six to eight weeks until he was able to build up the shoulder, neck and strap muscles to the point that they would support the neck region. Dr. James does not state that this limitation would be permanent. Later, Dr. Tennyson examined the claimant and did not find any objective evidence of disability in the claimant's cervical area. The x-rays taken of the claimant's neck and right shoulder were interpreted as normal.

We do not find that the medical evidence supports an award of compensation for unscheduled disability. There is no evidence that establishes that the claimant's continuing right shoulder pain is disabling or limits his activities. Based on this finding, the Board reverses the Referee's award of compensation equal to 32° for 10% unscheduled disability for the claimant's right shoulder injury.

ORDER

The Referee's order dated January 8, 1980 is modified.

The Referee's award of compensation equal to 32° for 10% unscheduled disability for the claimant's right shoulder injury and the awarding of an attorney fee out of the increased award of compensation for the right shoulder injury is reversed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 80-1116

December 2, 1980

MARY L. ROSA, CLAIMANT

Brown, Burt & Swanson, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which set aside its denial of compensability and awarded claimant's attorney a fee. The SAIF contends that its denial should have been affirmed.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of the record in this case, the Board reverses the Referee's order. We find that the record in this case clearly establishes the claimant's testimony is not credible. She testified that she was assaulted in August 1979 by a person she had known approximately two weeks. She also stated that in December 1979 she fell down some stairs. She denied injuring her back on either occasion. The police report introduced by the SAIF indicates that the person who assaulted her in fact had been known by her for approximately a year and they had lived together. Further, Dr. Becker's report regarding the December 27, 1979 incident indicates claimant stated she fell down some steps, injured her rib cage, had a black eye and had other bruises about her chin. Dr. Becker felt that "the mechanism" of the injury was somewhat suspicious. He noted the claimant had no complaints about her low back condition. Even though claimant was recalled and testified that the difference between her testimony on direct examination regarding how long she had known Brooks and the police report was a matter of degree. She also testified on redirect that she didn't remember some of the details of what she had told the investigating officer. We do not find this explanation by claimant rehabilitates her prior testimony. Therefore, we find that claimant's testimony is not credible.

On the merits of SAIF's Denial, the Board reverses the Referee's order. This claim was originally classified as non-disabling. The SAIF in January 1980 denied any additional responsibility for this claim because it felt that claimant's current back problems were not the result of or directly caused by her injury of June 21, 1979. The police report indicates that claimant in the August 1979 assault was grabbed about the neck and the assailant attempted to choke her. Claimant advised the investigating officer that she had been assaulted on two previous occasions within the past week of the August 1979 assault by the same assailant.

Dr. Fortner originally examined claimant after her June 1979 injury and diagnosed an acute back strain between the shoulders at about the 10th, 11th and 12th thoracic vertebrae. However, Dr. Becker, who saw claimant in December 1979, reported that claimant was complaining of mid-low back pain. He felt that claimant had a sprain of the low back and provided a lumbosacral corset to claimant.

The Board does not find the injuries diagnosed by Drs. Fortner and Becker are to the same body area. Coupled with claimant's incredible testimony, the Board cannot find that this claim should be classified other than non-disabling. Therefore, the Board orders the Referee's order be reversed and that the SAIF's denial be reinstated and affirmed.

ORDER

The Referee's order dated May 20, 1980 is reversed in its entirety.

The SAIF Corporation's denial dated January 25, 1980 is restored and affirmed.

December 2, 1980

RALPH E. SPURGEON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Reconsideration of Own Motion Determination

On September 30, 1980 the Board issued its Own Motion Determination in the above-entitled matter. In its advisory opinion, the Evaluation Division of the Workers' Compensation Department urged that vocational assistance be given priority to endeavor to place claimant back into some type of regular and gainful employment. This recommendation was overlooked by the Board which, by its order, granted claimant an award of 80% unscheduled disability. At this time the Board feels it should not have rated claimant's loss of wage-earning capacity as his vocational potential has not been determined.

Therefore, it is our decision that our order of September 30, 1980 be revoked and that Field Services Division of the Workers' Compensation Department is to immediately contact claimant and assist him in on-the-job training or job placement assistance and is to report back to the Board the outcome of its efforts by February 1, 1981.

ORDER

Claimant's claim is hereby reopened effective July 10, 1980 and until closure pursuant to ORS 656.276.

The SAIF Corporation is to credit its payments of permanent partial disability it paid pursuant to our order to the payment of compensation for temporary total disability granted by this order.

December 3, 1980

DAVID L. BRONSON, CLAIMANT
Goode, Goode, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 3, 1980, the claimant, by and through his attorney, requested the Board reopen this claim for his March 16, 1974 right leg injury. The claimant's aggravation rights have expired. The claimant had requested the Board to reopen this claim in November 1979, but the Board did not find the claim should be reopened until the claimant was hospitalized for the treatment and surgery recommended by Dr. Myers. Subsequently, the claimant was referred by Dr. Myers to Dr. Serbu.

In April 1980, Dr. Serbu reported that the claimant was having intermittent numbness in his right foot. It was decided not to perform any additional surgery on the claimant's foot unless his condition worsened. In September 1980, Dr. Serbu reported the claimant continued to have the same symptoms as he had in April 1980 and that the claimant's condition had not worsened.

After reviewing the evidence in this file, we do not find that it is sufficient to warrant reopening under our own motion jurisdiction at this time. Therefore, we deny the claimant's request.

ORDER

The claimant's request that the Board reopen this claim under its own motion jurisdiction is denied.

December 6, 1980

LARRY G. SAPP, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order and Own Motion Determination

On August 15, 1980, the claimant requested the Board reopen this claim for his July 12, 1968 injury under its own motion jurisdiction. The claim had been originally closed by a June 29, 1970 Determination Order which had granted claimant an award of compensation equal to 20% unscheduled disability for his low back injury. The claimant's aggravation rights have expired. The claim was reopened and closed again resulting in claimant receiving an additional award of compensation equal to 10% unscheduled disability for his low back injury, making a total award of compensation equal to 30% unscheduled disability.

In August 1980, Dr. Fry reported that he had begun treating claimant on March 11, 1980 for his back condition. Dr. Fry related the need for this treatment to claimant's injury of July 12, 1968. Dr. Fry indicated he had hospitalized the claimant on March 11, 1980 for conservative treatment and released him from the hospital on March 14, 1980. Dr. Fry diagnosed a lumbar spine strain.

The Board advised the SAIF Corporation (SAIF) of the claimant's request and asked for a response from it. The SAIF advised the Board that it wished to obtain an independent examination of the claimant. This was performed by the Orthopaedic Consultants on October 15, 1980. The Orthopaedic Consultants felt that claimant's condition was stationary and that his claim should remain closed. It was their opinion that claimant had had difficulty in March 1980 and felt it was a worsening of his original injury of 1968 and that the claimant was entitled to compensation for temporary total disability compensation and medical expenses related to that. They also felt that the former award of permanent partial disability compensation that claimant had been granted was inadequate and that he was entitled to permanent partial disability equal to a moderate impairment for his 1968 injury.

In November 1980, the SAIF advised the Board it would not oppose an own motion order reopening this claim for time loss when verified by the treating physician. It also asked that since claimant's condition was now stationary that the Board also enter a closing order.

The Board referred this matter to the Evaluation Division for a recommendation as to what compensation the claimant was entitled to. On December 15, 1980, the Evaluation Division advised the Board that the claimant had returned to work and had only a seventh grade education. They felt that the unscheduled disability award of compensation claimant had received was adequate. They recommended claimant be granted temporary total disability compensation from March 8, 1980 through April 20, 1980 and further from July 28, 1980 through September 1, 1980, based on information that the SAIF had provided them. They noted that the Orthopaedic Consultants incorrectly recited that claimant had been granted an award of compensation equal to 20% unscheduled disability, when, in fact, he had received a total award of compensation equal to 30% unscheduled disability for his injury. Therefore, they felt that the previous award was adequate.

We have reviewed the record in this case, and find that the claimant is entitled to have his claim reopened under own motion jurisdiction effective March 11, 1980, the date he was hospitalized by Dr. Fry. We also find this time that claimant's condition is stationary and the claim is ready for closure. Therefore, we find the claimant is entitled to an additional award of temporary total disability compensation from March 11, 1980 through April 20, 1980 and further from July 28, 1980 through September 1, 1980. We do not find the claimant is entitled to an additional award of permanent partial disability for this injury.

ORDER

The claimant is hereby granted an award of temporary total disability compensation from March 11, 1980 through April 20, 1980 and from July 28, 1980 through September 1, 1980.

WCB CASE NOS. 78-2398 & 79-8171E

December 8, 1980

PATRICK C. KIRBY, CLAIMANT
James Heugli, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

A request for review, having been duly filed with the Workers' Compensation Board in the above-entitled matter by the SAIF Corporation, and said request now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

CLAIM NO. C 395077

December 8, 1980

WILLIAM A. LANE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 11, 1980, the claimant requested the Board reopen his claim for his September 5, 1972 back injury under its Own Motion jurisdiction. The claimant's aggravation rights have expired. The Board, in August 1980 felt the evidence was insufficient to warrant a reopening of this claim at that time.

Dr. Stock, in June 1980, reported the claimant had low back pain. The claimant indicated he felt his work aggravated his condition. Dr. Stock diagnosed degenerative lumbar disc disease which he felt was aggravated by the claimant's work. It was his suggestion that claimant reduce the number of hours worked.

On July 3, 1980, Dr. Stevland reported the claimant continued to have low back pain and left sacroiliac pain. The claimant was scheduled for a left inguinal herniography and Dr. Stevland reported that during that hospitalization the claimant was treated with bedrest and perhaps a trial transcutaneous nursing relation for his back condition. The Board did order this claim reopened for the herniography.

In October 1980, Dr. Stevland reported that claimant continued to complain of low back pain which radiated to his left leg. He felt that claimant was unable to do anything for any sustained period of time because of this pain. He felt that claimant's current disability was an exacerbation of his long standing problem with his back. In November 1980, Dr. Stevland reported that since February 1980, the claimant's back pain had increased severely. He felt that claimant was totally disabled because of this back condition.

Also in November 1980, the Orthopaedic Consultants examined claimant and reported that claimant had quit work on August 1, 1980 to undergo the hernia surgery. They felt that claimant exhibited a rather severe degree of interference "from functional disturbances, manifested by refusal as well as inconsistencies." They did not feel that claimant needed to undergo any additional surgery for his back condition. They felt that claimant did have a definite and severe functional problem and urged a psychiatric examination by Dr. Colbach. They felt that claimant was taking excessive amounts of narcotic medications and that he should be weaned from such medication. They rated the loss of function in claimant's back in the moderate-severe range, which is the same rating they had given him approximately three years previously.

On November 24, 1980, the SAIF Corporation advised the Board that it opposed an Own Motion reopening this claim for claimant's current back complaints. They did not feel it had any responsibility for the claimant's current back problems since the claimant had degenerative lumbar disc disease which was aggravated by his job.

After reviewing all the evidence in this file, the Board finds that this claim should be reopened for payment of temporary total disability compensation, additional medical care and treatment to include psychological care as suggested by the Orthopaedic Consultants. We find that claimant's back condition related to his September 5, 1972 injury has worsened since February 1980. Therefore, we find that we should exercise our Own Motion jurisdiction and reopen this claim.

ORDER

This claim is remanded to the SAIF Corporation for acceptance and payment of compensation and other benefits provided for by law effective September 1, 1980 less time worked and less compensation already paid on the previous Own Motion claim for the hernia surgery.

December 8, 1980

PHILLIP E. MOYER, SR., CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF
Cross Request by Claimant

On November 26, 1980, claimant's attorney requested that the Board reconsider its Order on Review and grant him an appropriate attorney fee from SAIF's appeal.

Claimant's attorney's contention has merit. One of the issues appealed to the Board by the Fund was the Referee's awards of attorney fees. The Referee had granted claimant's attorney a fee of \$2,200 for the reversal of the denial of aggravation and \$200 for the reversal of the Fund's partial denial. The Board, in its order only reversed the Referee's conclusion on the partial denial which eliminated the \$200 attorney fee.

Therefore, because this was a SAIF appeal and claimant did win on the main issue of reversal of the aggravation claim and claimant's attorney did file a brief, he is entitled to an attorney fee at Board level.

ORDER

The Board's order on review is hereby amended to allow claimant's attorney a reasonable attorney fee in the sum of \$200, payable by the SAIF.

WCB CASE NO. 79-6300

December 8, 1980

LARRY R. PAYN, CLAIMANT
Olson, Hittle, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On December 12, 1980, the claimant suffered a compensable injury. His aggravation rights expired on December 12, 1978. However, this claim was reopened by a stipulation of the parties after the claimant had filed a timely aggravation claim (on July 11, 1978). The claim was closed by a January 18, 1979 Determination Order and the claimant has requested a hearing, contending he is entitled to a larger

award of permanent partial disability. The claimant, on September 4, 1979, asked the Board to exercise its Own Motion jurisdiction and reopen this claim. The SAIF Corporation cross requested a hearing contending the claimant's aggravation rights expired. The Board referred these requests to be heard with the claimant's request for hearing on the January 18, 1979 Determination Order. After a hearing, Referee Neal held that the claimant's aggravation rights had expired and recommended the Board order this claim be reopened effective July 27, 1979, the date of the claimant's surgery. The Board agreed with the Referee and ordered this claim reopened.

On November 7, 1980, the Board ordered this claim closed and granted the claimant an award of temporary total disability compensation and an award of permanent partial disability.

The claimant contends he is entitled to a hearing on the Determination Order mailed January 18, 1979 which he had timely requested a hearing on. The issue to be decided is the extent of disability.

We have reviewed this file and find that the claimant is entitled to a hearing as he contends. The claimant timely requested a hearing on the January 18, 1979 Determination Order and is entitled to a hearing per his request. Therefore, the Board would order this case referred to the Hearings Division to be set for a hearing per the claimant's request, the issue to be decided by a Referee is the extent of the claimant's permanent disability.

IT IS SO ORDERED.

CLAIM NO. ZC 474699

December 10, 1980

DOROTHY JOHNSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 22, 1973, the claimant suffered a compensable injury to her neck. Her claim was closed by a December 5, 1973 Determination Order which granted the claimant an award of temporary total disability compensation and an award of compensation equal to 32° for 10% unscheduled disability for her neck injury. The claimant's aggravation rights have expired. A stipulation dated March 28, 1975 granted the claimant an additional award of compensation equal to 48° for 15% unscheduled disability making a total award of compensation equal to 80° for 25% unscheduled disability.

In January 1980, the Orthopaedic Consultants reported that the claimant's condition was not stationary. They felt that her present problems were not entirely due to her 1973 injury, but that that injury did aggravate her pre-existing degenerative arthritis. It was their opinion that the claimant's condition had worsened since this claim was last closed and recommended that she undergo additional conservative treatment.

In March 1980, the claimant and the SAIF Corporation (SAIF) stipulated that this claim should be reopened as of February 4, 1980 for payment of temporary total disability compensation and other benefits until closed pursuant to ORS 656.278. The claimant had been hospitalized on that date and underwent a myelogram on February 7, 1980 which revealed changes in her cervical spine due to her surgery but did not reveal any other defects. The claimant underwent another myelogram on March 4, 1980.

In July 1980, Dr. Raaf reported the claimant had various complaints of pain. He felt the claimant had a carpal tunnel syndrome which was related to her work but not to the 1973 injury.

On October 22, 1980, Dr. Buza reported that the claimant's condition was medically stationary. He felt the claimant's carpal tunnel syndrome was work related but not related to her 1973 injury. Although, he felt that it might possibly be related to her 1973 injury, he opined that the claimant had mild to moderate residuals from her injury based on her paracervical and arm pain.

On November 11, 1980, the SAIF requested that this claim be closed and determination be made of the compensation the claimant was entitled to. The Evaluation Division of the Workers' Compensation Department on December 1, 1980 recommended this claim be closed and the claimant granted an additional award of temporary total disability compensation from February 4, 1980 through October 22, 1980 and an additional award of compensation equal to 48° for 15% unscheduled disability.

We have reviewed this file and concur with the recommendation of the Evaluation Division. However, we must point out that the parties could not agree to reopen this case as they did. The claimant's aggravation rights had expired and the Board was the proper party to order this claim reopened pursuant to ORS 656.278. We agree that this claim should have been reopened as of February 4, 1980 as was done. The parties cannot stipulate to confer jurisdiction on themselves. This claim is being closed pursuant to ORS 656.278.

ORDER

The claimant is hereby granted an additional award of temporary total disability compensation from February 4, 1980 through October 22, 1980 and an additional award of compensation equal to 48° for 15% unscheduled disability for her neck injury, making a total award of compensation equal to 128° for 40% unscheduled disability.

The claimant's attorney was compensated for his efforts in this case by the stipulation dated March 19, 1980.

WCB CASE NO. 79-1298

December 10, 1980

MARVIN LAWRENCE, CLAIMANT

A. C. Roll, Claimant's Atty.

Rankin, McMurry, et al, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Employer

The employer seeks Board review of the Referee's order which granted the claimant an award of compensation equal to 112° for 35% unscheduled disability for his back injury. This was in lieu of the Determination Order award of compensation equal to 32° for 10% unscheduled disability. The employer contends that the increased award of compensation granted by the Referee is not supported by the evidence and requests the Determination Order award reinstated.

The Board finds that the Referee correctly recited the facts of this case in his Opinion and Order.

After a de novo review of this record, the Board modifies the Referee's order. We find the claimant has a 25% unscheduled permanent partial disability. The medical record reveals this injury was diagnosed as a lumbar strain. The medical treatment has been conservative and the injury has resulted in a mild loss of function.

The claimant is 32 years old, has a ninth grade education plus training at a community college and training as a truck driver. At the time of hearing, he was employed as a truck driver for a different employer and was able to perform that job. Also the record establishes that this claimant cannot return to work in the logging industry or to work in lumber mills.

Comparing this case with other cases we have reviewed, we find that the award of compensation for unscheduled disability granted by the Referee is excessive. We find that the claimant has suffered a loss in his wage-earning capacity and grant him an award of compensation equal to 80% for 25% unscheduled disability for this injury. This award of compensation is in lieu of all prior awards of unscheduled disability the claimant has been granted for this injury.

ORDER

The Referee's order dated December 17, 1979 is modified.

The claimant is hereby granted an award of compensation equal to 80% for 25% unscheduled disability for his back injury. This is in lieu of all prior awards of unscheduled disability the claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

SAIF CLAIM NOS. C 294661 & C 357427

December 10, 198

DONALD MEYERS, CLAIMANT

Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Own Motion Order Referring for Consolidated Hearing

Upon the conclusion of the hearing, the Referee shall forward a recommendation on these issues to the Board together with a transcript of the proceedings and the other exhibits introduced at the hearing.

IT IS SO ORDERED.

A hearing is pending in Claim No. C 357427 which was established for the claimant's March 1, 1972 back injury. The claimant had requested the Board exercise its Own Motion jurisdiction and reopen that claim. The SAIF Corporation (SAIF) opposed such an order. The Board referred this case for hearing to determine whether the claimant's current condition and his surgery of December 1979 was related to claimant's original injury and represented a worsening thereof since the last award or arrangement of compensation or to a new injury.

On October 6, 1980 the claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction and remand Claim No. C 294661 for his February 5, 1971 low back and left hip injury. The claimant's aggravation rights have expired in this claim. The claimant requested this claim be reopened effective the fall of 1979. It was pointed out that this claim was interrelated to Claim No. C 357427 and request if this case was referred to a hearing, it be joined with that case.

The Board, after reviewing the evidence in Claim No. 294661, finds it would be in the best interest of the parties if it was consolidated with the hearing pending in Claim No. C 357427. The Referee shall determine if the claimant's current condition is related to either his February 5, 1971 injury, to his March 1, 1972 injury or to a new injury. If the Referee finds the claimant's condition is related to either the 1971 injury or the 1972 injury, the Referee shall determine if this represents a worsening of that injury since the last award or arrangement of compensation in the respective cases. The Referee shall recommend to the Board which claim, if any, should be reopened and the effective date of reopening.

CLAIM NO. DC 192037

December 10, 1980

MITCHELL A. ROSE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The claimant, on May 9, 1969, suffered a compensable injury to his back and right knee. This claim was initially closed by a Determination Order dated December 7, 1971. The claimant's aggravation rights have expired. The claimant has been granted awards of compensation totalling 250° for 80% unscheduled disability for his back injury and 30° for 20% loss of his right leg.

The Board reopened this claim pursuant to CRS 656.278 effective September 2, 1980, the date the claimant was admitted to the Pain Clinic. The claimant was discharged from the Pain Clinic on September 20, 1980.

On October 8, 1980, the SAIF Corporation requested an order closing this claim and determined the claimant's entitlement to compensation. It had paid the claimant temporary total disability compensation from September 2, 1980 through September 19, 1980. The Evaluation Division of the Workers' Compensation Department on December 1, 1980 recommended this claim be closed and the claimant be granted an award of additional temporary total disability compensation from September 2, 1980 through September 19, 1980 and did not recommend any additional permanent partial disability compensation.

The Board, after reviewing this file, agrees with the Evaluation Division's recommendation.

ORDER

The claimant is hereby granted an award of additional temporary total disability compensation from September 2, 1980 through September 19, 1980. The record indicates the claimant has already been paid this compensation.

The claimant's attorney was compensated by the Board's Own Motion Order.

WCB CASE NO. 76-3080

December 10, 1980

LAURENCE RYAN, CLAIMANT

Larry O. Gildea, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Order of Remand for Expedited Hearing

On September 19, 1980, the claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction pursuant to ORS 656.278 and reopen this claim for his February 2, 1974 left knee injury. This claim was closed by a July 11, 1975 Determination Order, and the claimant's aggravation rights have expired. Attached to this request was the September 15, 1980 report from Dr. Bert. In that report, Dr. Bert reported the claimant's knee condition had continued to worsen. He felt this was due to the claimant's working and the claimant's permanent disability was worse and prevented him from working.

Wausau Insurance Company (Wausau), on November 18, 1980, advised the Board the claimant had left the employer he had at the time of the 1974 injury and had gone to work for another employer. Wausau felt Dr. Bert's report established the claimant's work with his new employer had caused his condition to worsen and represented a new compensable condition. Wausau asked a hearing be set to resolve this matter.

After reviewing the information submitted to us, we find it would be in the best interest of justice to remand this case to the Hearings Division to be set for a hearing. The Referee shall decide if the claimant's current condition is related to the 1974 injury and represents a worsening thereof since the last award or arrangement of compensation. Upon the conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared. The transcript and other exhibits along with the Referee's recommendation shall be forwarded to the Board for its consideration.

The claimant's attorney advised the Board he intends to file a new injury claim with the claimant's new employer. If that claim is denied and a hearing is requested, that hearing should be consolidated with this hearing.

IT IS SO ORDERED.

WCB CASE NO. 79-8147

December 10, 1980

ROMAN C. SMITH, CLAIMANT

Brink, Moore, et al, Claimant's Attys.

Schwabe, Williamson, et al, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed the employer's denial of his claim. The claimant contends that he has met his burden of proof that he suffered a compensable right knee injury while employed by this employer.

The Board finds that the Referee correctly set forth the facts of this case in his order.

After a de novo review of this record, the Board reverses the Referee's order. We find that the evidence in this case shows that, on July 10, 1979, while working, the claimant stooped down and injured his right knee. After this incident, the claimant finished work and went on a vacation. During his vacation, the claimant engaged in several activities. He stated that his knee condition improved. He denied suffering any new injury to his knee. Upon his return to his regular job, the claimant experienced difficulty with his knee. There is no evidence that the claimant suffered any intervening injury. The medical evidence does not establish a direct causal relationship between the claimant's work and his injury. It does, however, indicate that the claimant's vacation activities could have caused or could have aggravated a pre-existing condition in the claimant's knee.

We find that the lay testimony in this case convinces us that the claimant, more probably than not, injured his right knee as he contends. We find the rationale expressed in the case of Volk v. Birdseye Division, 16 Or. App. 349, 518 P2d 672 (1973) helpful and persuasive to this case. Our case is not complicated. There is no evidence that he injured his knee while on vacation. In fact, the evidence indicates that his knee condition actually improved. The evidence establishes the claimant had no other injury to his knee, other than a bruise. Viewing this evidence and drawing from it all inferences favorable to claimant, we reach the conclusion he suffered a compensable injury to his knee. Therefore, the Board sets aside the employer's denial of this claim and remands this claim to it for acceptance and payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.268. The claimant's attorney is entitled to a fee for prevailing in overcoming the employer's denial.

ORDER

The Referee's order dated May 16, 1980 is reversed in its entirety.

The employer's denial dated August 30, 1980 is set aside and this claim is remanded to it for acceptance and payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.268.

The claimant's attorney is granted a fee of \$800 for prevailing in overcoming the employer's denial. This fee is for his services at both the Hearing and the Board levels.

CLAIM NO. C 473316

December 10, 1980

MICHAEL W. SOCIA, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 28, 1980, the claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction and reopen this claim for his October 25, 1973 right knee injury. This claim was originally closed and the claimant's aggravation rights have expired.

In July 1980, Dr. Bert diagnosed chondromalacia of the patella. Conservative treatment was begun. By September 1980, he felt the claimant needed a brace for his leg. Dr. Bert related the need for this care to the claimant's original injury and felt it represented a worsening of that condition. Dr. Bert reported the claimant was unable to work from August 27, 1980 to October 9, 1980 when the claimant obtained a brace and Dr. Bert released him for regular work.

The SAIF Corporation, on November 21, 1980, advised the Board it did not oppose an Own Motion Order reopening this claim for temporary total disability compensation from August 27, 1980 to October 9, 1980, less time worked.

After reviewing this record, the Board finds the evidence sufficient to warrant reopening of this claim for payment of temporary total disability compensation from August 27, 1980 through October 9, 1980, less time worked and other benefits provided for by law. The claimant's attorney is entitled to a fee equal to 25% of this award of temporary total disability compensation not to exceed \$250.

IT IS SO ORDERED.

CLAIM NO. C 479259

December 10, 1980

JUDY KAY TRUESDALE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 16, 1973 the claimant injured her right knee. This claim was closed and the claimant's aggravation rights have expired.

The SAIF Corporation, on November 17, 1980, advised the Board it had received various medical reports regarding this claim and forwarded copies of them to the Board. It indicated that, after reviewing these reports, it opposed an Own Motion Order reopening this claim since it did not appear that the claimant's condition had materially worsened since the last arrangement of compensation.

In April 1980, Dr. Nelson reported the claimant had tripped while running up some steps and had fallen on her knee. The claimant indicated that three days after this incident her right calf began to swell. The diagnosis was thrombophlebitis of the right calf and a recent injury to the right knee. Dr. Nelson was unable to relate the claimant's fall to her old knee injury.

The Orthopaedic Consultants, in October 1980, opined the claimant's condition remained medically stationary. They could not relate the thrombophlebitis condition to her original injury.

After reviewing this case, the Board does not find the evidence is sufficient to warrant the reopening of this claim at this time under its Own Motion jurisdiction. Therefore, the Board will not order this claim reopened pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-7117

December 11, 1980

JERALD PAUL FLOWER, CLAIMANT
James F. Larson, Claimant's Atty.
Marcus K. Ward, Atty. for SAIF.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which set aside its denial of the claimant's aggravation claim and ordered it to accept that claim. The SAIF contends that its denial should have been affirmed.

The Board finds that the Referee correctly recited the facts of this case in her order.

After a de novo review of this record, the Board reverses the Referee's order. The last award of compensation in this case was made by the October 11, 1978 Determination Order. We must determine if the claimant's condition due to his July 12, 1978 injury has worsened since that date. Based on the record in this case, we do not find that it has. The medical evidence indicates that the claimant did have continuing low back pain after his July 1978 injury. Drs. Boye and McVey both felt that the claimant's condition would improve with physical therapy. However, neither doctor reports that the claimant's condition had worsened. Dr. Boye had, prior to this claim being initially closed, recommended physical therapy. Both Drs. Anderson and Boye, prior to the claim being closed, had reported that the claimant had complaints of low back pain, but still they found the claimant's condition was stationary and felt that he did not have any permanent impairment. The claimant worked in the construction field and also as a self-employed wood cutter after this claim was closed. We find that the evidence in this case does not establish that the claimant's condition has worsened since the last award of compensation. Therefore, the Board reverses the Referee's order and restores the SAIF's denial and affirms it.

ORDER

The Referee's orders dated April 3, 1980 and April 28, 1980 are reversed in their entirety.

The SAIF Corporation's denial dated July 30, 1979 is restored and affirmed.

WCB CASE NOS. 79-8388 & 79-5430

December 11, 1980

CLAUDIA GEORGE, CLAIMANT
Rolf Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which remanded this claim to it for acceptance and payment of the benefits from November 29, 1978 and awarded the claimant's attorney a fee. The SAIF contends the claimant failed to prove a compensable aggravation claim, and if she did, it is the responsibility of another carrier.

The Board finds the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the Board reverses the Referee's order. There are two claims involved in this case.

On June 19, 1977, the claimant injured her neck and upper back while employed by the Fireside Cafe whose workers' compensation coverage was provided by Farmers Insurance Group (Farmers). This claim was closed by a Determination Order dated December 9, 1977 which granted the claimant an award of temporary total disability. This was appealed, and in an Opinion and Order dated May 24, 1979, the claimant was granted an award of compensation equal to 32° for 10% unscheduled disability for this injury. In February 1980 this order was affirmed by the Board.

On May 2, 1978, the claimant suffered an injury to her low back while employed by a different employer whose workers' compensation coverage was provided by the SAIF. The last award or arrangement of compensation in this claim was made on November 20, 1978 when the parties entered into a stipulation which granted the claimant an award of compensation equal to 64° for 20% unscheduled disability for this injury.

We do not find the claimant's testimony in this case to be credible. In comparing her testimony at this hearing with that from the earlier hearing, the Board finds many inconsistencies. Further, claimant's reason for leaving her job at The Towers is suspect and very possibly is not because of back complaints.

We do not find the weight of the evidence establishes that the claimant's condition related to either her June 1977 injury or May 1978 injury has worsened since the last award of compensation in the respective cases. Dr. Chester's opinion that the claimant's condition had aggravated is not supported by any objective findings.

In October 1978, shortly before the alleged period of aggravation, Dr. Chester indicated claimant's pain was the result of tension and nothing definitive could be done about it until she learned to get rid of stress in some other way. He had been treating claimant for several months, attempting to find some treatment which would help her. All the evidence indicates a continuation of medical treatment for claimant's subjective symptoms. When claimant quit her job at The Towers, the fact was merely mentioned by Dr. Chester. His medical reports before and after the alleged "aggravation" are basically the same. In March 1980, he became much more explicit in his description of claimant's condition in November 1978. The Board notes that few of these findings were mentioned at the time of claimant's aggravation and would question the reliability of Dr. Chester's other reports. The Northwest Pain Center found little significant physical limitations. Dr. Embick indicated no need for further treatment and the 20% award previously granted was adequate. The Orthopaedic Consultants found no objective findings to suggest any loss of function in the cervical spine. We conclude that the weight of the medical evidence does not support either of the claimant's aggravation claims and affirm the denials issued by Farmers and the SAIF.

The Referee relies upon the "last injurious exposure rule" in reaching his conclusion. We do not find that this rule is applicable to the facts of this case. In this case, there were two distinct areas of the body that were injured. The upper back and neck were injured in June 1977, and the lower back was injured in May 1978. The rule relied upon by the Referee applies only where there are two successive injuries to the same body part.

In conclusion, we reverse the Referee's order in its entirety. The claimant is entitled to continuing medical care and treatment for the residuals from her injuries pursuant to ORS 656.245. All conditions related to her neck and upper back should be the responsibility of Farmers;

SAIF is responsible for any problems related to her low back. The denials issued by Farmers and the SAIF of the claimant's aggravation claims are restored and affirmed.

ORDER

The Referee's order dated June 30, 1980 is reversed in its entirety.

The SAIF Corporation's and Farmers Insurance Company's denials of the claimant's aggravation claims are restored and affirmed.

WCB CASE NO. 79-2703

December 11, 1980

BETTY L. JONES, CLAIMANT
Brian Welch, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which approved the SAIF Corporation's (SAIF) denial of her claim. The claimant contends the Referee erred in affirming SAIF's denial because she has proven she suffered a disabling occupational disease.

The Board finds the Referee correctly recited the facts of this case in her order.

After a de novo review of this record, the Board sets aside the SAIF's denial and remands this claim to it for acceptance and payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.268.

The claimant worked for nine years with this employer without experiencing difficulty with her arms. Only after being shifted to a more strenuous shift in 1977 did claimant experience difficulty with her arms. The Orthopaedic Consultants opined that claimant's condition in her arms, diagnosed as bilateral chronic humeral epicondylitis, was "occupational and not due to any specific accident." They felt this condition was the cause of claimant's inability to work.

Dr. Sulkosky, one of claimant's treating physicians, felt that claimant's work which required repetitive lifting-type maneuvers was a "common denominator in a lateral epicondylitis." Also he felt claimant's work caused her arm pain to increase to the point she needed medical treatment.

Claimant was seen by Drs. Moseley, Stephens and Spaulding. Dr. Moseley does not feel claimant's work caused her lateral epicondyle condition, but he felt it did cause her condition to be more symptomatic. Dr. Stephens does not have an opinion on the relationship between claimant's work and her bilateral epicondylitis condition. Dr. Spaulding did not feel claimant's work caused this condition but notes that such a condition could be aggravated by the work performed by the claimant.

We are more persuaded by the opinion of the Orthopaedic Consultants and Dr. Sulkosky. They relate claimant's bilateral epicondylitis condition to her work with this employer. Drs. Spaulding and Moseley feel, while claimant's work did not cause this condition, it could have worsened it. Based on the fact claimant worked for this employer for nine years without difficulty until her shift change in 1977 which was more strenuous work and the beginning of her arm pain, and the more persuasive medical reports, we find the claimant has proven her bilateral epicondylitis condition is compensable. Therefore, the Board reverses the SAIF's denial.

The Board would also order a penalty equal to 25% of the temporary total disability compensation due claimant from January 17, 1979, the date claimant filed the claim, until June 26, 1979, the date of the SAIF's denial, less time worked, for the unreasonable delay in accepting or denying this claim. The Board affirms the Referee's award of an attorney fee in this case for the SAIF's action.

ORDER

The Referee's order dated May 29, 1980 is modified.

The SAIF Corporation's denial dated June 26, 1979 is set aside, and this claim is remanded to it for acceptance and payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.268.

Claimant is hereby granted an additional award of compensation as a penalty for the SAIF Corporation's unreasonable delay in accepting or denying this claim, equal to 25% of the total temporary disability compensation due claimant from January 17, 1979 to June 26, 1979, less time worked. The award of an attorney's fee of \$200 to claimant's attorney is affirmed.

The claimant's attorney is granted a fee equal to \$800 for his services at the Hearings and Board levels for prevailing in overcoming this denial.

December 11, 1980

GARY L. MUEHLHAUSEN, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
Schwabe, Williamson, et al, Employer's Attys.
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 Referee is final be operation of law.

December 11, 1980

LARRY R. PAYN, CLAIMANT
Olson, Hittle, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order for Hearing

On December 8, 1980 the Board issued an order remanding this claim to the Hearings Division to be set for a hearing on the claimant's request for a hearing on the January 18, 1979 Determination Order. The claimant is entitled to a hearing on the adequacy of the Determination Order, even though subsequently this claim was reopened and closed by the Board under ORS 656.278. However, prior to the Board exercising its own motion jurisdiction, the claim had been reopened prior to expiration of claimant's aggravation rights, and the January 18, 1979 Determination Order was issued and closed under ORS 656.268. Therefore, the claimant is entitled to a hearing on this Determination Order. The Board had previously referred the claimant's own motion request to be consolidated with the hearing on the extent of disability awarded by the January 18, 1979 Determination Order. These two cases should not have been joined. We are vacating our December 8, 1980 order and order this claim to be set in the normal course for hearing on the claimant's request for a hearing.

ORDER

The Board's order dated December 8, 1980 is hereby vacated; this matter is to be set for hearing.

December 11, 1980

BILL W. SAVAGE, CLAIMANT
Phil Ringle, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which allowed the SAIF Corporation (SAIF) to suspend the claimant's temporary total disability benefits and denied his request for penalties and attorney fees. The claimant contends the SAIF improperly terminated his temporary total disability compensation benefits and he is entitled to attorney fees and penalties for the SAIF's unreasonable termination of his benefits and delay in paying them. The Referee also found that ORS 656.325 was unconstitutional.

The claimant, then a 46-year-old deputy sheriff, on April 22, 1977, injured his back while trying to arrest and subdue a person and fell and pulled his back. This injury was diagnosed as a probable herniated disc at L4-5 level. A myelogram and, if necessary, a laminectomy was suggested. The claimant declined to undergo either procedure.

In November 1977, Dr. Parvaresh, a psychiatrist, reported he had treated the claimant in 1972 after the claimant suffered a neck injury. Dr. Parvaresh reported the claimant was "deathly" afraid of any surgery or diagnostic procedure and was having difficulty sleeping and becoming anxious and upset. He did not feel the claimant, psychologically, could "handle" surgery.

Dr. Pasquesi, in December 1977, reported the claimant's condition was stationary. He felt the claimant had impairment equivalent to 10% of a whole man on the basis of chronic moderate pain.

Dr. Parvaresh, in February 1978, opined the claimant displayed signs and symptoms of a psychoneurotic disorder associated with depression and psychophysiological musculoskeletal disorder. He rated the claimant's impairment at not greater than 15%.

On March 16, 1978, a Determination Order granted the claimant an award of temporary total disability compensation.

After the SAIF denied responsibility for the claimant's gastro-intestinal problem, a hearing was held; and Referee Ail ordered the SAIF to reopen this claim effective September 26, 1978, set aside its denial of the claimant's gastro-intestinal problem and granted the claimant's attorney a fee.

After the claim was reopened, the claimant received treatment for his psychological condition.

In August 1978, Dr. Intile reported the claimant had been having recurrent episodes of vomiting. He could not determine the cause of the vomiting, but felt it might be related to the claimant's "psychologic overlay" associated with his various physical complaints.

The claimant was advised by a letter dated September 11, 1979 that the SAIF wanted an independent evaluation of his back injury and had scheduled an appointment for him to be examined by the Orthopaedic Consultants. The letter advised the claimant that if he failed to keep this appointment, his temporary total disability compensation benefits could be terminated.

The claimant's attorney advised the SAIF that the claimant did not feel he should be re-examined by the Orthopaedic Consultants, and the appointment should be cancelled. Further, the claimant's attorney indicated that, when the claimant had last been examined by them, it caused him to "be physically distraught and emotionally upset."

The SAIF then advised the claimant if he did not keep this appointment, it would seek permission to suspend his temporary total disability compensation. The claimant failed to keep the appointment.

On September 21, 1979, the SAIF requested permission to suspend the claimant's temporary total disability compensation benefits. The claimant objected to this action.

The Compliance Division, on September 27, 1979, authorized the SAIF, pursuant to ORS 656.325, to suspend his temporary total disability compensation benefits as of September 19, 1979.

The claimant testified he did not keep the appointment with the Orthopaedic Consultants because he had been humiliated, ridiculed, and suffered increased pain and discomfort during their exam and after it. Also, he stated, due to his psychological disorder, he became ill when he was subjected to an orthopaedic type of examination. He felt he had been treated unfairly by the doctors associated with the Orthopaedic Consultants.

A Determination Order dated December 13, 1979 awarded the claimant temporary total disability compensation. It recited that there was insufficient information to support an award of permanent partial disability and that a determination of permanent partial disability would be made when adequate information was received.

The Referee found that ORS 656.325 was unconstitutional. However, on the merits of this case, the Referee found the claimant's refusal to be examined by the Orthopaedic Consultants was unreasonable. The Referee did not find that the SAIF's action in this case was unreasonable and declined to assess a penalty or grant the claimant's attorney a fee. The Referee amended his order and ordered that the SAIF could suspend temporary total disability compensation benefits from September 19, 1979 until 30 days from April 19, 1980 during which time the claimant was to be examined by a physician designated by the SAIF. The Referee also set aside a Determination Order dated December 12, 1979 and ordered this claim closed pursuant to ORS 656.268 after the claimant had been examined.

After a de novo review of this record, the Board modifies the Referee's order. We reverse the Referee's finding that ORS 656.325 is unconstitutional. See In the Matter of the Compensation of John O'Neal, WCB Base No. 79-6714, decided June 11, 1980.

On the merits of this case, we agree with the Referee that the claimant's refusal to keep his appointment with the Orthopaedic Consultants was unreasonable. The insurance carrier has the right to have the injured worker examined by a medical doctor of their choice. The facts in this case do not lead us to a finding that the claimant was reasonable in his refusal to be examined by the Orthopaedic Consultants. We find the Compliance Division properly issued the Determination Order of December 13, 1979. The SAIF Corporation, under authority granted by the December 13, 1979 Determination Order, suspended the claimant's temporary total disability compensation benefits. We find SAIF's actions were proper in this case and find no reason to assess penalties and attorney fees.

We find the Determination Order dated December 13, 1979 should be reinstated.

ORDER

The Referee's order dated March 13, 1980 as amended by his April 10, 1980 order is modified.

The SAIF Corporation, with the consent of the Compliance Division, is authorized, pursuant to ORS 656.325, to suspend the claimant's temporary total disability benefits effective September 19, 1979 until he submits to an examination by a physician or physicians of his choice.

The Determination Order dated December 13, 1979 is reinstated and affirmed.

December 11, 1980

WILLIE STREETER, JR., CLAIMANT
Hilson & Eder, Claimant's Attys.
Lang Klein et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order entered in this case. The employer contends claimant is not entitled to compensation for temporary total disability from March 10, 1977 through October 7, 1978 nor to penalties.

Claimant, then a 37-year-old finishing grinder with this employer, on December 8, 1974, filed a claim indicating that his left hand and wrist had become sore and swollen while working. His condition was diagnosed as deQuervain's disease bilaterally with the right side having been previously treated by surgery for release of the tendon sheath over the right radial head.

Claimant was hospitalized, and on February 11, 1975, release surgery was performed on the left wrist. Dr. Schlim recommended that claimant change jobs. Claimant subsequently underwent three additional surgical procedures on his left hand for recurrences. Dr. Schlim, on January 15, 1976, noted claimant continued to complain of his wrists being extremely sensitive, but the doctor felt that claimant's condition was medically stationary.

A Determination Order dated May 11, 1977 awarded claimant temporary total disability compensation and compensation equal to 30° for 20% loss of use of his left forearm. Reconsideration of this order was requested, and a Determination Order dated October 5, 1977 affirmed the first Determination Order.

In April 1978, Dr. Langston reported claimant continued to complain of pain in his left hand and felt claimant had a definite functional component. He felt claimant had disability equal to 20% loss of function of the arm. Dr. Langston felt claimant was employable in occupation other than grinderman.

Dr. Gill, in June 1978, examined claimant and felt claimant had a "(1) Painful neuroma, superficial branch, radial nerve, (2) significant functional overlay." He felt that the disability claimant reported far exceeded any objective findings of disability. Dr. Gill felt additional surgery might be considered only if consultations with Dr. Smith were carried out to determine the extent of claimant's functional problems.

On October 9, 1978, Dr. Smith reported he felt due to claimant's continuing complaints of pain and his re-examination of claimant, claimant did have a larger neuroma than at the time of the previous surgeries. He felt claimant should have further surgery. Dr. Smith related the need for this surgery to claimant's original injury. On December 11, 1978, Dr. Smith excised the neuroma of the superficial radial nerve of claimant's right wrist and embedded a "stump" in the flexi carpi radialis.

On April 30, 1979, Dr. Smith reported claimant could return to work as of March 26, 1979 and found claimant's condition was medically stationary.

In May and September 1979, Dr. Smith reported claimant still had mild discomfort in his wrist. He felt claimant should be retrained and claimant had minimal "physical loss." Dr. Smith felt claimant should not lift over 50 pounds.

Claimant was referred for vocational assistance in November 1979. He indicated he wished to return to janitorial work. Because he had transferrable skills in that area, he was not classified as a vocationally handicapped worker. Employment re-entry assistance was provided to claimant.

The insurance carrier for the employer was advised on November 28, 1978 that the neuroma was causally connected to claimant's industrial injury and surgery was recommended. It began paying claimant temporary total disability compensation as of December 11, 1978, the date of claimant's surgery.

The Referee found the award of permanent partial disability correctly compensated claimant for any loss of function of his forearm he has due to this injury. However, the Referee ordered payment of temporary total disability compensation from March 10, 1977 through December 11, 1978 inclusively less time worked; assessed a penalty equal to 25% of the temporary total disability compensation due from June 28, 1978 through December 11, 1978 and granted claimant's attorney a fee equal to \$500 for the carrier's failure to correctly process this claim and granted claimant's attorney a fee out of the increased temporary total disability compensation.

After a de novo review of the record in this case, we reverse the Referee's order. The evidence in this case establishes that claimant's condition was medically stationary and temporary total disability compensation properly terminated on March 10, 1977. Claimant was entitled to temporary total disability compensation as of the date of his hospitalization and his claim was properly re-opened by employer's carrier at that time.

The Board also reverses the Referee's award of penalties and attorney fees based on the carrier's improper processing of this claim. The carrier properly commenced payment of compensation effective December 11, 1978, the date of claimant's last surgery. We find the carrier was not unreasonable or negligent in processing this claim.

ORDER

The Referee's order is reversed in its entirety.

NOTICE TO ALL PARTIES: This order is final unless, within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

WCB CASE NO. 78-2024

December 11, 1980

EVA S. WALLACE, CLAIMANT
Richard T. Kropp, Claimant's Atty.
R. Ray Heysell, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer-insurer seeks Board review of the Referee's order entered in this case. On March 19, 1980 the parties agreed to an Amended Order to be made a part of the Referee's order. However, the employer-insurer had requested the Board review of this case on March 14, 1980. Therefore, the Referee lost jurisdiction in this case and the Amended Order is null and void. The employer-insurer contends that the claimant did not prove a compensable aggravation claim.

The Board finds that the Referee correctly recited the facts of this case in his order.

After de novo review, the Board modifies the Referee's order. We find the Referee erred when he ordered part of this claim reopened and closed the remainder with a determination of permanent partial disability. After thorough review of the evidence, the Board concludes the claim should be reopened with a closure pursuant to ORS 656.268, when the condition is stationary. Therefore, the Board modifies the Referee's order and orders the following:

IT IS HEREBY ORDERED that the claimant's claim for aggravation of the October 8, 1972 injury be allowed and the claim is remanded to the carrier for acceptance and payment of compensation commencing on May 31, 1977 until closed pursuant to ORS 656.268.

IT IS FURTHER ORDERED that the claimant's attorney is granted a fee of \$900 to be paid by the insurer and the employer in addition to and not out of the compensation due the claimant for prevailing upon the denial of the claim for aggravation issued by the insurer.

IT IS FURTHER ORDERED that the claimant's attorney be paid a fee of \$500 for prevailing in this case at the Board level. This fee is in addition to all others granted in this case.

WCB NO. 79-10, 193

December 16, 1980

MARVIN ANDERSON, CLAIMANT
Gary D. Allen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks review by the Board of the order of the Referee which affirmed the SAIF's denial of November 20, 1979.

Claimant was and still is employed by Fairview Hospital and Training Center as a therapy technician. In the course of his employment, one of his job responsibilities is the toilet training of approximately 16 mentally retarded 18 to 20 year olds. This puts claimant in daily contact with feces material as the patients often soil themselves.

Claimant alleges that his work caused him to develop A type hepatitis. Claimant testified that at home he has well water and a septic tank. Claimant's friends, neighbors and his wife and five children have drank from this well water and no one developed hepatitis.

A county health representative testified at the hearing that A type hepatitis is transmitted the fecal-oral route and is called infectious hepatitis. In 1979 Marion County had 75 such cases, one of them appearing at Fairview in May 1979. Type B hepatitis is a serum form from blood or needles.

Claimant filed his claim for occupational disease alleging exposure on October 8, 1979. His claim was denied by the Fund on November 20, 1979.

A sanitarian checked out claimant's well in November 1979 and found the water supply was unsafe and claimant needed to add chlorine. Lab reports, which the Referee would not admit into evidence, indicated claimant had bacteria in the water. Hepatitis is caused by a virus.

The Chief Medical officer at Fairview, Dr. Miller, testified at the hearing also. He indicated that in 1979 several hepatitis B type carriers were discovered. One of these ended in death. The doctor did admit that a mild hepatitis A type case in a patient could possibly be overlooked and treated as flu without the hepatitis being discovered. He testified that the coliforms found in claimant's well water did not cause hepatitis. The doctor's opinion was that claimant did not get his hepatitis exposure at Fairview.

Claimant sought medical treatment from Dr. McIntyre who reported on February 1, 1980 that, based on a reasonable medical probability, claimant contacted his hepatitis in the course of his employment. The doctor noted that the chief method of transmission was fecal-oral route and that it was obvious that one would be more exposed to this disease in an institutional setting, especially if one was caring for the needs of the retarded.

The Referee found that the presence of an A type virus at Fairview had not been established and, therefore, he affirmed the denial of compensability.

The Board, on de novo review, would reverse the Referee's conclusion.

The Board finds that it is more probable than not that claimant developed his hepatitis from exposure at Fairview. Claimant worked daily with fecal material, and none of this virus was found to be present in his well water. Further, Dr. McIntyre, based on a reasonable medical probability, found claimant's condition arose out of his employment at Fairview.

The Board further wants to point out that the Referee's failure to admit the test results from the laboratory on claimant's well samples was in error. These exhibit findings were conducted by experts and were properly presented to the Referee as evidence in this case.

ORDER

The order of the Referee dated July 15, 1980 is hereby reversed.

Claimant's claim is remanded to the Fund for acceptance and payment of compensation as provided by law until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is hereby granted as and for a reasonable attorney fee for prevailing on a denied claim \$500 at the hearing level and \$250 at Board level, payable by the SAIF Corporation.

December 16, 1980

PAULETTE AYO-WILLIAMS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 2, 1980, the SAIF Corporation (SAIF) advised the Board the claimant's aggravation rights in this claim for her November 24, 1974 injury had expired. The SAIF provided the Board with medical reports which indicated the claimant, on October 3, 1980, was hospitalized and underwent a myelogram which revealed a herniated disc at the L4-5 level on the right. Dr. Buza, on October 17, 1980, operated on the claimant's back and related the need for this surgery to the claimant's original injury as did Dr. Warner. The SAIF did not oppose an Own Motion Order reopening this claim.

We have reviewed the medical reports submitted by the SAIF and find this claim should be reopened effective October 3, 1980, pursuant to ORS 656.278.

ORDER

This claim is reopened effective October 3, 1980 for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

WCB CASE NOS. 79-11, 012 & 79-7210

December 16, 1980

ROBERT BARNETT, CLAIMANT
Roll, Roll & Westmoreland, Claimant's Attys.
Lang, Klein, et al, and, Schwabe, Williamson, et al, Employer's Attys.
MacDonald, McCallister, et al, Attys. for SAIF.
Order Denying Motion

On October 28, 1980, an Opinion and Order was entered in this case by Referee Neal which set aside EBI's denial of the claimant's claim for his peptic ulcer condition and remanded the claim to it for acceptance and payment of compensation and other benefits provided for by law. EBI requested the Referee reopen the record and admit an August 28, 1980 report by Dr. Heinonen. The Referee denied this request but included that report as part of the record for appeal purposes. Both EBI and the claimant have requested the Board review this case.

On November 19, 1980, EBI moved the Board to admit Dr. Heinonen's August 28, 1980 report as newly discovered evidence pursuant to OAR 436-83-700(5).

We have reviewed this motion and deny it. We review these cases de novo. In our review, we will decide if the Referee was correct in not considering this report and whether we should consider it.

ORDER

EBI's motion to admit newly discovered evidence is denied.

WCB CASE NO. 78-2939

December 16, 1980

GWENDOLYN CRIPPEN, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
John Klor, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Order on Remand

The employer, by and through its attorney, on November 17, 1980 advised the Board it had an additional report dated June 13, 1978 from Dr. O'Hollaren which should have been considered by the Referee. However, before the Referee could consider this report, the claimant had requested the Board review the Referee's order. The employer requested the Board either accept this report as part of the record or remand this case to Referee Mongrain so he could complete the record in this case.

On November 25, 1980, the claimant, by and through her attorney, advised the Board it did not oppose remanding this case to Referee Mongrain for consideration of the additional report or receiving that report as part of the record.

After considering this matter, we find it would be in the best interest of justice that this case be remanded to Referee Mongrain for consideration of the June 13, 1978 report of Dr. O'Hollaren and the issuance of an Opinion and Order in this case.

IT IS SC ORDERED.

December 16, 1980

ROBERT A. DAVIS, CLAIMANT
Bouneff, Muller & Marshall, Claimant's Attys..
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's Opinion and Order which affirmed the SAIF Corporation's (SAIF) denial of his claim. The claimant contends that he has proven his respiratory problems are compensable under the workers' compensation law.

The Board finds that the Referee correctly recited the facts of this case in his Opinion and Order.

The majority of the Board affirms the Referee's Opinion and Order. The claimant began working for this employer in September 1977 and filed a claim for his respiratory problems in January 1979. Dr. Lahti, the claimant's treating physician, reported that the claimant had a history of recurring pharyngitis from 1976 through 1979. After the claimant left work with this employer, Dr. Lahti stated the claimant had not had any sore throats, and it was his opinion that the claimant's chronic pharyngitis was due to either the working conditions at this employer's place of business or due to an allergy to one of the substances used in the work, or a combination of both. Dr. Lahti felt it would be difficult to prove anything other than a time relationship between the claimant's work and his development of this condition. The majority of the Board does not find that Dr. Lahti's temporal relationship is sufficient to prove the claimant's condition was caused by his work with this employer. The other medical evidence establishes that the claimant's condition is due to some type of viral infection. There is no evidence which links this viral infection to the claimant's work. Further, Dr. Lahti's opinion is not supported, by any evidence or findings, other than on a temporal basis nor does it in any way describe the basis for his conclusion. Therefore, the majority of the Board affirms the SAIF's denial of this claim.

ORDER

The Referee's Opinion and Order dated May 15, 1980 is affirmed.

I respectfully dissent from the majority opinion of the Board as follows:

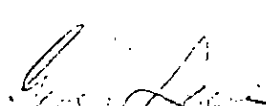
I find claimant's claim is compensable. Claimant's testimony, as corroborated by the employer/owner, indicates claimant's work environment during the winter months of 1979 was in a building with the doors wide open and the work area was not heated. The environment was wet and drafty.

Claimant's treating physician, Dr. Lahti, first saw claimant on January 2, 1979 and indicated that claimant's condition of streptococcal pharyngitis was due to industrial exposure.

In a report dated September 13, 1979, Dr. Lahti elaborated. It was his opinion that claimant's chronic pharyngitis was due to either the working conditions or an allergy to a substance used at his employment or a combination of the two.

The only other medical evidence is that of Dr. Burrows who saw claimant at the hospital and who made a diagnosis only and SAIF's medical consultant, Dr. Much. Dr. Much never examined or evaluated claimant and found no relationship of his condition to his work.

I give the greatest weight to the opinion of the treating physician, Dr. Lahti.


George Lewis, Board Member

CLAIM NO. C 174885

December 16, 1980

DOWEL DICKENSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On March 14, 1969, the claimant suffered a compensable injury to his right leg. A Determination Order dated February 1, 1973 granted him an award of compensation equal to 105% for 70% loss of his right leg. His aggravation rights have expired.

The Board reopened this claim pursuant to ORS 656.278, effective August 16, 1980, the date the claimant was hospitalized for removal of a plate and nail used in treating his original injury. ~~Mars...~~

SAIF, Legal Services.

On October 20, 1980, Dr. Karney reported the claimant's condition was medically stationary. The claimant had fallen on October 19, 1980, splitting open the incision. Dr. Karney found the claimant had marked limitation of hip motion, a one-inch shortening of the right leg, marked thigh atrophy, tenderness and an external rotation deformity of 45°.

The SAIF Corporation, on November 18, 1980, requested an order closing this claim and a determination of the claimant's entitlement to compensation. The Evaluation Division of the Workers' Compensation Department, on December 7, 1980, recommended this claim be closed with an award of additional temporary total disability compensation from August 16, 1980 through October 20, 1980 and no additional permanent partial disability award.

After reviewing this file, we concur with the recommendation of the Evaluation Division.

ORDER

The claimant is hereby granted an award of additional temporary total disability compensation from August 16, 1980 through October 20, 1980.

WCB CASE NO. 79-6548

December 16, 1980

HERMAN FLEISHMAN, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Jim Gehrts, Portland Legal Services, SAIF
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which found (1) that he had suffered a compensable injury on April 5, 1979; (2) that it produced temporary disability lasting about one week, but not requiring any medical treatment; and (3) found that it was "a disabling compensable injury" as defined by ORS 656.005(8). Therefore, the Referee set aside the SAIF Corporation's (SAIF) denial of June 26, 1979 and remanded this claim to it for acceptance and appropriate processing consistent with the above premises. The claimant contends the Referee erred in deciding the questions of the duration and the extent of disability.

We find that the Referee correctly recited the facts of this case in his order.

After de novo review, the Board would modify the Referee's order. We agree with the Referee the evidence in the record establishes that the claimant suffered a compensable disabling injury on April 5, 1979. The Board finds that the May 1979 "basketball" injury contributed to or caused the claimant's continuing difficulty with his shoulder. We find that the May 1979 injury is a subsequent and intervening injury which relieves the SAIF from responsibility for the claimant's current and on-going shoulder problems. The Board agrees with the Referee that claimant's claim should be accepted by the SAIF as a compensable, disabling injury and processed by it. However, claimant is entitled to a closure under the provisions of ORS 656.268 at which time a determination shall be made concerning any time loss due and owing to him.

ORDER

The Referee's Opinion and Order dated June 23, 1980 is modified.

The SAIF Corporation's denial, dated June 26, 1979 is reversed and this claim is remanded to it for acceptance and processing as a disabling injury claim. The May 1979 injury relieves SAIF from responsibility for the claimant's continuing shoulder condition subsequent to the date of that injury. A determination shall be made by the Evaluation Division consistent with the above findings.

CLAIM NO. B 66126 December 16, 1980

BARBARA FOSS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Order

The November 7, 1980 Order was incorrect in showing the Notice to All Parties on page 2. The claimant has no right to appeal the Board's Order in this case. The Board's Order of November 7, 1980 is amended to substitute the following notice:

APPEAL NOTICE

The claimant has no right to a hearing, review or appeal on this award made by the Board on its own motion.

The SAIF Corporation may request a hearing on this order.

The order is final unless, within 30 days from the date hereof, the SAIF Corporation appeals this order by requesting a hearing.

CLAIM NO. D53-122693

December 16, 1980

JERRY FRITZ, CLAIMANT

Pozzi, Wilson, et al, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Order of Remand for a Hearing

On November 14, 1980, the claimant, by and through his attorney, requested the Board exercise its Own Motion jurisdiction as set forth in ORS 656.278 and reopen this claim for his July 10, 1967 injury. Attached to this request was a medical report from Dr. Cruickshank, dated October 31, 1980, which indicated the claimant had complaints of low back and left leg pain. He diagnosed a probable recurrent disc at the L4-5 level on the left. Dr. Cruickshank related this to the claimant's original injury and felt the L5 nerve root should be decompressed and the current herniated disc removed.

Employers Insurance of Wausau (Wausau) indicated the claimant's aggravation rights have expired. Wausau opposed reopening this because it felt the information it had indicated the claimant had suffered a new injury and that his current condition was related to the new injury and not the 1967 injury.

After reviewing the information submitted to us, we find it would be in the best interest of justice to remand this case to the Hearings Division to be set for a hearing. The Referee shall decide if the claimant's current condition is related to the 1967 injury and represents a worsening thereof since the last award or arrangement of compensation. Upon the conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared. The transcript and other exhibits along with the Referee's recommendation shall be forwarded to the Board for its consideration.

IT IS SO ORDERED.

December 16, 1980

DOROTHY HIGGINS, CLAIMANT**Reiter, Bricker, et al, Claimant's Attys.****Gearin, Landis & Aebi, Employer's Attys.****SAIF, Legal Services, Defense Atty.****Order of Remand to the Hearing Division**

On January 21, 1980, we issued an Order on Review in this case. We found the claimant had not timely filed her claim. No other issues were decided by the Board. The claimant appealed this case to the Court of Appeals.

In an opinion filed September 2, 1980, the Court of Appeals reversed the Board's order and remanded this case to the Board. The Court did not find the employer had been prejudiced by the claimant's late filing and did not find the claimant's claim was barred. Since the claimant had not briefed the compensability issue before the Board and the Court and since several cases had been decided by the Supreme Court and the Court of Appeals affecting the rules of law to be applied to this case which the Court found could significantly affect this case, the Court remanded this claim to the Board to determine if the claim is compensable, and if so, to award appropriate compensation. The Judgment and Mandate was issued in this case on October 15, 1980.

In December 4, 1980, the employer requested the Board to supplement the record with a report from the claimant's treating physician, Dr. G. L. Swift or to reopen the record for the receipt of additional evidence as might be pertinent and necessary to make a complete decision on the issue of compensability as prescribed by the Order on Remand from the Court of Appeals.

We have considered the employer's request and the directions provided by the Court of Appeals. To achieve the best interest of justice, we remand this case to the Hearing Division to be set for a new hearing. The Referee shall consider all the evidence in this record plus any new evidence developed since the last hearing and issue an appealable order. The Referee shall determine if this claim is compensable and, if so, award appropriate compensation.

IT IS SO ORDERED.

December 16, 1980

YAKU KAMIS, CLAIMANT

Dennis W. Bean, and, Gracey & Roeschlaub, Claimant's Attys.
Rankin, McMurry, et al, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

Cross Request by Employer

The claimant and the employer seek Board review of the Referee's order which granted the claimant additional compensation equal to 52.5° for 35% loss of use of his left leg, making a total award equal to 75° for 50% loss of his left leg. The claimant contends he is permanently and totally disabled. The employer contends the award of compensation granted by the Referee is excessive.

We find that the Referee correctly recited the facts of this case in his order.

After de novo review, the Board modifies the Referee's order. We do not find that the evidence in this record supports the award of compensation the Referee granted to the claimant. The Board finds the reports of Dr. Specht are persuasive in this case. On December 4, 1979, he indicated that claimant's impairment was mild and the 15% award granted by the July 3, 1979 Determination Order was appropriate. The medical evidence indicates that the claimant is capable of returning to work at any job which does not require prolonged walking or standing or place great demands on his knee. Dr. Specht felt that the claimant would do better in jobs which allowed him to sit, such as bench work. The claimant testified he has continuing difficulty with his leg and cannot kneel, stoop, crawl, run or kick. He is able to stand for three hours and walk for two to three hours without experiencing pain in his knee. The claimant testified that he can do some lifting and can drive about two hours before he develops aching in the knee. Based on the evidence in this case and considering the test to be applied in determining the extent of disability, we find that claimant is not permanently and totally disabled; in fact, we find the award of compensation granted by the Referee is excessive. We find the claimant is entitled to an award of compensation equal to 45° for 30% loss of use of his left leg.

ORDER

The Referee's Opinion and Order dated June 30, 1980, is modified.

The claimant is hereby granted an award of compensation equal to 45% for 30% loss of use of his left leg. This award is in lieu of all prior awards of scheduled disability the claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

WCB NOS. 79-5749 & 79-6615

December 16, 1980

JOHN LAUGHLIN, CLAIMANT
Charles D. Maier, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Remand

On November 7, 1980, the claimant, by and through his attorney, requested this case be remanded to the Hearings Division. Referee Mannix issued his Opinion and Order on August 14, 1980 in this case which the SAIF Corporation (SAIF) and the claimant have requested the Board to review. However, on August 25, 1980, the claimant underwent a myelogram, and the claimant's physician requested reopening of this claim to enable the claimant to undergo surgery. The SAIF, on October 9, 1980 denied reopening the claim and a hearing has been requested on that denial by the claimant. The claimant requested that this case be remanded to the Hearings Division so that the events arising after the hearing could be fully addressed by a Referee. The SAIF opposed the remanding of this case.

We have reviewed the contentions of the parties and find that it would be in the best interests of justice if this case were remanded to Referee Mannix for consideration of the additional evidence that the claimant has obtained and consideration of the propriety of the SAIF denial of reopening this claim.

IT IS SO ORDERED.

December 16, 1980

MARIE B. MYERS, CLAIMANT
Stanley Fields, Claimant's Atty.
Scott M. Kelley, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Order on Reconsideration

On November 24, 1980, we issued an Order on Review in this case which affirmed the Referee's award of permanent partial disability compensation and assessed a penalty equal to 25% of the temporary total disability compensation due from April 18, 1979 through April 26, 1979 for the carrier's late payment of compensation.

The carrier, by and through its attorney, requested the Board reconsider its Order. It provided the Board with a copy of a check showing it had paid the claimant compensation on his first installment of April 16, 1979 and not on April 26, 1979 as recited by the Board.

We have reconsidered our order as requested on the finding that the first installment of compensation was paid on April 16, 1979. The employer had notice of claimant's injury on March 30, 1979. The first installment of compensation should have been made on April 13, 1979. Therefore, our order is amended accordingly.

ORDER

Claimant is granted an additional 25% of compensation for temporary total disability from April 13 through April 16, 1979 as and for a penalty for the employer/carrier's late payment of compensation. This is in lieu of our previous order.

ELMER RADMACHER, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Rankin, McMurry, et al, Attys. for SAIF.
Order on Reconsideration

On December 2, 1980, the Board issued an Order on Review which affirmed and adopted the Referee's Opinion and Order. The Board awarded the claimant's attorney no fee at Board level. The claimant's attorney requests the Board reconsider its prior Order and modify to allow a nominal attorney fee for his time spent in "monitoring" the case on review.

The request for review was filed by the SAIF Corporation. Transport Indemnity Co. and claimant were parties to the review. No briefs were filed.

The Board did not award claimant's attorney a fee because he did not file a brief with the Board. The Board's holding in Bentley v. SAIF, 31 Or. App. 480, 522 (1979), held that attorney's fees cannot be granted when no legal services had been provided at Board level even though the employer/carrier had requested the review and the claimant had prevailed.

Following the Bentley (supra) rationale, we deny claimant's attorney's request.

ORDER

The claimant's attorney's request that the Board award him a nominal attorney fee is denied.

CLAIM NO. ZD 44348

December 16, 1980

JERRY SNETHEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

The claimant sustained a compensable low back injury on August 9, 1974. His claim was closed by a November 13, 1974 Determination Order which granted him an award of temporary total disability compensation. His aggravation rights have expired.

In September 1980, Dr. Spady reported that the claimant had been symptom-free from August 1976 to that time. He felt the claimant's primary problem at that time was his overweight which overstressed his back. Dr. Spady did not feel that any treatment would eliminate the claimant's weight problem. It was his opinion that the claimant had a modest amount of residual impairment from his injury and that the claimant's condition was medically stationary. Also, he felt the chiropractic treatment the claimant had been undergoing was not beneficial to the claimant.

On September 19, 1980, the SAIF Corporation (SAIF) requested this claim be closed and a determination be made of claimant's entitlement to compensation. SAIF had not paid any temporary total disability compensation to the claimant. The Evaluation Division of the Workers' Compensation Department on December 1, 1980 recommended that this claim be closed without the awarding of any additional temporary total disability or permanent partial disability compensation.

We have reviewed the record and do not find that the Board was ever requested to exercise its own motion jurisdiction and reopen this claim. Medical care and treatment has been provided by the carrier under ORS 656.245. The claimant has not lost any time from work, and the evidence does not indicate that he is entitled to an award of permanent partial disability compensation. Therefore, the Board finds this claim should remain closed.

ORDER

This claim is to remain closed. The claimant is entitled to continue to receive medical care and treatment related to his original injury pursuant to ORS 656.245.

WCB CASE NO. 79-10, 944 December 16, 1980

THOMAS SUTTON, CLAIMANT
Robert H. Grant, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's Opinion and Order which granted the claimant an award of additional compensation equal to 64% for 30% unscheduled disability, making a total award of compensation equal to 96% for 30% unscheduled disability for his back injury. The SAIF contends this award of additional compensation is not supported by the evidence.

We find the Referee correctly recited the facts of this case in his Opinion and Order.

After de novo review, the Board modifies the Referee's Opinion and Order. The claimant is 30 years old, has an 11th grade education and was studying for his GED at the time of the hearing. He has worked in a lumber mill and worked for four and one-half years as a timber faller. This injury was diagnosed as a "mild" herniated disc at the L4-5 level on the right. He has received conservative treatment for it. Dr. Saez felt the claimant should be "rehabilitated." It was his opinion that the claimant had moderate subjective and minimal objective "disability" involving the lumbar spine as a residual of his injury. No further treatment has been prescribed for the claimant other than to return to Dr. Saez as needed. Based on the evidence in this record and comparing this case with other cases we have reviewed, we find that the award of compensation granted by the Referee is excessive. We find that the claimant is entitled to an award of compensation equal to 64° for 20% unscheduled disability for this back injury. This is in lieu of all prior awards of unscheduled disability the claimant has been awarded for this injury.

ORDER

The Referee's Opinion and Order dated June 13, 1980 is modified.

The claimant is hereby granted an award of compensation equal to 64° for 20% unscheduled disability for this back injury. This award of compensation is in lieu of all prior awards of unscheduled disability the claimant has received for this injury.

The remainder of the Referee's opinion and order is affirmed.

December 19, 1980

RUTH P. BOGGS, CLAIMANT

Reiter, Bricker, et al, Claimant's Attys.

Schwabe, Williamson, et al, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Own Motion Order Referring for Hearing

On November 18, 1980; the claimant, by and through her attorney, requested the Board to reopen this claim for her February 1, 1973 back injury. The claim was initially closed by a July 3, 1974 Determination Order and the claimant's aggravation rights have expired. The claimant has received a total award of compensation equal to 60% unscheduled disability for her back injury. The last award of compensation was in May 1977. The claimant contends that her condition has worsened since the last arrangement of compensation requiring further medical treatment, use of prescription medication and increased disability.

Dr. Thompson, in August 1980, reported that he had examined the claimant in January 1979 and on August 15, 1980. He found the claimant had more limitation of motion and felt that her condition had worsened to "some degree." It was his opinion that on the basis of the claimant's history and the evaluation that he had performed that the claimant did have a worsening of her symptoms and therefore had grounds for an aggravation of her condition.

In December 1979, Dr. Mahan had reported that the claimant had greater trochanteric bursitis/tendonitis. In May 1980, he stated that he felt this problem was related to her back problem.

The carrier, on December 5, 1980, advised the Board that it opposed an own motion order reopening this claim. It indicated that it would continue to provide for medical care and treatment pursuant to ORS 656.245.

We have reviewed the information supplied to us by the parties. We find that it would be in the best interest of the parties and in the best interest of justice if this matter were referred to the Hearings Division to be set for a hearing.

The Referee shall decide if the claimant's current back condition and her bursitis/tendonitis condition is related to her February 1, 1973 back injury and represents a worsening thereof since the last award or arrangement of compensation in this claim. Upon the conclusion of the hearing, the Referee shall cause a transcript of the hearing to be prepared. The Referee shall forward this along with his recommendation in this case and the other exhibits introduced at the hearing to the Board for its consideration.

IT IS SO ORDERED.

December 19, 1980

ADREAN T. BOYCE, CLAIMANT
Bloom, Ruben, et al, Claimant's Attys.
McMenamin, Joseph, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty..
Order Denying Motion

On November 24, 1980, the claimant's attorney requested the Board modify its Order on Remand of September 17, 1980. He contends he is entitled to fee for prevailing on obtaining the reinstatement of the Referee's order which granted the claimant an increased award of compensation. The Board had initially modified the Referee's order and reinstated the Determination Order award of compensation. The Court of Appeals reinstated the Referee's order. The claimant's attorney had previously requested the Board and the Court of Appeals to grant him a fee and his requests were denied.

After again reviewing the record in this case and the claimant's attorney's request, we find no reason to modify the order. Therefore, the Board denies the claimant's attorney's motion.

ORDER

The claimant's attorney's motion dated November 24, 1980 is denied.

December 19, 1980

PAUL G. BROWN, CLAIMANT
James F. Larson, Claimant's Atty.
Roger Warren, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Carrier

Wausau Insurance Companies (Wausau) seeks Board review of the Referee's opinion and order which found that the claimant had proven a compensable aggravation of his September 16, 1978 injury, assessed penalties and an attorney's fee for Wausau's late payment of interim compensation, and awarded the claimant's attorney a fee for overcoming Wausau's denial of the claimant's aggravation claim. Wausau contends that the claimant failed to prove a compensable aggravation claim, and if he did, it is not the responsibility of the employer at the time of September 16, 1978 injury, and the claimant is not entitled to an award of additional permanent partial disability.

We find the Referee correctly recited the facts of this case in her Opinion and Order.

RUTH P. BOGGS, CLAIMANT

We review de novo and modify the Referee's Opinion and Order. We do not find that the claimant has proven a compensable aggravation of his September 1978 injury. The claimant originally injured his back in January 1969. This claim was closed by a June 22, 1970 Determination Order. The claimant's aggravation rights on this injury have expired.

On September 16, 1978, the claimant again injured his back. This injury was diagnosed as an acute lumbosacral strain. This claim was closed by a December 18, 1978 Determination Order which granted the claimant an award of temporary total disability compensation.

On September 17, 1979, Dr. Wilson reported the claimant was reporting increasing back pain. He felt the claimant was having an exacerbation of his chronic low back pain which the claimant related to his September 1978 injury. Dr. Wilson felt the claimant was entitled to compensation for time loss and should be retrained since he was unable to return to heavy manual labor.

In March 1980, Dr. Short reported that he had examined the claimant and felt the claimant's September 1978 injury did worsen the claimant's symptoms, but had some question about whether or not it affected his underlying condition. He was unable to find any organic findings of worsening of the claimant's back condition as a result of the September 1978 injury. He felt the claimant was "definitely worse subjectively."

On the evidence in this record, we do not find the claimant has proven that his underlying back condition was worsened by the September 16, 1978 injury. The claimant had been advised by his doctors since the 1969 injury not to return to truck driving or other heavy manual labor, but he has continued to perform this type of work. He received an award of compensation equal to 208° for the 1969 injury. Dr. Wilson's report does not indicate the claimant is in need of any additional treatment and only states that the claimant needs retraining to avoid heavy manual labor types of work (the same recommendation that was made after his first injury). Dr. Wilson does not relate the claimant's current condition to the claimant's 1978 injury, but felt it was an aggravation of that injury based on the claimant's "feelings." Dr. Wilson does not base this opinion on any medical findings and does not explain the basis of his opinion. We do not find this report to be persuasive in determining if the claimant has proven a compensable aggravation claim.

Dr. Short, on the other hand, questions whether or not the claimant's 1978 injury worsened his underlying back condition. He found no objective evidence of any worsening of the claimant's condition. Dr. Short found only a subjective worsening of the claimant's condition.

Based on this record, we find that the claimant has not proven he has a compensable aggravation of his September 16, 1978 injury. He has not proven that the injury affected his underlying back condition. Therefore, we order Wausau's denial reinstated and affirmed.

Further, we do not find the claimant is entitled to an award of permanent partial disability for his September 1978 injury.

ORDER

The Referee's Opinion and Order dated May 8, 1980 is modified.

The denial issued by Wausau Insurance Companies on October 10, 1979 on behalf of this employer is reinstated and affirmed.

The Referee's award of a penalty and an attorney's fee on the late payment of interim compensation is affirmed.

WCB CASE NO. 80-7029

December 19, 1980

TERRY DORSEY, CLAIMANT
Doblie & Francesconi, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Motion to Dismiss

Claimant's Motion to Dismiss SAIF's Appeal on the basis it failed to file a brief within a timely manner is hereby denied.

There is no requirement in the Workers' Compensation law or the Board rules which indicates that a brief must be filed by the appellant before the Board will review the case. ORS 656.295(5). While briefs are a significant aid in the review process, the failure to file a brief is not grounds for a dismissal of a request for review.

This matter will be placed on the review docket to be reviewed by the Board in due course.

IT IS SO ORDERED.

December 19, 1980

CURTIS G. FAHY, CLAIMANT
Myrick, Coulter, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order and Determination

On December 2, 1980, the claimant, by and through his attorney, requested the Board reconsider its November 7, 1980 Own Motion Order. This was based on receipt of additional medical evidence consisting of the chart notes from Dr. Weinman. Dr. Weinman reported that on May 18, 1980, the claimant had difficulty getting out of bed and developed right low back pain which extended into his right thigh. He felt this was related to the claimant's 1974 injury and took the claimant off work. On June 3, 1980, Dr. Weinman felt the claimant's condition was back to normal for him and released the claimant for regular work.

We have reconsidered this evidence in this case and find this claim should be reopened under the Board's own motion jurisdiction. We find the claimant is entitled to an award of additional temporary total disability from May 18, 1980 through June 3, 1980 less time worked based on Dr. Weinman's chart notes.

ORDER

Claimant is entitled to additional temporary total disability compensation from May 18, 1980 through June 3, 1980 less time worked.

Claimant's attorney is awarded as attorney's fee for his services at this Board review 25% of the increased temporary total disability compensation not to exceed \$250.00.

WCB NOS. 78-4221 & 78-4222

December 19, 1980

HARRY GETTMAN, CLAIMANT
Richard Sly, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Remand

On July 24, 1979, the Board issued an Order on Review in this case granting the claimant an award of compensation equal to 192° for 60% unscheduled disability for his low back injury. This case was subsequently appealed to the Court of Appeals and eventually to the Supreme Court.

The Supreme Court, in a decision entered September 10, 1980, reversed the Court of Appeals and the Board and remanded this claim back to the Board for further consideration. The Supreme Court found that the Board and the Court of Appeals had reduced claimant's award of compensation based on its findings that claimant had "potential" for retraining. The Supreme Court stated that the question of whether or not a claimant is permanently and totally disabled must be decided upon the conditions existing at the time of the hearing. Therefore, this case was remanded to the Court of Appeals with instructions to remand it to the Board for consideration in light of the Supreme Court's findings. The Judgment and Mandate of the court was issued on November 6, 1980.

The Board, in light of the Supreme Court's instructions, after reviewing the entire record, affirms its prior order. We find that the medical evidence in this case by itself does not entitle claimant to an award of permanent and total disability. None of the doctors who treated or examined claimant found him physically permanently and totally disabled. Dr. Khan found claimant totally precluded from his regular occupation; the Orthopaedic Consultants felt claimant could return to his regular occupation but with limitations on lifting and only infrequent bending. These physicians rated claimant's impairment as mild. Dr. Satyanarayan disagreed with the Orthopaedic Consultants only to the extent that he felt claimant was precluded from his regular job.

Based on these medical opinions, claimant is not excused from a showing of motivation and his responsibility to seek regular and gainful employment. The record discloses that vocational rehabilitation personnel found claimant ineligible for their services with no explanation given but also they recommended referral to a service coordinator. Efforts of the service coordinator are not of record. Claimant, however, had already retired from the labor market, having applied for his retirement benefits on July 13, 1977.

For the above reasons, the Board cannot say that this claimant's injuries were such that, regardless of motivation, he is unable to engage in gainful and suitable employment. Based on the residuals from claimant's injuries and the physician's opinions concerning claimant's capabilities, he is employable.

The Board concludes that claimant is entitled to an award of 192° for 60% unscheduled disability to compensate him for the loss of wage earning capacity arising out of his industrial injuries.

ORDER

Claimant is hereby granted an award of 192° for 60% unscheduled disability.

The carrier is allowed to credit payments made for permanent partial disability against this award.

WCB CASE NO. 79-7093

December 19, 1980

REX HARRIS, CLAIMANT

Charles Paulson, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which found the claimant was permanently and totally disabled as of June 1, 1970. The SAIF contends the claimant has not proven he is permanently and totally disabled.

We find the Referee correctly recited the facts of this case except he mistakenly stated Dr. Hardy is a psychologist when, in fact, he is a psychiatrist.

After de novo review, we do not find that claimant is permanently and totally disabled. The evidence establishes that the claimant is capable of doing many things and is very active. Also the evidence establishes the claimant, through investment and real estate transactions, has been able to earn money. His ability to do so can be considered in determining his loss of wage earning capacity. After making an independent review of the record in this case, we find the claimant has lost a considerable portion of wage earning capacity, but he has not proven he is permanently and totally disabled. Based on our independent judgment of the facts in this case, we find the claimant is entitled to an award of compensation equal to 240° for 75% unscheduled disability in lieu of the prior awards of unscheduled disability he has been granted for this injury.

ORDER

The Referee's order dated April 25, 1980 is modified.

The claimant is hereby granted an award of compensation equal to 240° for 75% unscheduled disability for this injury. This is in lieu of all prior awards of unscheduled disability the claimant has been granted for this injury.

The SAIF Corporation is entitled to credit any payments of permanent total disability compensation it made pursuant to the Referee's order and the prior awards of compensation against the award of compensation granted by this order.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-7503

December 19, 1980

LAURA L. MAGWOOD, CLAIMANT

Pozzi, Wilson, et al, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Employer

The employer requests Board review of the Referee's order. The Referee set aside the employer's denial dated September 11, 1979, remanded the claim to the employer for payment of all benefits due, found the claimant's condition medically stationary and ordered the claim referred to the Evaluation Division for a determination and awarded the claimant's attorney a fee for overturning the employer's denial. The employer contends that its denial should have been affirmed.

The Board finds that the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the majority of the Board reverses the Referee's order. We find that the preponderance of the evidence establishes that the claimant had a pre-existing low back condition prior to her employment with this employer. We do not find that her work with this employer caused any worsening of her pre-existing back condition. Applying the test set forth by the Supreme Court in the case of Weller v. Union Carbide Corporation, 288 Or. 27, 602 P2d 259 (1979), to the facts of this case, we do not find that the claimant has proven her claim is compensable. The medical evidence indicates that her work did cause increased pain, but it does not establish that it caused the underlying or pre-existing condition to worsen. Therefore, the majority of the Board reverses the Referee's order in its entirety and restores the employer's denial dated September 11, 1978 and affirms it.

ORDER

The Referee's order dated April 23, 1980 is reversed in its entirety.

The employer's denial dated September 11, 1978 is restored and affirmed.

I respectfully dissent from the majority of the Board as follows:

The order of the Referee should be affirmed and the denial set aside.

It is immaterial whether claimant had back problems, pre-existing the subject work exposure since the employer takes the worker as she is. The critical consideration in this case is the application of the law as enunciated in the Weller line of cases. The evidence preponderates in establishing compensability. The work exposure caused a temporary worsening of the underlying disease requiring medical services and temporary disability.

Claimant's attorney should be allowed an attorney's fee at Board level of \$300.00.


M. Keith Wilson, Chairman
Workers' Compensation Board

CLAIM NO. SC 237789

December 19, 1980

CHESTER MILLS, CLAIMANT
David A. Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 31, 1970, the claimant suffered a compensable injury to his head. This claim was initially closed by a December 23, 1970 Determination Order which granted him an award of temporary total disability compensation and an award of compensation equal to 16° for 5% unscheduled disability for his head injury and 90° for loss of vision in his right eye. The award of unscheduled disability was subsequently increased to 10%. The claimant's aggravation rights have expired.

We ordered this claim reopened effective January 6, 1980 under our own motion jurisdiction. The claimant had been hospitalized on that date and later underwent a CAT scan which revealed the presence of a left frontal lesion. EEG tests showed frequent seizure discharges emanating from that location. Dr. Englander diagnosed post-traumatic seizures related to the claimant's 1970 injury.

On November 6, 1980, Dr. Englander reported the claimant's condition was stable and he was being treated with medication to control his seizures. Dr. Englander felt the claimant should avoid work in any capacity in which the loss of consciousness would cause injury to himself or others. The final diagnosis was post-traumatic epilepsy.

On November 14, 1980, the SAIF Corporation requested this claim be closed and a determination of the compensation to which the claimant was entitled be made. The Evaluation Division of Workers' Compensation Department on December 3, 1980 recommended this claim be closed and the claimant be granted an award of additional temporary total disability from January 6, 1980 through November 6, 1980 less time worked and additional compensation equal to 10% for his head injury, making a total award of 20% unscheduled disability.

We have reviewed this record and agree with the Evaluation Division regarding the award of additional temporary total disability compensation. However, we find the claimant is entitled to a larger award of unscheduled disability than that recommended by the Evaluation Division. The claimant is now 34 years old and has a high school education. Dr. Englander places limitation on the type of work the claimant is able to perform. This bars him from performing construction work and many other types of employment. We find the claimant is entitled to an additional award of compensation equal to 96% for 30% unscheduled disability for his head injury.

ORDER

The claimant is hereby granted an additional award of temporary total disability compensation from January 6, 1980 through November 6, 1980, less time worked, and an additional award of compensation equal to 96% for 30% unscheduled disability for his head injury, making a total award of compensation equal to 128% for 40% unscheduled disability for his head injury.

December 19, 1980

GARY L. MUEHLHAUSEN, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
Schwabe, Williamson, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order Vacating Order of Dismissal

The Board's Order of Dismissal dated December 11, 1980 is hereby vacated and the claimant's request for review is reinstated. The Board will proceed to review this case.

IT IS SO ORDERED.

December 19, 1980

MAXINE E. SHAW, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
Lang, Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order on Remand to Hearings Division

On November 29, 1979, the Board issued an Order on Review in this case. The Board found claimant was not permanently and totally disabled, however, it granted her an award of compensation equal to 240° for 70% unscheduled disability. The claimant appealed this to the Court of Appeals contending that she was permanently and totally disabled.

An opinion dated August 25, 1980 by the Court of Appeals remanded this case to the Board. The Court stated that, based on the record it currently had, they agreed with the Board that the claimant was not permanently and totally disabled. However, the Court disagreed with the Board's analysis of the facts in this case. The Court found that the claimant had attempted various types of employment and made applications for two jobs prior to the hearing held in this case. They felt that the claimant's efforts were on the borderline of being reasonable. Further, the Court pointed out that claimant had been offered a job as a seamstress, a job she had performed prior to her injury. The Court felt that the medical evidence did not establish total disability, that claimant's job search was minimal and may have been less than reasonable. Under these circumstances, the Court concluded the claimant's failure to at least attempt to work as a seamstress was the most telling fact that foreclosed a finding of total disability.

The second issue raised by the claimant was whether or not she was entitled to a permanent partial disability award either in the scheduled area or in the unscheduled area. The Court found that the medical evidence seems to suggest that the claimant's phlebitis and her thrombophlebitis and/or varicose veins involve primarily or exclusively her legs. The employer contends, based on this evidence, that she is entitled only to a scheduled disability award of compensation.

The Court pointed out that the Supreme Court decided the case of Woodman v. Georgia Pacific Corp., 289 Or. ____ P2d ____ (1980) which set forth the ground rules for distinguishing scheduled from unscheduled injuries. The Court of Appeals felt that the rules set forth in the Woodman case (supra) indicate: (1) That if the claimant's disability is general vascular problems, it should be compensated with an unscheduled award even if it happens to manifest itself primarily in her legs; but (2) if the claimant's vascular problem is limited to her legs, it should be compensated with a scheduled award unless it also has secondary consequences beyond the scheduled loss that are compensable under the Woodman rules.

Further, the Court found a factual void in the record. The Court found the doctors were not asked and did not volunteer their opinions on whether they thought claimant's condition was a general circulatory or vascular problem or, instead, whether they thought it affected only circulation in the veins of her legs. For these two reasons, the Court remanded the case to the Board with instructions to remand this case to the Referee for further proceedings consistent with their opinion.

The Judgment and Mandate was issued on December 11, 1980 by the Court of Appeals in this case.

In light of the Court of Appeals' decision in this case, the Board remands this case to Referee Pferdner as directed by the Court. The Referee shall determine, by the taking of additional evidence, whether the claimant's condition is a general circulatory or vascular problem or whether it affects only the circulation in the veins of her legs. The Referee further shall determine if the claimant is entitled to an award of scheduled disability or an award of unscheduled disability.

ORDER

This case is remanded to Referee Pferdner for further proceedings consistent with the opinion issued by the Court of Appeals in this case.

December 19, 1980

JEAN P. SULLIVAN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 5, 1980, the SAIF Corporation (SAIF) indicated it would not oppose an Own Motion Order reopening claimant's claim for treatment of her septic arthritis and time loss directly related to her June 2, 1972 injury. Claimant's aggravation rights had expired. Attached to the SAIF's letter were several medical reports in support of the claimant's position.

The evidence indicates that after her shoulder surgery in 1975, the claimant experienced continuing problems with infection and drainage. For quite some time this was treated with antibiotics. In August 1980 Dr. W. C. Kaesche indicated that the claimant had been experiencing pain in her shoulder and was felt to have some bursitis. When she failed to respond to injections, he hospitalized her on August 29, 1980 for continued treatment which included aspiration and manipulation of her right shoulder.

The treating doctors found that she had a rather significant industrial injury in 1972 and her problems had continued since then. Dr. Wayne Norton of the SAIF indicated that the claimant's condition had been one of chronic infection which recently had flared up to produce the problems for which she was being treated. He finds the problem is definitely related to the industrial injury.

The Board, after thoroughly considering the evidence before it, finds that it is sufficient to reopen the claimant's claim at this time. The claimant's claim should be reopened for payment of compensation and other benefits provided for by law commencing on August 29, 1980 until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

JOYCE TURNER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed the award of compensation she had been granted by the two Determination Orders entered in this case. The claimant contends that she is entitled to additional permanent partial disability compensation for her injury.

The Board finds that the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, the Board modifies the Referee's order. We agree with the Referee's affirming the awards of compensation granted by the Determination Orders for the loss of use of her left and right arms. We do not agree with the award of compensation granted for her loss of wage earning capacity due to her back injury.

The claimant is 53 years old and has a high school education plus three years of study at the college level. She has been a housewife and worked as an assembly line worker in a can factory, clerk at an order desk and in a printing and book binding business. The medical evidence establishes that this claimant should not return to the printing and binding job she had at the time of the injury, nor to one which requires heavy lifting, repetitive bending, stooping or twisting. Various tests indicate that the claimant has a bright-normal range of intelligence.

The claimant, at the time of the hearing, was working as an aide at a senior citizen center on a part-time basis. We find that the claimant has lost more of her wage earning capacity than that for which she has been compensated.

Therefore, the Board grants the claimant an award of compensation equal to 64° for 20% unscheduled disability for this injury. This is in lieu of all prior awards of unscheduled disability for this injury. This is in lieu of all prior awards of unscheduled disability the claimant has been granted for this injury.

ORDER

The claimant is hereby granted an award of compensation equal to 64° for 20% unscheduled disability for this injury. This is in lieu of all prior awards of unscheduled disability that the claimant has been granted for this injury.

Claimant's attorney is granted as reasonable attorney's fee for his services at this review the sum equal to 25% of the increased award of compensation, not to exceed \$3,000.

CLAIM NO. 133CB629352

December 19, 1980

KENNETH V. WARING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 5, 1980, the claimant requested the Board reopen this claim for his October 6, 1973 injury. This claim had been originally closed by a January 5, 1975 Determination Order and the claimant's aggravation rights have expired.

A skin graft over the left malleolus had been done in 1973. In November 1980, Dr. Kadwell reported he had seen the claimant on November 7, 1980 and found a stasis ulcer was forming in the skin graft with surrounding cellulitis and pustular drainage. The diagnosis was a leg ulcer of the left leg in the previous skin graft. Dr. Kadwell stated that the claimant had had an ulcer form in the previously injured and grafted area over the left malleolus. He indicated that the claimant was unable to work and was being treated for this condition.

The Travelers Insurance Company advised the Board, on December 10, 1980, that it had reviewed the medical reports and did not oppose an own motion order reopening this claim.

After reviewing the record in this claim, we find that the evidence is sufficient to warrant the reopening of this case for the payment of compensation and other benefits provided for by law effective November 7, 1980, the date claimant came under the care of Dr. Kadwell, until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

December 19, 1980

DONALD E. WOODMAN, CLAIMANT
Doblie, Bishoff & Murray, Claimant's Attys.
Jaqua & Wheatley, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order of Remand to the Hearings Division

In an opinion dated July 24, 1980, the Supreme Court reversed and remanded this case to the Court of Appeals. The Supreme Court found that the Board's use of the terms "associated with" and "related to" in describing the causal link between the injury to the arm and consequences for the shoulder and back are insufficiently precise to show whether the Board found, from the evidence, that those consequences would or would not follow the amputation of the arm in all but exceptional cases. The Court was not sure the Court of Appeals had applied the correct legal test in this case and, therefore, remanded this case to the Court of Appeals.

On October 6, 1980, the Court of Appeals, in light of the Supreme Court's opinion, found there was a void in this record. Therefore, it remanded this case to the Referee for the taking of further evidence solely on the question of whether the medical expectancy that the claimant's neuroma problems and spinal problems caused by imbalance would accompany the amputation is so great that their failure to occur would be exceptional.

A Judgment and Mandate was issued in this case by the Supreme Court on August 14, 1980 and by the Court of Appeals on December 10, 1980.

Based on the Court of Appeals' order, the Board remands this case to Referee Seifert to take further evidence solely on the question of whether the medical expectancy that the claimant's neuroma problems and spinal problems caused by imbalance would accompany the amputation is so great that their failure to occur would be exceptional. The Referee shall issue an appealable order on this issue.

December 23, 1980

ROBERT GREGOR, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 1, 1980, the claimant, by and through Dr. John White, requested the Board to exercise its own motion jurisdiction and reopen his claim for his April 17, 1972 left arm injury. The claimant's aggravation rights have expired. Attached to his request was a report from Dr. White dated November 26, 1980 which indicated claimant had painful neuromas of the left median and ulnar nerve stumps. These neuromas interfered with the claimant's use of his left arm. Dr. White recommended surgery to correct this problem.

On December 5, 1980, SAIF advised the Board that it would not oppose an own motion reopening for the surgery scheduled December 8, 1980. Attached to SAIF's letter were several medicals supporting the claimant's claim. A report from Dr. Harold Poole indicates that the claimant saw him on November 11, 1980 for a painful neuroma. The claimant was then referred to Dr. White who recommended surgery.

The Board, after considering the evidence before it, finds that it is sufficient to warrant reopening the claimant's claim at this time. The claimant's claim for the April 17, 1972 injury should be reopened effective November 11, 1980 for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

December 30, 1980

MARK ARATA, CLAIMANT

J. David Kryger, Claimant's Atty.

George Goodman, Employer's Atty.

SAIF, Legal Services, Defense Atty.

Order Denying Employer's Motion

On December 1, 1980, the employer moved the Board to add an issue for Board review. The employer contends the question of whether or not CNA should have been allowed to deduct a time loss overpayment from the recent permanent disability award should be considered by the Board. In support of its argument, the employer cites the case of Wilson v. SAIF which was decided on August 5, 1980 by the Court of Appeals. The employer contends that the Wilson decision sets up the procedural requirement that existing time loss overpayments be brought to the attention of the Hearings Referee in order to later obtain a potential set off. However, this case had not been decided at the time of the hearing in this case. The employer contends that by adding this issue to the matter before the Board, it would avoid additional litigation. In the alternative, the employer argues that if the Board should not decide to include this as an issue in its review of this case, this case should be remanded to the Referee for his consideration.

The claimant, by and through his attorney, on December 8, 1980, responded to the employer's motion. The claimant stated that at the time of the hearing the only issue raised was the extent of permanent disability. No other issues were raised concerning an overpayment and no overpayment was even mentioned at the time of the hearing. Subsequent to the hearing, the claimant states that CNA unilaterally deducted an overpayment from the permanent partial disability award. CNA had been contacted regarding its action and refused to pay the full amount as awarded by the Referee. The claimant states that the action taken by CNA occurred after the hearing and after the issuance of the Opinion and Order. The claimant's only remedy, he contends, is to file a request for hearing under the statute and compel the insurance carrier to return the wrongfully withheld overpayment.

The claimant points out that if the Board does remand this case, it would not achieve any different result than in following the statutory procedure of having a hearing on the issue of the wrongful withholding of the overpayment. The claimant points out that in either case the Hearings Division will hold a hearing and take evidence on that issue.

We have reviewed the employer's motion and the claimant's response to it. The Board does not have the authority to undertake, in its review of a case new issues which were not raised at the time of the hearing. We find no reason to remand this case to the Hearings Division to take evidence on this issue. Therefore, we deny the employer's motion and will proceed with our review of this case.

ORDER

The employer's December 1, 1980 motion to add an issue at board review or in the alternative to remand this case to the Hearings Division to be set for hearing is denied.

CLAIM NO. C 49505 December 30, 1980

FRANKLIN D. BARNETTE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order Referring for Hearing

On November 21, 1966, the claimant sustained a compensable injury to his back. This claim has been reopened and closed and the claimant has received a total award of compensation equal to 153.6° for 80% loss of use of the arm by separation for unscheduled disability. On October 29, 1980, the Board issued an Amended Own Motion Determination Order which was the last award of compensation in this case. The claimant's aggravation rights have expired.

Dr. Brenneke, in November 1980, reported that claimant had low back pain with sciatica. He noted that claimant had had multiple operative procedures in the past. Dr. Brenneke found that the claimant had spasms in the lumbosacral area and hospitalized him for bed rest and traction on November 4, 1980. He reported that patient should be hospitalized for one to two weeks and treated conservatively. He stated that there was an objective worsening of the claimant's previous condition without any new injury.

On November 24, 1980, Dr. Grewe reported that claimant had undergone three attempts at a spinal fusion with nonunion and persistent pain and disability. Dr. Grewe felt that the claimant should not undergo any further surgical attempts at fusion, and that such attempts were contraindicated on the basis of a poor chance of success. He noted that the claimant made frequent trips to the emergency room, required considerable treatment for his day-to-day problems, and had frequent exacerbations of pain. Dr. Grewe opined that claimant was and would be permanently and totally disabled from gainful employment. Dr. Grewe felt there were two alternatives that could be attempted in claimant's situation: (1) The use of some sort of procedure such as a Knodt rod or other internal fixation, or combined interbody and posterior, lateral fusion; or (2) to widely decompress the area of scarring around the nerve at the attempted fusion sites and perform, in addition, (depending on further localization studies) sensory rhizotomy, at least of the posterior roots, to try to gain pain improvement.

Claimant, on November 28, 1980, requested the Board consider all the medical reports submitted on his behalf and review the own motion regarding his claim.

Dr. Brenneke, on December 1, 1980, reported that claimant had been placed in a brace in May 1980. He reported that claimant had difficulty walking and occasionally his right leg gave out, causing claimant to fall. Dr. Brenneke had hospitalized the claimant from November 4, 1980 for bed rest and traction. While hospitalized, the claimant was placed in a body cast and was to remain in that body cast for approximately two to four weeks. Dr. Brenneke felt that claimant had experienced a significant deterioration of his back pain over the last six to twelve months. He felt that claimant had a significant amount of trouble which was not stationary at that time.

The SAIF Corporation, on December 10, 1980, advised the Board that it opposed an own motion order reopening this claim for temporary total disability compensation as it did not appear that the claimant's condition had materially worsened since the last arrangement of compensation.

We reviewed the medical reports submitted by the parties in this case and find that it would be in the best interest of justice if this matter were referred to the Hearings Division to be set for a hearing. The Referee shall determine if the claimant's condition has worsened since the last award or arrangement of compensation in this case and if his worsened condition is due to his 1966 injury. Upon the conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared. The Referee shall forward the transcript, along with the other exhibits introduced at the hearing, and a recommendation in this case to the Board for its consideration.

December 30, 1980

GARY BEUS, CLAIMANT
David W. Hittle, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Presiding Referee's order denying the claimant's request to set this case for a hearing or to otherwise have it processed by the Hearings Division. The claimant's Request for Hearing had been dismissed on October 1, 1979 after no response had been received to a Show Cause Order. This order became final. The claimant contends he is entitled to have this case rescheduled for a hearing.

We have reviewed the record in this case and the briefs of the parties and affirm the Presiding Referee's order. ORS 656.389(3) provides that an order of a Referee is final unless, within 30 days, one of the parties requests a review by the Board. In this case, neither the claimant nor the SAIF Corporation requested a review by the Board of the Order of Dismissal within 30 days. That order became final.

We do not find that the claimant's explanation of why he did not respond to the Order to Show Cause or Order of Dismissal justifies the Board resetting this case for a hearing. The claimant was mailed these documents at his last known address. The law does not require personal service.

The Board declines to exercise its authority under ORS 656.278 for the same reasons.

ORDER ON REVIEW

The Presiding Referee's order dated September 4, 1980 denying the claimant's request to have his case set for hearing or otherwise processed by the Hearings Division is affirmed.

OWN MOTION ORDER

The claimant's request for own motion relief is denied.

APPEAL NOTICE

The claimant has no right to a hearing, review or appeal on this award made by the Board on its own motion.

The SAIF Corporation may request a hearing on this order.

The order is final unless, within 30 days from the date hereof, the SAIF Corporation appeals this order by requesting a hearing.

WCB CASE NO. 78-9419

December 30, 1980

RHONDA BROWN, CLAIMANT
Douglas S. Green, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Remand

On August 17, 1979, the Board entered an Order on Review in this case which affirmed and adopted the Referee's Opinion and Order. The Referee found that the claimant had failed to timely request a hearing within 60 days from a denial issued by the employer. The Court of Appeals affirmed the Board.

In an opinion dated July 23, 1979, the Supreme Court reversed the Court of Appeals and remanded this case to the Board. The Supreme Court held that the Board had unduly extended the principal it had set forth in the case of Sekermestrovich v. SAIF, 280 Or. 723, 573 P2d 275 (1977). The Court stated that this case did foreclose a finding of "good cause" and the determination of whether or not "good cause" was established was a judgment to be made by the Referee and the Board in the first instance. The Court stated that because the Referee and the Board concluded that the Sekermestrovich case required dismissal of the claimant's claim, they had not considered other issues bearing on the timeliness or on the merits of this case. Therefore, this case was remanded to the Board.

We have reviewed the record in this case and utilized the Supreme Court's guidance in this case. We agree with the Referee that this employer was not prejudiced by the claimant's late filing of a claim. Further, we find the claimant has established good cause for not filing her Request for Hearing within the 60 days required by ORS 656.319(1). She is entitled to a hearing in this case. However, since the Referee did not determine whether or not the claimant has proven her claim is compensable and we are unable to determine from this record if she did so, we remand this case to Referee Mongrain to conduct a hearing on the merits of this case and to determine if the claimant's claim is compensable.

December 30, 1980

ZANE CULBERTSON, CLAIMANT
Emmons, Kyle, et al, Claimant's Attys.
David O. Horne, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer
Cross Request by Claimant

The employer seeks Board review of the Referee's order which granted claimant an award of compensation equal to 32% for 10% unscheduled disability for his right shoulder and cervical injury and an award of compensation equal to 5% unscheduled disability for his low back and right hip injury. The Referee, at the hearing, denied allowing the employer to try to lay a foundation for introduction of certain surveillance film. The employer, on appeal, contends that the Referee should have allowed it to lay a foundation to have the surveillance films admitted. Further, employer contends that the award of compensation granted by the Referee is excessive and not supported by the evidence in this case.

The claimant contends the employer was allowed to attempt to lay a foundation for the admission of the surveillance films, but the employer failed to do so. Further, the claimant contends the award of compensation granted by the Referee is supported by the evidence in this case.

The Board finds that the Referee correctly recited the facts of this case in his order.

After de novo review of the record in this case, the Board finds that the Referee's award of compensation is not supported by the evidence. However, the Board does find that the Referee correctly ruled in not allowing the employer to attempt to lay a foundation for the introduction of the surveillance films. The investigator who took these films subsequently died and therefore was not available to testify as to the dates, time and activities which he filmed. He was not available for cross-examination. Therefore, we conclude that the employer would have been unable to lay a proper foundation for the introduction of the surveillance films.

On the employer's second contention that the award of compensation in this case is excessive and not supported by the evidence, the Board agrees. We find that the medical evidence indicates that claimant has no permanent impairment due to his on-the-job injury. The claimant has been found to have a full range of motion in his right shoulder and cervical spine. Claimant advised the doctors that he was able to lift weights without any pain or restriction of movements of his shoulder. He was released to his regular work with no restrictions. Dr. Martens does feel that claimant should avoid prolonged standing, bending and lifting over 50 pounds as well as walking. Dr. Hartmann felt that claimant might benefit from a job change. We do not find that these recommendations are due to any permanent impairment claimant has suffered due to his on-the-job injury. The evidence does not indicate that claimant's back pain and hip pain are related to this injury. Claimant is now 24 and has a high school education. He has worked as a backhoe operator, worked on the green chain with this employer and has also worked as a bag boy and as a welder. Claimant stated that he feels he could do any of the jobs in the lumber mill except for possibly not being able to perform the job on the green chain.

We conclude, based on the evidence in this case, that claimant has not established he has suffered any loss of wage earning capacity due to his on-the-job injury. There is no evidence that claimant has experienced any permanent impairment, and the weight of the evidence indicates that claimant was released by the physicians to return to his regular work without any restrictions due to this injury. Therefore, the Board modifies the Referee's order by reversing the awards of unscheduled disability granted by the Referee and reinstating the Determination Order.

ORDER

The Referee's order dated May 13, 1980 is modified.

The Determination Order dated March 19, 1979 is reaffirmed by the Determination Order dated June 11, 1979 and is restored and affirmed.

The remainder of the Referee's order is affirmed.

December 30, 1980

NEIL E. FAIN, CLAIMANT

Terence J. Hammons, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's Opinion and Order which granted the claimant an award of compensation equal to 64° for 20% unscheduled disability for his low back injury. The SAIF contends this award of compensation is excessive.

We find the Referee correctly set forth the facts of this case in his Opinion and Order.

After de novo review, the Board modifies the Referee's order. The July 3, 1979 Determination Order granted the claimant temporary total disability compensation and temporary partial disability compensation. Dr. Bert, prior to the claim being closed, felt the claimant had minimal pain and should avoid any heavy lifting or frequent bending. The claimant was not taking any medication and had full range of motion of his back. The Orthopaedic Consultants rated the claimant's "residual disability" as minimal and felt he could return to his former occupation with limitations. The claimant is 31 years old and has a GED. He has worked in lumber mills and construction work for the forest service. He is presently employed making wood bathroom accessories. Based on the evidence in this case, we find the award of compensation granted by the Referee is excessive and would modify it to 32° for 10% unscheduled disability.

ORDER

The Referee's order, dated June 10, 1980, is modified.

The claimant is hereby granted an award of compensation equal to 32° for 10% for his low back injury. This award is in lieu of all prior awards of unscheduled disability the claimant has received for this injury.

The remainder of the Referee's order is affirmed.

December 30, 1980

STANLEY FOUNTAIN, CLAIMANT
Lawrance L. Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On October 13, 1980, the claimant and his attorney entered into a stipulation which granted him an additional award of permanent partial disability equal to 96° for 30% unscheduled disability, provided the award be paid in a lump sum and granted the claimant's attorney a fee out of this increased award and dismissed the claimant's request for a hearing. This stipulation was approved by Referee Gemmell.

Subsequent to the approval of the stipulation, the claimant retained a different attorney, and on November 12, 1980 requested the Board set aside the stipulation and set this case for a hearing on its merits. The claimant contended that at the time the stipulation was entered into, he was unable to work. Further, the claimant forwarded a report to the Board from Dr. Hoff in which the doctor stated he felt that claimant had moderately severe disability and was unable to work.

On November 17, 1980, the employer/carrier advised the Board that it objected to the claimant's request. The employer/carrier contends that any rights the claimant may have are under ORS 656.278. Further, they contend that the stipulation is a final order and does not have any appeal rights to it. They request the Board dismiss the claimant's request for review.

The claimant, by and through his attorney, on December 9, 1980, advised the Board that he was relying on the case of Schultz v. SAIF, 252 Or 211, 448 P2d 551 (1968).

We have reviewed the contentions of the parties in this case and dismiss the claimant's request for review. We find the claimant's request is without merit. The Schultz case relied upon by the claimant held that if, on the face of the record, the probability of an inaccurate award was found, the Board could remand the claim to the Hearings Officer for further determination of claimed liability although the original award was based on an agreement of the parties. In this case, we do not find that on the face of the record that the award of compensation granted to the claimant in the stipulation was inadequate. Therefore, the Board denies the claimant's request that the stipulation entered into and approved on October 13, 1980 be set aside and that this case and claim be set for hearing before a Referee.

ORDER

The claimant's request for review dated November 12, 1980 is dismissed.

WCB 80-9494, C1 W-017760 December 30, 1980

WCB 80-10, 393; C1 W-11328
& D32-11706

WCB 80-10, 394; C1 95C 60 4387

WCB 80-10, 494; C1 D32-11557 & C1 17760

MARY A. GOTCHALL, CLAIMANT

Gary D. Hall, and, Galton, Popick & Scott, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order Consolidating Cases for Hearing

On October 30, 1980, the claimant, by and through her attorney, requested the Board exercise its own motion jurisdiction and reopen this claim for her October 14, 1973 injury, Claim No. 17760. The claimant had filed an aggravation claim which Industrial Indemnity denied on the basis that the claimant's aggravation rights had expired and she suffered from an occupational disease which is the responsibility of Wausau Insurance Companies. The claimant requested a hearing on this denial, WCB Case No. 80-9494.

The claimant also has requested a hearing protesting the extent of disability awarded in the October 20, 1980 Determination Order for her January 15, 1976 injury. The insurer for this injury was Industrial Indemnity and is WCB Case No. 80-9957.

Industrial Indemnity advised the Board it did not feel this case should be considered by the Board under its own motion jurisdiction. It advised the Board claimant has also filed an occupational disease claim with Wausau Insurance Company for a cervical and shoulder condition. This was denied and a hearing has been requested on it. (WCB Case No. 80-10,494)

The claimant also has filed an occupational disease claim against Mail-Well Envelope Company which was denied by its insurance carrier, Aetna Insurance Company. The claimant has requested a hearing on this denial (WCB Case No.'s 80-10,394 and 80-10,393).

The Board, after reviewing the contentions of the parties, finds it would be in the best interests of the parties if claimant's Own Motion request was referred to a Referee to be consolidated with WCB Case No.'s 80-9494, 80-9957, 80-10,393, 80-10,394, and 80-10,494 for a hearing. The Referee shall determine if claimant's low back problem is related to her October 14, 1973 injury and represents a worsening of it since the last award or arrangement of compensation. Upon the conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared. The Referee shall forward the transcript, the other exhibits introduced at the hearing and recommendation to the Board for its consideration. The Referee shall also issue appropriate orders in all the other cases.

IT IS SO ORDERED.

CLAIM NO. WD 3632

December 30, 1980

KEITH GUBRUD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On July 3, 1980 we ordered this claim reopened as of June 9, 1980 for the payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278. This was based on Dr. Serbu's report of the same date which indicated the claimant had an acute mechanical low back strain. Dr. Serbu prescribed complete bed rest and had requested this claim be reopened. The claimant indicated that he was off work from June 9, 1980 through July 13, 1980 but stated he did not lose any wages.

In October 1980, Dr. Serbu reported that the claimant had made a total recovery and recommended the claim be closed with no additional award of permanent partial disability. He noted that the claimant had been off work for five or six days in June 1980.

The SAIF Corporation, on October 28, 1980, requested that a determination be made of the compensation to which the claimant was entitled. The Evaluation Division of the Workers' Compensation Department on December 5, 1980 recommended that this claim be closed and that the claimant not be awarded any additional temporary total disability or any additional permanent partial disability.

We have reviewed this file and do not agree with the recommendation of the Evaluation Division. The medical evidence establishes that the claimant was unable to work from June 9, 1980 through June 13, 1980 because of his back problems. Therefore, we find that he is entitled to an award of additional temporary total disability from June 9, 1980 through June 13, 1980.

ORDER

The claimant is hereby granted an award of additional temporary total disability compensation from June 9, 1980 through June 13, 1980.

WCB NOS. 79-4980, 79-10, 169,
& 79-10, 606

December 30, 1980

GARY W. HUNTER AND MICHAEL LEROY, CLAIMANTS
Pozzi, Wilson, et al, Claimants' Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which found that the abovenamed claimants were employees of the State of Oregon and not the employees of Multnomah County. The Referee remanded their claims to SAIF for acceptance and processing and granted the claimants' attorney a fee for his services in overcoming the denials. The Referee also ordered the SAIF to reimburse Scott Wetzel for all workers' compensation payments made by Scott Wetzel to or on behalf of the claimants for their claims. The SAIF contends that the claimants were employees of Multnomah County and that their claims should be remanded to Scott Wetzel for processing. As an alternative, the SAIF contends the Board should adjust the award of attorney's fees to reflect the nature of the proceedings and vacate that part of the Referee's order which required it to reimburse Scott Wetzel for the claim costs.

The facts in this case were stipulated to by the parties at the time of the hearing, and we find no reason to recite these facts in our Order.

We review de novo and reverse the Referee's order. The Referee applied a two-prong test to determine whether the claimants were employees of the State of Oregon or employees of Multnomah County. The Referee felt that the right of control far outweighed the question of who paid the wages of the claimants. He found that since the claimants were under the control of the Circuit Court judges, who are State employees that they, therefore, also are State employees.

We do not agree with the Referee's analysis of the facts in this case. The State authorizes or allocates funds to the County to cover the cost of operation of the court system. The County actually pays the salaries of and provides other fringe benefits for the court reporters. The court reporters do work on a day-to-day basis for the Circuit Court judges. However, we find that technically the court reporters are under the control of the County. The County has delegated, in a very small fashion, its authority or power to control the court reporters to the Circuit Court judges to control the day-to-day work of the reporters. If the Circuit Court judge is absent, the court reporter is required to stay at work and to take orders from the Court Administrator who can reassign them to other courts or order them to perform other work. Therefore, we find that these claimants are, in fact, employees of the County and not employees of the State, based on the facts of this case. We would refer any question regarding the amount of the attorney fees to the Circuit Court for determination pursuant to ORS 656.388(2).

ORDER

The Referee's Opinion and Order dated June 30, 1980 is reversed.

The claimants' claims are remanded to Scott Wetzel for acceptance and processing and payment of compensation and other benefits as provided for by law until closed pursuant to ORS 656.268.

The claimants' attorney is entitled to have fees awarded by the Referee paid by Scott Wetzel. It is further ordered that appropriate reimbursement shall be made between the SAIF Corporation and Scott Wetzel in this case.

The claimants' attorney is entitled to a fee of \$100 for his services on behalf of the claimants at the Board level.

WCB CASE NOS. 78-8151, 78-8152,
& 78-8153.

December 30, 1980

JACQUE C. JAEGER, CLAIMANT
Richardson, Murphy, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation seeks Board review of the Referee's order which granted the claimant permanent total disability compensation in addition to penalties and attorney fees.

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.

The Board clarifies its position on penalties. It is true that if an employer/carrier does not correctly process a claim or fails to comply with an order of a Referee, the Board or a court, penalties can be assessed. If the employer/carrier complies with an order but does not pay the penalty assessed against it, an additional penalty cannot be assessed for its failure to pay the penalty. This would constitute a penalty on a penalty. However, if the employer/carrier continues to fail to comply with an order, such as an order ordering it to pay medical bills, a penalty could be assessed based on the subject of the order (medical bills) in addition to the original penalty assessed. In this case, the Referee was correct in stating he could not assess a penalty on the SAIF Corporation's (SAIF) failure to pay a penalty assessed against it for not paying medical bills. However, if the medicals had not been paid, the Referee could have assessed a penalty for the SAIF's continuing failure to pay the medical bills.

ORDER

The order of the Referee, dated March 31, 1980, is affirmed.

Claimant's attorney is granted as attorney fees for his services at this Board review the sum of \$150, payable by the SAIF Corporation.

A consolidated hearing was held on the above four claims (docketed under the above three WCB Case Nos.) in Portland, Oregon, on November 19, 1979, before William H. Peterson, the undersigned Referee. The claimant was present and was represented by Allen T. Murphy, Jr., of the claimant's attorneys, Richardson, Murphy, Nelson & Lawrence. The employer for all four claims, Multnomah County, School District No. 1 (School District), and its insurer, the State Accident Insurance Fund (SAIF), were represented by Kenneth L. Klein-smith, Associate Counsel, SAIF.

The hearing record was held open for an additional medical report and the scheduling of argument. Off-the-record oral argument was presented on December 21, 1979. Dr. Andrea Tongue's one-page report of December 4, 1979, to Mr. Murphy was admitted as Claimant's Exhibit No. D64. Following written confirmation of a stipulation made during the off-the-record argument, the record was first closed on January 3, 1980. The record was reopened for the admission of Claimant's Exhibit No. D65, a two-page report of February 11, 1980, from Ingram and Associates to the Field Services Division (FSD) of the Workers' Compensation Department, and was reclosed on February 25, 1980.

ISSUES:

On each of the four claims, the claimant requested a hearing to contest the Determination Order that closed it - raising as the primary issue the extent of her permanent disability. The claimant contends that she is entitled to permanent total disability status. The corresponding claim numbers, injury dates, closing awards, etc., were as follows:

SAIF No. HD-358381; injury of March 15, 1972; Determination Order of May 19, 1978, with no permanent disability award (Ex. A13); hearing request of October 17, 1978, docketed under WCB Case No. 78-8152. (This claim is hereinafter referred to as the March 1972 injury.)

SAIF No. HC-411744; injury of December 6, 1972; Determination Order of May 19, 1978, with no permanent disability award (Ex. B4); hearing request of October 17, 1978, docketed under WCB Case No. 78-8151. (Hereinafter the December 1972 injury.)

SAIF No. HD-25175; injury of June 6, 1974; Determination Order of May 19, 1978, with no permanent disability award (Ex. C4); hearing request of October 17, 1978, docketed under WCB Case No. 78-8153. (Hereinafter the June 1974 injury.)

SAIF No. HD-119142; injury of September 24, 1975; Determination Order of June 9, 1979, with award of 5 percent of statutory maximum for permanent partial unscheduled disability (Ex. D55); hearing request of June 26, 1979, was added to above three consolidated cases without assignment of a fourth WCB Case No. (Hereinafter the September 1975 injury.)

Secondary issues were raised in amended hearing requests filed by the claimant on July 3, 1979; and there were further clarifications and limitations of the issues both at the hearing and during the later off-the-record argument. The net result was that:

1. The claimant is not seeking a reopening of any of these claims for further treatment and temporary total disability benefits (TTD). Any necessary treatment will be provided by SAIF pursuant to ORS 656.245.

2. A dispute over SAIF's alleged failure to pay past medical bills incurred in these claims was resolved by a stipulation that I could award the claimant \$100 as a penalty, and award the claimant's attorneys \$100 as a reasonable related attorney fee. (See letter of December 28, 1979, from Mr. Murphy to me.)

3. A secondary issue to be decided is whether the claimant is entitled to a penalty and the payment of an attorney fee for SAIF's alleged failure to pay a penalty ordered by the Workers' Compensation Board (Board) on August 4, 1978.

THE PENALTY ISSUE

In its August 8, 1978, Order on Review of a prior proceeding on these claims, the Board ordered SAIF to pay outstanding medical bills that had been incurred since the summer of 1976 in connection with the March 1972 injury, and also ordered SAIF to pay to the claimant a penalty equal to 25 percent of those bills (Ex. D40, p. 4). At the hearing before me the parties stipulated that SAIF did not pay that penalty. No dispute was raised regarding those medical bills; presumably they were paid in compliance with the Board Order. The claimant, therefore, is seeking a penalty on a penalty. There is no evidence, nor was it argued by SAIF, that the penalty was withheld pending an appeal from the Board's decision.

The Board has held that penalties may not be imposed upon penalties: William Wisherd, Claimant, WCB Case No. 75-4574, Order on Review, 18 Van Natta 125 (1970). In Wisherd, and similar cases, the continued resistance or delay was in the payment of both the previously delayed compensation and the resulting penalty. Thus, in cases such as Wisherd, there remained an available sanction: a further penalty on the still unpaid compensation.

The Court of Appeals has held that penalties need not be paid while an appeal is pending: Reed v Del Chemical, 26 Or App 733, 741 (1976). In order to reach that conclusion, the Court held, in interpreting ORS 656.262(8), that a penalty is not a "payment of compensation".

The Board and the Court are, therefore, in harmony: Penalties are not compensation; therefore, penalties may not be imposed upon penalties. Although I might have interpreted the applicable statute differently, I am bound by those holdings. Claimant's counsel has directed me to no case which addresses the problem posed here - payment of the previously-delayed compensation, but a failure or refusal to pay the penalty even though no appeal is pending. SAIF's action, absent any explanation, is unreasonable - and may even be defiant - but I reluctantly conclude that in this forum there is neither a remedy for the claimant nor a sanction to deter non-compliance. (The Board and its Referees do not have contempt powers.)

THE EXTENT OF DISABILITY ISSUE

Findings

The claimant was a completely credible witness. She is 51 years old. She has an M.A. degree in education, and has a high-school teaching certificate. Before her injuries, she took additional night school courses, and may have nearly enough credits for a Ph.D. degree. She has bright average to superior intelligence. She worked for the School District for 15 years. She was an Arts & Crafts teacher for the first eight years, a School Counselor for two years, and a Vice Principal for the last five years. Avocationally, she has some skill at jewelry and ceramics.

The claimant was in a non-compensable car accident in 1959, with cervical and lumbosacral injuries that first culminated in a laminectomy at L4-5 in 1961. Her recovery, however, was complicated and prolonged by the development of post-operative osteomyelitis, which resulted in the excision of her 5th spinous process in January 1962. After a lengthy recovery, she returned in 1966 to teaching for the School District at Roosevelt High School. In the two years before her return she did some part-time work retouching art layouts. It was at Roosevelt High School that she rose from teacher to Vice Principal - the position at which she was working when the compensable injuries occurred.

There were racial problems at the school in the 1970's, which resulted in riots, or near riots, and the presence of armed police in the halls. As a Vice Principal, the claimant was responsible for the welfare and discipline of the girl students, and had to break up fights between them. It was these problems that led to all her injuries. There were actually six incidents - two in 1972, two in 1974 and two in 1975 - but claims were only made for four of the six.

In March 1972, while the claimant was trying to separate students in the cafeteria during an assembly, with the lights out, a long, portable, chair rack was pushed over and struck her in the left temple, knocking her to her knees. The next day she had a large bruise on the temple, double vision, and could not read.

In December 1972 the claimant was taking a girl to the office, after breaking up a fight, when the other girl jumped over a railing and hit them both. The claimant was struck in the head and knocked down, with the others on top of her. Her jaw was dislocated and she developed muscle spasms in her neck.

In June 1974 the claimant was rushing down some stairs to the source of noise and a fight. There were papers littering the stairs. She slipped on them and fell on her back. She had severe low-back and neck pain, and was later very stiff and sore.

In September 1975, while breaking up a fight between two girls, she was thrown against a wall and lockers. Her low back was painful from this, and walking was difficult.

The foregoing injuries are the ones for which claims were made. No claim was made for a February 1974 incident that aggravated her previous low-back condition for the first time (Ex. D31, p. 1), or for a May 1975 incident in which she was pulled and shoved while breaking up a fight, with resulting low-back and neck pain.

As a result of the March 1972 injury, the blow to the temple, the claimant has severe vision problems. She cannot focus at near distances, which necessitates different strength lenses for different distances, and she has exotropia that causes double vision (Ex. A5, Ex. A11, Ex. D61, p. 5 and Ex. D64). These conditions have progressively worsened since the injury. She can now read only at a very close distance, such as 5 or 6 inches, and out at about three feet, but not at other focal points. Her double vision was originally a problem at near distances, but now extends out to at least 15 feet.

The other injuries were material contributing factors in worsening the claimant's pre-existing spinal problems, which had been relatively asymptomatic (Ex. D25A, p. 1). Treatment has been conservative. A lumbar myelogram in May 1976 was the basis for a diagnosis of a recurrent herniated disc at L4-5, but surgery was ruled out because of the previous osteomyelitis. The claimant's symptoms have included neck pain, severe low back pain, and pain, numbness and weakness in her right leg. Because of the claimant's worsening back and eye problems, she did not return to work after the school year ended in July 1976, and has not returned to work since.

In April 1978 an examining panel of specialists at Orthopaedic Consultants, P.C. believed that the claimant was medically stationary, with chronic lumbar and cervical strains. The panel evaluated her loss of neck function as "mild (10-20%)" and her loss of back function at "60-80% (moderately severe)". These impairment estimates were the total losses with the compensable injuries superimposed on the pre-existing conditions (Ex. D31, p. 6).

The claim was not closed, however, because of recommendations that the claimant be referred to a pain clinic. She was a patient at the Northwest Pain Clinic from August 21 to September 8, 1978, and again for a short period in December 1978; and was seen in follow-up on February 28, 1979. At discharge in September, 1978, the Pain Center's prognosis for the claimant's return to employment was "extremely guarded" (Ex. D42, p. 2), and was still "guarded" in February 1979 (Ex. D46). The treatment there did not significantly improve the claimant's symptoms, but did assist her in eliminating pain medication and placing greater reliance on transcutaneous nerve stimulators. The claimant's treating physician, Dr. Velma J. Horenstein, because of the claimant's inability to sit, stand or walk without pain for any length of time (the claimant testified to a sitting limitation of 30 minutes and a standing limitation of 10 or 15 minutes),

questioned whether the claimant could be rehabilitated into any occupation -- especially in view of the claimant's impaired vision (Ex. D49).

A second examination at Orthopaedic Consultants' was conducted on May 10, 1979, by a different examining panel. Although some of the findings were different, and this panel believed that there was a severe functional overlay, the bottom line was the same as before: The panel found "no change in the previous impairment ratings" (Ex. D50, p. 5). Dr. Horenstein concurred (Ex. D53).

In June 1979 the case was assigned by FSD to Ingram & Associates, a private rehabilitation-counseling firm, to provide the claimant with job re-entry assistance. The case was handled by Julia Ingram, Director - who testified at the hearing. She was credible and persuasive. She found the claimant to be cooperative in following her suggestions, and did not believe the claimant to be a malingerer. In responding to an inquiry from Ms. Ingram, Dr. Horenstein included in the claimant's physical limitations an inability to do any lifting, pushing, pulling, bending, squatting or climbing (Ex. D55A). Because of the claimant's vision problems, Ms. Ingram had her seek further eye consultations, as well as psychological counseling with a clinical psychologist with Ms. Ingram's firm. Ms. Ingram believed, initially, that the claimant would be able to work part-time. Some efforts were made toward job placement with Marylhurst College and with the Portland Art Museum. They were not successful. The School District was unable to locate a position for the claimant (Ex. D57A, Ex. D60, and Ex. D61A). In a closing report written by Ms. Ingram to FSD in February 1980, after the hearing, she said:

"It is my opinion that with this client's multiple impairments and lack of progress in solving the visual convergence problem she is not feasible for vocational rehabilitation. If either her back or vision problems improve significantly, we would be pleased to assist her." (Ex. D65).

The claimant credibly described her constant back pain, right leg pain, and physical limitations. There is no purpose in detailing them here; they correspond generally with the complaints, findings and limitations in the medical reports. There have been psychological evaluations made during the history of this claim that indicate some degree of psychological overlay to the claimant's physical and visual problems. There is no evidence of a pre-existing disabling psychological condition. More than one physician has commented that a functional overlay would not be unusual considering the medical history (Ex. D28 and Ex. D31, p. 5). The psychologists have not directly addressed causation, but I conclude from the record as a whole that the claimant does have a psychological component as a result of the compensable injuries. The claimant's psychological condition was considered to be stationary in February 1978 (Ex. D46), and there is no basis for reopening the claim for further therapy.

OPINION

I conclude that the claimant is permanently incapacitated, as a result of her compensable injuries, from regularly performing work at a gainful and suitable occupation: ORS 656.206(1)(a). She is entitled to a permanent total disability award, retroactive from May 10, 1979 - the medically stationary date that provided the basis for terminating her TTD and closing the last claim (Ex. D55).

It is, of course, unusual that a person with the claimant's education, and with 12 to 15 years of her working life remaining, should be unable to become re-employed in some job - be adaptable to some gainful occupation. Nevertheless, the conclusion is inescapable that she is not presently employable at a regular, gainful occupation. The Northwest Pain Center psychologists' prognosis for re-employment was guarded. Her treating physician doubts that the claimant can become re-employed. The examiners at Orthopaedic Consultants have found a high degree of physical impairment. The eye specialists have reported significant visual problems. The claimant has cooperated with job re-entry efforts. Her employer, despite its size, has no job for her. The vocational rehabilitation expert has tried, but has given up.

This is not a case where one of the injuries, viewed alone, is a sufficient basis for a total disability award. The multiple "battlefield" injuries, superimposed on the claimant's pre-existing condition, have created a synergism. Her total disability is greater than the sum of the parts.

ORDER

IT IS THEREFORE ORDERED, in accordance with the stipulation of the parties, that SAIF shall pay the claimant a lump sum in the amount of \$100 as a penalty for unreasonable delay in the payment of medical bills incurred in these claims.

IT IS FURTHER ORDERED, in accordance with the stipulation of the parties, that SAIF shall pay the claimant's attorneys, in addition to and not out of compensation or the above penalty, the sum of \$100 as an attorney fee for service rendered in connection with that penalty issue.

IT IS FURTHER ORDERED that the claimant shall be awarded, in lieu of and not in addition to the permanent disability compensation already granted for the September 1975 injury, compensation for permanent total disability, effective May 11, 1979.

IT IS FURTHER ORDERED that the claimant's attorneys shall be paid an attorney fee of 25 percent of and out of the permanent disability compensation awarded by this Order, not to exceed a total of \$2,000.

IT IS FINALLY ORDERED that all other relief sought by the claimant in this proceeding shall be and hereby is denied.

December 30, 1980

FAYE MAHONEY, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
Lang, Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order

On November 26, 1980, the claimant, by and through her attorney, requested the Board exercise its own motion jurisdiction and reopen this claim for her March 23, 1973 back injury. She indicated her aggravation rights have expired. Attached to this request were medical reports from Dr. McDonnell which indicated the claimant was unable to work due to a worsening of her condition related to her original injury. He did not feel the claimant had suffered a new injury. Dr. McDonnell reported that on May 28, 1980 the claimant had a recurrence of back pain while working at a nursing home.

St. Catherine's Nursing Home and its insurer, The Maryland, on December 10, 1980 advised the Board it opposed reopening of this claim. It felt the claimant had suffered a new injury in May 1980 while employed in the state of Washington. It requested it be provided with medical information and be allowed to take the claimant's deposition.

The claimant on December 16, 1980 advised the Board she had not yet obtained Washington counsel and had not filed a Washington workers' compensation claim.

We have reviewed the correspondence in this case and will withhold any consideration of the claimant's request for own motion relief until she has obtained Washington counsel and filed a Washington workers' compensation claim.

JOHN H. MARLEY, CLAIMANT
John Svoboda, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

On December 9, 1980, the SAIF Corporation (SAIF) filed a request for reconsideration, clarification and motion to stay order pending reconsideration and clarification of the Board's order dated November 24, 1980 which ordered this claim reopened under ORS 656.278. The claimant's request that the Board reopen this claim had been referred to be set for a consolidated hearing with a hearing already scheduled on the SAIF's denial of continuing responsibility for his back condition. The SAIF was ordered by the Referee to pay for certain medical services pursuant to ORS 656.245. The SAIF requested the Board review that portion of the Referee's Opinion and Order. The Referee also recommended the Board reopen this claim.

We deny the SAIF's request. Our order of November 24, 1980 dealt only with the Referee's recommendation in the Own Motion portion of this claim. It did not dispose of the claimant's entitlement to certain medical services currently being considered by the Board on the SAIF's request for review. We see no reason to reconsider, clarify or to stay our order.

ORDER

The SAIF Corporation's December 9, 1980 motion is denied.

IONA MATHEWS, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Paul L. Roess, Atty. for SAIF.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's Opinion and Order which (1) found the claimant's right shoulder, right arm and neck problems were compensably related to her July 1, 1973 industrial injury; (2) ordered it to pay all medical services provided with respect to the claimant's right shoulder, right arm and neck symptoms between December 7, 1978 and the date of the hearing; (3) assessed a penalty in the sum of 25% of all such compensation due and owing at the time of the hearing; and (4) awarded the claimant's attorney a fee in the sum of \$1,500. The SAIF contends that the claimant has failed to carry the burden of proof with regard to a showing of a compensable relationship.

The Board finds that the Referee correctly recited the facts of this case in his Opinion and Order.

PAVE MARONEY, CLAIMANT

We modify the Referee's order. We agree with the Referee's finding that the claimant's right shoulder, right arm and neck conditions are related to her July 1, 1973 injury for the reasons set forth by the Referee.

We do not agree with the Referee's finding that the SAIF unreasonably denied this claim. ORS 656.262(8) discusses unreasonable delay or unreasonable refusal to pay compensation and unreasonable delay in accepting or denying a claim. There is no description or discussion of an unreasonable denial. We do not find that the term "unreasonable denial" is set forth in our law. The Referee misapplied this term in his order.

Based on the record in this case, we do not find that the SAIF failed to comply with ORS 656.262(8). The SAIF was provided a December 1978 medical report from Dr. Campagna which described a condition in the claimant's cervical spine. There was no indication that this condition was related to the claimant's 1973 injury. ORS 656.273 sets forth the requirements of an aggravation claim. Subparagraph 1 states, "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." Subparagraph 3 states, "A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation." The medical reports submitted to the SAIF up to the time of its denial of November 19, 1979 did not indicate that the claimant's right arm, right shoulder and neck conditions were related to her 1973 injury and did not indicate that she needed additional treatment for conditions related to that injury. In fact, Dr. Campagna indicated he would reserve medical opinion until he heard from the pain clinic. Only after the denial had been made was a causal relationship between claimant's current problems and the 1973 injury established. We do not find that the medical reports submitted to the SAIF up to the date of its denial required it to act. There was no evidence linking the problems the claimant was having to her original injury and the SAIF did not have any obligation to act on these reports because it did not have notice that an aggravation claim was being made. We do not find the delay from December 1978 to November 1979, based on these facts, constitutes unreasonable delay in accepting or denying the claimant's aggravation claim. Penalties are not warranted in this case.

ORDER

The Referee's Opinion and Order dated June 6, 1980 is modified.

The award of penalties in the amount of 25% of all compensation for medical services due and owing at the time of the hearing for medical services for treatment obtained by the claimant between December 7, 1978 and the date of the hearing which were for the right shoulder, arm and neck conditions is reversed.

The remainder of the Referee's Opinion and Order is affirmed.

WCB CASE NO. 79-6222 December 30, 1980

GEORGE EDDIE McDONALD, CLAIMANT
Herbert A. Putney, Claimant's Atty.
Brian Pocock, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which set aside its denial of responsibility for his back injury, ordered it to accept the claim as a compensable injury effective June 13, 1979 until closed, assessed a penalty equal to 25% of any amounts of compensation due the claimant pursuant to ORS 656.262(8) and granted the claimant's attorney a fee. The employer contends the claimant failed to establish that this claim is compensable and that its denial was unreasonable.

We find the Referee correctly recited the facts of this case in his order.

After de novo review, we modify the Referee's order. We agree with the Referee that the employer's denial of this claim must be set aside. We, as did the Referee, find the claim compensable.

We do not find the employer's denial in this case "unreasonable." Based on the information it had gathered, a question arose whether the claimant had been injured as he alleged. Only later did medical evidence clearly support the claimant's allegations. However, at the time the denial was issued, the information the employer relied on would reasonably support a denial.

The employer had knowledge of the alleged injury on June 13, 1979, and placed this claim in a deferred status. The claimant was paid temporary total disability compensation from June 13, 1979 until September 20, 1979, the date the claim was denied. ORS 656.262(5) requires a carrier to give the claimant written notice of acceptance or denial of a claim within 60 days after the employer has notice or knowledge of the claim. ORS 656.262(8) provides for the awarding of an additional amount of compensation up to 25% of the compensation then due plus attorney fees if the carrier unreasonably delays acceptance or denial of the claim. We do not find any reasonable basis for the self-insured employer's delay in claim denial beyond the 60 days required by ORS 656.262(5).

In this case, the carrier went well beyond the 60 day limitation. The carrier is required to promptly accept or deny the claim so the worker can, if the claim is denied, seek an appeal and final determination of his compensation rights. The law requires prompt payment of interim compensation and prompt acceptance or denial of claims. These are not alternative requirements. A penalty is appropriate where a carrier does not promptly deny a claim. Hewes v. SAIF, 36 Or. App. 91, P2d (1979). We find the claimant is entitled to an award of additional compensation as penalty for the carrier's unreasonable delay in denying this claim in a sum equal to 25% of the temporary total disability compensation due from August 12, 1979 (the 60th day from the date the employer had knowledge of the alleged injury) through September 20, 1979, the date of the denial plus an attorney fee as awarded by the Referee.

ORDER

The Referee's order dated May 9, 1980 is modified.

The claimant is hereby granted as an additional award of compensation a sum equal to 25% of the temporary total disability compensation due him from August 12, 1979 through September 20, 1979 as a penalty for the carrier's unreasonable delay in denying this claim plus an attorney fee, as granted by the Referee. This is in lieu of the penalty by the Referee.

The remainder of the Referee's order is affirmed.

December 30, 1980

LAWRENCE MCGEHEE, CLAIMANT
Tim Helfrich, Claimant's Atty.
Keith Skelton, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Request for Dismissal

On December 4, 1980, the employer, by and through the attorney for its insurance carrier, requested the Board dismiss the claimant's request for Board review in this case. It contends that since the claimant had terminated a vocational rehabilitation program and new Determination Order dated August 22, 1980 had been issued, the new Determination Order takes precedence over the proceeding before the Board. (The claimant had requested a hearing on the November 7, 1977 Determination Order.)

The claimant, by and through his attorney, on December 11, 1980, responded to the employer's motion. The claimant contends he is entitled to have the Board review this case and that the August 1980 Determination Order does not render his request for Board review moot.

We have considered the contentions of the parties. We do not find the August 1980 Determination Order takes precedence over the proceeding before the Board or renders it moot. The claimant is entitled to have the Board review this case. Therefore, we deny the employer's Motion to Dismiss Review in this case.

ORDER

The employer's Motion to Dismiss Review dated December 4, 1980 is denied.

The claim CLAIM NO. HC 464440 January 6, 1981
1979 and 1980
KARL W. BARRETT, CLAIMANT
Dan O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On September 15, 1973 the claimant sustained a compensable injury to his left foot. He suffered multiple fractures of the metatarsals and phalanges with subsequent avascular necrosis of the dorsum of the foot. The claimant underwent multiple surgical treatments for this injury. The claim was initially closed by a February 19, 1975 Determination Order which granted claimant an award of permanent partial disability compensation equal to 65% loss of the left foot. The claimant's aggravation rights have expired. This claim was subsequently reopened and closed and the claimant has been granted a total award of compensation equal to 90% loss of his left foot.

Dr. Goodkin reported that, on June 5, 1980, he had pared the corn and callous of the claimant's left foot thoroughly. He felt this was related to a boney deformity of the claimant's left foot.

On June 10, 1980, Dr. Mueller performed additional surgery consisting of a partial excision of the proximal phalanx of the third toe on the left foot, excision of the metatarsal head along with release of the extensor tendon to the large toe. He related the need for this surgery to the claimant's September 15, 1973 injury.

On September 4, 1980 the Board reopened this claim under its own motion jurisdiction effective the date the claimant was hospitalized for the June 10, 1980 surgery for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278. The claimant's attorney was also granted a fee equal to 25% of the increased temporary total disability compensation granted by the Board, payable out of said compensation as paid, not to exceed the sum of \$250.

Dr. Mueller, on November 20, 1980, reported that he last examined claimant on July 25, 1980 and found that he had recovered completely from the June 1980 surgery. He felt that claimant had improved dramatically after excision of the proximal phalanx of the left third toe and metatarsal head. He felt that the claimant's condition could be considered stationary as of July 25, 1980 and that the claim could be closed with no additional permanent impairment.

On December 1, 1980 the SAIF Corporation requested this claim be closed and a determination be made of the compensation which should be awarded to the claimant. The Evaluation Division of the Workers' Compensation Department, on January 18, 1980, recommended this claim be closed and the claimant be granted an additional award of temporary total disability compensation from June 10, 1980 through July 25, 1980. The Evaluation Division did not recommend any additional award of permanent partial disability compensation.

We have reviewed the file in this case and concur with the recommendation of the Evaluation Division.

ORDER

The claimant is hereby granted an additional award of temporary total disability compensation from June 10, 1980 through July 25, 1980.

The claimant's attorney was granted a reasonable fee by the Board's Own Motion Order in this claim.

WCB CASE NOS. 79-7108 & 78-7392 January 6, 1981

LANAE BRAULT, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer
Cross Request by Claimant

The employer and the claimant seek Board review of the Referee's Opinion and Order in this case. The claimant contends: (1) He is entitled to greater awards of permanent partial disability on both cases; and (2) he is entitled to temporary total disability compensation to March 7, 1979 together with penalties and attorney fees. The employer contends: (1) The awards of permanent partial disability compensation are excessive; and (2) the awarding of a penalty and attorney fees for the claimant's voluntary agreement to repay a total temporary disability compensation overpayment was in error.

The claimant, a 26-year-old truck driver employed by Farney Trucking, suffered an injury on July 27, 1977 when a crate fell on him. His injuries were diagnosed as a contusion to his right index finger, right toes and a low back strain.

Dr. Gritzka, on August 23, 1977, felt the claimant was capable of returning to his regular work. The claimant had minimal complaints of low back pain. On September 16, 1977, Dr. Gritzka reported the claimant's injury had healed, and he did not feel the claimant had permanent impairment.

This claim was closed by a Determination Order mailed October 19, 1977 which awarded the claimant temporary total disability compensation. Claimant returned to his regular occupation and missed no time from work.

In early November 1977, the carrier advised the claimant he had been paid more temporary total disability compensation than he was entitled to. The employer, the carrier and the claimant agreed that \$50 per pay period could be withheld from his paycheck to reimburse the carrier for this overpayment. He stated he felt a "moral obligation" to repay the carrier.

On June 12, 1978, the claimant was lifting freight and had low back pain, and his leg gave way. Dr. Gritzka diagnosed a severe lumbar strain. He felt that if the claimant returned to work as a truck driver, he would suffer recurrent episodes of back pain and physical impairment. On July 1, 1979, the claimant enrolled at a community college in journalism courses.

In January 1979 Dr. Dinneen reported he had tried to examine the claimant, but the claimant left prior to his being able to do so. The claimant reported he was having no back trouble and could probably return to work as a truck driver but was more interested in another type of work. The claimant explained that when he arrived to be examined by Dr. Dinneen, he waited for over an hour and a half before being seen by Dr. Dinneen. He was told to undress to be examined. He said he was left in a cold room, so he got dressed and left.

The carrier requested an administrative closure of this claim because the claimant had changed and cancelled appointments for an independent examination.

On March 1, 1979 Dr. Gritzka reported the claimant was still in school. He stated the claimant was having episodes of twitching in his lower extremities and felt if that problem became significant, the claimant should be referred to a neurologist.

This claim was closed by a Determination Order mailed March 7, 1979 which granted the claimant an award of temporary total disability compensation from June 12, 1978 through January 18, 1979.

In September 1979, Dr. Gritzka reported he had last seen claimant on September 28, 1978. At that time the claimant's back condition did not prevent him from attending school. Dr. Gritzka felt the claimant could not return to truck driving or a "heavy labor" type of job or one which required bending, stooping, lifting, carrying or major physical exertion. He felt the claimant was probably medically stationary and rated his residual permanent partial physical impairment as 5% to 7.5% of the whole man.

The claimant stated he began driving a bus in April 1979 on a part time basis and expects to become a full time bus driver. The claimant testified there are many things he cannot now do. Claimant has 10th grade education plus a GED certificate.

The referee awarded: (1) Additional compensation equal to 32° for 10% unscheduled disability for this injury; (2) a penalty equal to 25% of the temporary total disability compensation from August 22, 1977 through September 9, 1977 for the recoupment scheme of EBI; and (3) an attorney fee out of the increased unscheduled disability compensation in the claim for the first injury. The Referee awarded: (1) The claimant temporary total disability compensation until March 1, 1979; (2) compensation equal to 48° for 15% unscheduled disability; (3) a penalty and attorney fee for late payment of temporary total disability; and (4) an attorney fee out of the increased unscheduled disability compensation in the claim for the second injury.

After de novo review, the Board would modify the Referee's order. We reverse the Referee's order on the July 27, 1977 injury (WCB Case No. 78-7392). There is no evidence that the claimant suffered any loss of wage earning capacity due to that injury. The claimant was released to and returned to his regular occupation of truck driving. Dr. Gritzka did not feel the claimant suffered any permanent impairment due to that injury. Therefore, we reverse the Referee's award of compensation equal to 32° for 10% unscheduled disability for this back injury.

Further, we do not find the claimant is entitled to an award of penalties and attorney fees for EBI's manner of recovering the overpayment of temporary total disability compensation. We do not find that ORS 656.268, ORS 656.382 or ORS 656.262 are applicable to this situation. The claimant was overpaid compensation. He was not entitled to this money. The claimant testified he felt a "moral obligation" to repay it and agreed with his employer and EBI on the manner in which to repay this money. There is no evidence the claimant was intimidated or coerced into accepting this deduction. We find the claimant, his employer and EBI voluntarily entered into a contract to repay the overpayment of temporary total disability compensation. The claimant did not have to do so but voluntarily entered into this "contract" and is bound by it. Therefore, we reverse the Referee's award of penalties and attorney fees on this issue.

Considering the June 12, 1978 injury, we modify the Referee's order. We do not agree with the Referee's awarding of temporary total disability to March 1, 1979. Dr. Gritzka examined the claimant on September 28, 1978 and reported the claimant's condition did not prevent him from attending school. Dr. Gritzka in March 1979 did not report any new or significant changes in the claimant's condition. We find the preponderance of the evidence establishes that the claimant's condition was medically stationary as of September 28, 1978 and that the claimant is entitled to temporary total disability compensation to that date.

Further, we do not find any basis for assessing penalties and attorney fees for EBI requesting closure of this claim. The claimant failed to stay at Dr. Dinneen's office to be examined. EBI requested an administrative closure of this claim which was approved by the Workers' Compensation Department. There was no reason to obtain the claimant's treating physician's approval before doing so. The sole issue was whether or not the claimant would submit to an examination by a doctor of the carrier's choice. We find the carrier had the right to request a closure based on the facts it had before it at that time, and the carrier was authorized to terminate temporary total disability compensation by the Workers' Compensation Department and did so.

We find the Referee's award of unscheduled disability compensation does not adequately compensate the claimant for his loss of wage earning capacity due to the June 12, 1978 injury. The medical evidence indicates the claimant should not perform heavy labor jobs or jobs requiring bending, stooping, lifting or carrying or major physical exertion. His impairment has been rated to be 5% to 7.5% of the whole man. Based on the evidence in this case and considering all the relevant factors to be considered in determining an injured worker's loss of wage earning capacity, we find the claimant is entitled to an award of compensation equal to 80% for 25% unscheduled disability.

ORDER

The Referee's order dated March 12, 1980 as amended on March 14, 1980 is modified.

That portion of the Referee's order concerning WCB Case No. 78-7392 is reversed in its entirety.

In WCB Case No. 79-7108, the claimant is hereby granted an award of temporary total disability compensation to September 28, 1978 instead of March 1, 1979.

Claimant is granted an award of compensation equal to 80% for 25% unscheduled disability for the June 12, 1978 back injury, WCB 79-7108. This award is in lieu of all prior awards of unscheduled disability granted for this injury.

The claimant's attorney is granted a fee of 25% of the increased unscheduled disability compensation granted by this order.

SAIF CLAIM NO. D 15827 January 6, 1981

DAVID L. BRONSON, CLAIMANT
Goode, Goode, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

This is an Amended Own Motion Order to correct the undated Own Motion Order in this case.

The date of the Own Motion Order will be as shown below with Appeal Rights commencing from said date.

IT IS SO ORDERED.

January 6, 1981

TONY JACK BRUGATO, CLAIMANT

Gary Galton, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Own Motion Determination

On November 1, 1964 the claimant suffered numerous injuries in a pickup-automobile collision. This claim was initially closed on October 28, 1968 and the claimant's aggravation rights have expired. The claimant has received a total award of compensation for this injury equal to 90% loss of the left leg, 70% loss of the right leg and 90% unscheduled disability. This claim was subsequently reopened by the Board under its own motion jurisdiction in August 1978 and then closed on October 30, 1978 with an award of additional temporary total disability compensation..

The claimant, by and through his attorney, on September 8, 1980 requested the Board enter an Own Motion Determination order granting the claimant an award of permanent total disability effective June 30, 1980 and granting his attorney a reasonable attorney fee equal to 25% of the additional compensation not to exceed \$2,000. The claimant indicated he had been unable to work since June 30, 1980. Attached to this request was a report from Dr. Cohen who, in August 1980, reported the claimant had to cease working because of increasing pain. It was Dr. Cohen's opinion that the claimant is permanently and totally disabled from performing gainful and suitable occupations and related this disability to the claimant's November 1964 injury to his lower extremities and his back.

The SAIF Corporation (SAIF) advised the Board on November 13, 1980 that it opposed an Own Motion Order reopening this claim as it appeared the claimant's condition continued to remain stationary. It indicated it would not object to an order granting additional permanent partial disability.

On October 29, 1980, the Orthopaedic Consultants reported that they had examined the claimant and felt that his condition was stationary. They felt that the claimant's condition was worse now than it was at the time of the prior closure and subsequent hearing. They felt the prognosis for significant improvement was extremely poor.

We have reviewed the evidence in this record and find the claimant is permanently and totally disabled due to the residuals of his November 1964 injury. The claimant has a high school education and he is 59 years old. Medical evidence indicates that claimant has continued to have more and more difficulty with his knee and back as time has progressed. It is apparent this continuing problem has resulted in the claimant's cessation of work. We find the evidence in this record establishes that the claimant is not capable of regularly performing work at a gainful and suitable occupation. Therefore, the Board orders the claimant be granted an award of compensation for permanent total disability effective October 29, 1980, the date he was found medically stationary by the Orthopaedic Consultants.

ORDER

The claimant is hereby granted an award of compensation for permanent total disability effective October 29, 1980.

The claimant's attorney is granted as a reasonable attorney fee an amount equal to 25% of the increased compensation granted by this order, not to exceed \$2,000.

CLAIM NO. C 228487 January 6, 1981

PATRICK L. BUCHANAN, CLAIMANT
Allen T. Murphy, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 16, 1980, the SAIF Corporation (SAIF) advised the Board that it was forwarding copies of various information concerning this claim. The SAIF advised the Board the claimant's aggravation rights have expired in this case and that it was referring this claim to it for own motion consideration. Two of the medical reports forwarded to the Board indicated the claimant is having low back and right leg pain. The claimant had undergone two laminectomies in the lumbar region of his back for his January 19, 1970 back injury.

On December 4, 1980, Dr. Dumke diagnosed "recurrent protruded intervertebral disc or scar napkin ring constriction or traction scar involving the L-5 root." He requested authorization to do a myelogram and re-exploration of the previous surgical sites. Dr. Dumke reported that claimant was unable to perform light work.

Dr. Fagan reported that claimant was experiencing low back pain with a possible disc herniation. He advised that the claimant should be hospitalized for further treatment.

The SAIF indicated it would not oppose an own motion order reopening this claim for the current treatment the claimant was undergoing.

We have reviewed the reports submitted to us by the SAIF and find this claim should be reopened effective December 4, 1980 for the payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

ORDER

This claim is hereby ordered reopened effective December 4, 1980 for the payment of compensation and other benefits as provided for by law until closed pursuant to ORS 656.278.

WCB CASE NO. 79-4037

January 6, 1981

DWANE M. BURCH, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the order of the Referee which granted claimant an award of 30% unscheduled disability and ordered it to pay claimant's mileage claim and an attorney fee of \$300 for its failure to pay the mileage claim.

Claimant, 40 years of age, had been employed twelve years as a journeyman sheetmetal worker. On April 28, 1978, while so employed by Temp Control Corporation, he lifted a ductwork while in a twisted position and experienced low back pain. He was initially seen by a chiropractor, Dr. Smith, who diagnosed lumbosacral subluxation with associated sacroiliac sprain with secondary cervical subluxation.

On July 24, 1978, Dr. Kaesche reported a diagnosis of sciatica left leg and L-5 nerve root irritation. On August 21 the doctor reported claimant could return to light duty work but with no heavy lifting. Dr. Kaesche felt claimant's condition was medically stationary.

Claimant was enrolled at the Pain Center, and Dr. Seres reported on November 9, 1979 that claimant should avoid heavy labor occupations but had the capacity for moderate activities. He indicated that claimant was not interested in vocational rehabilitation and recommended that claimant quickly return to gainful employment.

A second Determination Order granted claimant compensation for temporary total disability through December 11, 1979 and an additional award of 16% for 5% unscheduled disability.

On April 1, 1980, Dr. Danielson reported claimant had to refrain from work as of March 14, 1980 due to a worsened condition. The doctor felt claimant should be receiving time loss payments.

On April 29, 1980, the SAIF denied reopening of claimant's claim.

Claimant has a high school education and three years of community college. His work experience has been as a fireman for three years and as an installer for Western Electric for three years.

At the hearing, claimant submitted a claim for travel expenses.

The Referee found claimant was entitled to an award of 30% unscheduled disability and also ordered the travel expense claim to be paid by the SAIF and an attorney's fee of \$300 to claimant's attorney on that issue.

After de novo review of the record in this case, the Board modifies the Referee's order. We find that the Referee correctly determined the permanent partial disability due claimant for this injury. Therefore, we affirm the Referee's award of additional compensation granted by his order.

We do not, however, agree with the Referee's remanding the claimant's mileage claim to SAIF for acceptance of payment and his award of attorney's fee on that issue. We find that this claim should be remanded to SAIF, but any claim for mileage must be supported by evidence that it was related to the medical treatment claimant sought for his injury. We do not find that any such evidence was presented and would find that SAIF would be responsible to pay such mileage claims only if it can be established that they were related to the claimant's original injury and treatment therefor. Further, we would reverse the Referee's order which granted the claimant's attorney a fee of \$300 on that issue. The claimant's attorney at the hearing did not request either penalties or attorney fees on that issue. Therefore, we reverse that portion of the Referee's order.

ORDER

The Referee's order, dated May 1, 1980, is modified.

The mileage claim submitted by the claimant is remanded to SAIF for acceptance in payments if such claims for mileage can be supported by evidence that it was related to claimant's original injury and treatment therefor. The Board reverses the award of attorney's fee granted by the Referee in relation to the mileage claim.

The remainder of the Referee's order is affirmed.

Claimant's attorney is granted the sum of \$300 as reasonable attorney's fee for his services at this Board review.

CLAIM NO. RC 383397

January 6, 1981

RICHARD C. CHILDRESS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The claimant sustained a compensable injury to his left knee on July 18, 1972. The claim was originally closed by a November 7, 1973 Determination Order which granted claimant an award of permanent partial disability compensation equal to 10% loss of his left leg. This claim was subsequently reopened and closed on two additional occasions, resulting in the claimant receiving an additional award of permanent partial disability compensation equal to 10% loss of the left leg, making a total award of compensation equal to 20% loss of his left leg. The claimant's aggravation rights have expired.

On November 15, 1979, Dr. Manley reported that the claimant had continuing difficulty with his left knee and dislocation of the patella tendon. An arthroscopy was performed the following day and revealed a post-operative patellectomy and chondromalacia of the left knee. On January 1, 1980, the claimant was rehospitalized for continuing difficulty with his left knee and underwent a lateral retinacular release, arthrotomy of the left knee and Trillet procedure. On June 27, 1980, the claimant underwent a vastus medialis advancement and removal of the screw from his left leg. The post-operative diagnosis was recurrent dislocation of the patellar tendon of the left knee. Dr. Manley, in September 1980, reported that the claimant was able to return to work on approximately November 1, 1980, but would be unable to kneel, squat, climb ladders or run up and down stairs. He felt that claimant should limit his standing on a periodic basis to a one hour time limit and could lift up to 50 pounds.

The Orthopaedic Consultants examined the claimant on November 5, 1980 and reported the claimant's condition was medically stationary and recommended claim closure. It was their opinion that claimant was capable of performing light to medium work with no repetitive kneeling or squatting, no walking over rough terrain, no climbing of ladders or stairs, and lifting was limited to 35 pounds. They rated the physical impairment as being mildly moderate and in the range of 35% for this injury.

The SAIF Corporation, on November 26, 1980, requested a determination be made of the compensation that claimant was entitled to. It indicated that it paid the claimant temporary total disability compensation from November 15, 1979 through November 19, 1980. On December 12, 1980, the Evaluation Division of Workers' Compensation Department recommended this claim be closed and that claimant be granted additional award of temporary total disability compensation from November 15, 1979 through November 5, 1980 and an additional award of compensation equal to 30% for 20% loss of the left leg, making a total award of permanent partial disability compensation equal to 40% loss of the left leg for this injury.

The Board has reviewed the record in this case and concurs with the recommendation of the Evaluation Committee and adopts it as its own.

ORDER

The claimant is hereby granted an additional award of temporary total disability compensation from November 15, 1979 through November 5, 1980 and an additional award of permanent partial disability compensation equal to 30% for 20% loss of the left leg.

January 6, 1981

DOROTHY DAVIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 16, 1980, the SAIF Corporation (SAIF) forwarded to the Board various information concerning this claim. It advised the Board the claimant's aggravation rights have expired in this case. Various medical reports were attached to this letter which indicated that the claimant had pseudarthrosis at L-4/L-5 level and a chronic lumbosacral strain. The claimant had suffered a compensable back injury on April 4, 1956 and had undergone a fusion from the L-4 level to the sacrum. Medical evidence indicated that the claimant's present condition was directly related to her 1956 injury.

Dr. Langston reported the claimant would be hospitalized on January 8, 1981 and would undergo surgery on January 9, 1981 to correct the pseudarthrosis condition.

The SAIF advised the Board it would not oppose an own motion order reopening this claim for the surgery that was currently scheduled for January 9, 1981.

We have reviewed the information in this claim and find that it is sufficient to warrant reopening of this claim. Reopening is effective January 9, 1981 or the date the claimant was hospitalized for the surgery recommended by Dr. Langston. The claimant shall be paid compensation and other benefits as provided for by law until closed pursuant to ORS 656.278.

ORDER

It is hereby ordered that this claim be reopened on January 9, 1981 for the payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

JOHN J. DEVOE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 24, 1980 the claimant, by and through his attorney, requested the Board reopen this claim for his July 20, 1973 back injury. This claim had been originally closed and the claimant's aggravation rights have expired. Attached to the claimant's request were various medical reports. In February 1979, Dr. Andersen reported the claimant had a cervical and lumbar spondylosis. Dr. Andersen felt that claimant probably had either an osteophytic spur or a herniated disc which were responsible for the continuing pain that claimant had been experiencing. On May 31, 1979, the claimant was hospitalized by Dr. Andersen and underwent a hemilaminectomy at the L3-4 level with excision of herniated nucleus pulposus.

The Orthopaedic Consultants on November 19, 1980 examined the claimant and felt that his condition was medically stationary. It was their opinion that the surgery done in May of 1979 on the low back was related directly to claimant's prior injury.

The SAIF Corporation in December 1980 indicated it did not oppose an Own Motion Order reopening this claim for the surgery that was performed on May 31, 1979. It also asked that the Board issue an order closing this claim since the claimant's condition had returned to the stationary level. It continued to deny any responsibility for the claimant's neck and upper extremities problems on the basis they were not related to the injury for which this claim was established.

We have reviewed the information provided by the parties in this case. We find this claim should be reopened effective May 31, 1979 for the payment of temporary total disability compensation and other benefits provided for by law. We do not find that we are at this point able to determine if the claimant has any additional permanent disability due to this subsequent surgery. Therefore, we refer this case to the Evaluation Division for recommendation on additional permanent partial disability, if any.

ORDER

Claimant is awarded additional temporary total disability commencing May 31, 1979 through November 19, 1980.

This case is referred to the Evaluation Division for recommendation on additional permanent partial disability, if any.

Claimant's attorney is granted a fee in the sum of \$300 out of the increased temporary total disability compensation.

DOROTHY GAVEL, CLAIMANT

SAIF, Legal Services, Defense Atty.

WCB CASE NO. 79-8218

January 6, 1981

ROBERT C. GEISERT (DECEASED), CLAIMANT

Kenneth Colley, J. David Kryger, and James D. Heugli, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Order Denying Dismissal

On December 19, 1980, Ronald J. Hamlet, by and through his attorney, requested dismissal of the Request for Review in this case. The Referee's order was dated November 7, 1980 and the Request for Review was mailed on December 5, 1980 and received by the Board on December 8, 1980. Mr. Hamlet contends the Request for Review was beyond the 30 day limit for filing the Request for Review.

We have considered Mr. Hamlet's contentions in this case. OAR 436.83-700(2) provides that the time limitation of 30 days of ORS 656.289(3) is satisfied upon mailing the Request for Review to the Board. In this case, the claimant timely filed a Request for Review. Therefore, we deny Mr. Hamlet's request.

ORDER

Mr. Hamlet's request for dismissal of the Request for Review in this case is denied.

WCB CASE NOS. 79-3393 & 80-5377

January 6, 1981

GREGORY G. GLEASON, CLAIMANT

Tom Kanlon, Claimant's Atty.

Jerry McCallister, Employer'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 Referee is final by operation of law.

WCB CASE NO. 79-8899 January 6, 1981

LARRY GONCE, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
Paul L. Roess, Employer'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 Employer, and said request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 80-6366 January 6, 1981

JAMES L. GROVER, CLAIMANT
Robert L. Chapman, Claimant's Atty.
Frank A. Moscato, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

The claimant, by and through his attorney, on December 5, 1980 requested the Board to exercise its own motion jurisdiction and reopen his claim from his March 16, 1971 right leg and left hip injuries. This claim had been closed and the claimant's aggravation rights have expired. The claimant required a total hip replacement for this injury.

On April 7, 1980, the claimant was hospitalized for an infected left trochanteric bursa. Surgery was performed consisting of an incision and excision of the left trochanteric bursa and debris and trochanteric wire. Dr. Lynch related the need for this surgery and hospitalization directly to the claimant's total hip replacement.

The insurance carrier, in June 1980, denied any payment of any further benefits for this claim. It was pointed out that claimant's aggravation rights had expired on July 18, 1977.

(Also in June 1980 Dr. Van Zee reported that the claimant had a deep-seated staphylococcal infection involving the left hip prosthesis which stemmed from the injury sustained by the claimant on March 16, 1971. He reported the hospitalization was complicated because of the infection of the development of acute interstitial nephritis and moderate renal failure from the antibiotics. Dr. Van Zee reported that claimant was rehospitalized in May 1980, again for infection of the left hip prosthesis. He reported that claimant also underwent surgical extirpation of the infected left hip prosthesis. Dr. Van Zee reported that claimant remained disabled and bedfast at that time.

A report apparently dictated after the surgery, Dr. Lynch reported that after the infected left trochanteric bursa was excised, the total hip replacement had to be removed. Dr. Lynch reported that claimant currently had a flail hip and was walking with crutches. He related all of claimant's current problems to his original industrial injury. Dr. Lynch reported it was well recognized that on frequent occasion a total hip replacement can become infected on a delayed basis and that this was usually a blood-borne infection. He reported that claimant remained totally disabled.

The carrier, in December 1980, advised the Board that it opposed an own motion order reopening this claim for payment of temporary total disability compensation. It indicated that it continued to pay all the claimant's medical bills pursuant to ORS 656.245. It also advised the Board that the claimant, through his attorney, had filed a request for hearing from its June 3, 1980 denial. That case is WCB Case No. 80-6366.

We have reviewed the evidence in this file and find that it is sufficient to warrant reopening of this claim for payment of temporary total disability compensation and other benefits effective April 7, 1980, the date claimant was hospitalized for the surgery performed by Dr. Lynch. This hospitalization and surgery cannot be handled under the provisions of ORS 656.245. We request claimant's attorney to dismiss his request for hearing on the denial pending before the Hearings Division as it has no jurisdiction to hear this matter under ORS 656.278.

ORDER

This claim is ordered reopened effective April 7, 1980 for payment of temporary total disability compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

The claimant's attorney is entitled to a fee equal to 25% of the temporary total disability compensation awarded in this case not to exceed the sum of \$300.

MARCELYN J. HOLCOMB, CLAIMANT

Malagon & Yates, Claimant's Attys.

Luvaas, Cobb, et al, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Employer

The employer seeks Board review of the Referee's order which ordered it to pay claimant's attorney a fee of \$100 and assessed a penalty equal to 10% of all temporary total disability compensation due claimant from October 20, 1979 through December 31, 1979. This was based on the Referee's finding that the employer had not acted unreasonably in making payments of temporary total disability compensation but had erred in not paying the claimant the compensation she was due. The employer contends that its action in this case does not justify the awarding of a penalty and an attorney's fee.

We find that the Referee correctly recited the facts of this case in his order.

We reverse the Referee's order. In this case the employer was provided workers' compensation insurance by two different carriers. The Mid-Century Insurance Company (Mid-Century) and subsequently the SAIF Corporation (SAIF) provided insurance coverage for this employer. Mid-Century was the responsible insurer at the time of the claimant's November 1976 injury.

In May 1979, the claimant requested this claim be reopened. She was hospitalized on June 7, 1979 for myelogram. The claimant, by and through her attorney, in December 1979 requested that an order designating a paying agent pursuant to ORS 656.307 be issued since both Mid-Century and the SAIF had denied responsibility for the claimant's condition. This order was issued on February 20, 1980 and designated Mid-Century as the paying agent. On March 3, 1980 it paid the claimant temporary total disability compensation from June 6, 1979 through October 19, 1979. On March 17, 1980, it requested a Determination Order be entered in this case based on Dr. Miller's October 19, 1979 report. In that report Dr. Miller stated that he felt that by January 1, 1980 the claimant could return to her former type of work. He stated that he had not given her a return appointment since he found that she was medically stationary at that time. Based on this report, Mid-Century did not pay the claimant any additional temporary total disability compensation. On the same day the claimant requested that the Presiding Referee issue an order directing Mid-Century to show cause why temporary total disability benefits had not been paid and further directing it to pay the claimant a penalty equal

to 25% of the benefits owing and a reasonable attorney's fee in the amount of \$750. Upon receipt of this, Mid-Century proceeded to pay the claimant additional temporary total disability compensation for the period from October 20, 1979 through December 31, 1979, the date the claimant was released for regular employment by Dr. Miller. This compensation was paid on March 24, 1980. ORS 656.262(8) provides that if the employer insurer unreasonably delays and unreasonably refuses to pay compensation, it shall be held liable for an additional amount up to 25% of the amounts then due plus an attorney's fee.

We do not find that the acts of the carrier in this case constitute unreasonable resistance to the payment of compensation. The error that was made by this carrier is understandable based on Dr. Miller's report. Dr. Miller's report can be interpreted as indicating that the claimant's condition was medically stationary as of the day of the report. However, Dr. Miller did not release the claimant to return to her former type of work until January 1, 1980. We do not find that, based on the facts in this case, the carrier's acts constitute unreasonable resistance to the payment of compensation. Therefore, the Board reverses the Referee's award of a penalty and an attorney's fee in this case.

ORDER

The Referee's order dated June 5, 1980 is reversed in its entirety.

CLAIM NO. C 219964

January 6, 1981

DOUGLAS HOLLAND, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order and Determination

On November 18, 1969, the claimant sustained a compensable injury to his left index finger. This claim was closed, and claimant's aggravation rights have expired. The claimant was rehospitallized on October 1, 1980, and the stump of the left second metacarpal bone was excised. On December 9, 1980, Dr. Nicholson reported that he had examined claimant on November 13, 1980 and released him to return to normal activities. He reported that the area of the surgery was not tender and was well healed. The claimant indicated that he left work on October 13, 1980 and returned to work on November 13, 1980.

The SAIF Corporation, on December 19, 1980, advised the Board of these facts and indicated it would not oppose an Own Motion Order reopening this claim effective October 13, 1980 for payment of temporary total disability compensation through November 13, 1980. It also requested an order closing this claim since the claimant's condition was again stationary.

The Board has reviewed the information forwarded to it by the SAIF and finds that the claimant is entitled to temporary total disability compensation from October 13, 1980 through November 13, 1980 and other benefits provided for by law. We find that the claimant's condition is now stationary and, therefore, this claim should be closed.

ORDER

The claimant is granted an award of additional temporary total disability compensation from October 13, 1980 through November 13, 1980.

CLAIM NO. C 431424

January 6, 1981

ARDIS ELAINE JOHNSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 19, 1980 the claimant requested the Board reopen this claim under its own motion jurisdiction. This claim was established for the claimant's March 15, 1973 back injury. The claimant advised the Board that she was unable to work on a full time basis and was working on a half day basis every other day. This claim was initially closed and her aggravation rights have expired.

In October 1980 the claimant was examined by the Orthopaedic Consultants. They felt that claimant's condition was medically stationary and found that she had complaints of discomfort which were entirely subjective. They found no objective physical changes to suggest any major degeneration of the claimant's condition in the recent months. It was their opinion that claimant would not require further operative procedures in the near future. They did not see any indication to reopen this claim for payment of temporary total disability compensation and felt that claimant could continue with her current work. They anticipated that the claimant would experience additional exacerbations in the future related to the residual changes following her operative procedures for this injury. It was their opinion that claimant was in need of the treatment provided by Dr. Fagan.

On December 4, 1980, Dr. Fagan reported he had examined the claimant on November 28, 1980 and felt that she was able to return to work on a part time basis three days per week. In September 1980, he had reported her condition had improved and that she was to return to work on a part time basis.

On December 12, 1980 the SAIF Corporation forwarded to the Board certain information in this case and indicated that it opposed an Own Motion Order reopening this claim as it did not appear there had been material objective worsening of her condition since the last arrangement of compensation. It indicated, however, it would continue to pay all related medical bills under the provisions of ORS 656.245.

We have reviewed the material submitted to us and find that the evidence is insufficient to warrant a reopening of the claim at this time under the Board's own motion jurisdiction. The claimant is entitled to have continuing medical care and treatment as recommended by Dr. Fagan for the residuals of her original injury provided for by the SAIF Corporation under the provisions of ORS 656.245.

ORDER

The claimant's request that the Board reopen this claim under its own motion jurisdiction is denied.

CLAIM NO. 21C100369

January 6, 1981

ALDINE KEITH, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
Black, Kendall, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

This Amended Own Motion Order is to correct the Own Motion Order dated November 7, 1980 wherein the Appeal Notice referred to the SAIF Corporation. The SAIF Corporation is not the carrier in this matter, and therefore all reference to the SAIF Corporation should be deleted. The proper Appeal Notice should read as follows:

APPEAL NOTICE

The claimant has no right to a hearing, review or appeal on this award made by the Board on its own motion.

The insurance carrier may request a hearing on this order.

The order is final unless, within 30 days from the date hereof, the insurance carrier appeals this order by requesting a hearing.

WCB CASE NO. 79-3963 January 6, 1981

ROBERT LANE, CLAIMANT
Allan Coons, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Review

The claimant seeks Board review of the Referee's order which granted him an additional award of compensation equal to 16° for 5% unscheduled disability for his low back injury, making a total award of compensation equal to 32° for 10% unscheduled disability. The claimant contends he is entitled to a "moderate" award of compensation.

We find the Referee correctly recited the facts of this case in her order.

After de novo review, the Board would modify the Referee's Opinion and Order. The claimant is 33 years old, has a tenth grade education with a GED certificate. He has performed physically demanding jobs such as construction, demolition, pulling green chain, plumbing, driving truck and driving a garbage truck and picking up garbage. He has no prior history of any back trouble.

The Orthopaedic Consultants felt the claimant could return to truck driving if he did not engage in heavy lifting activities. They rated the loss of function in the low back as minimal.

Dr. Woolpert, who saw the claimant in October 1978 and in January 1980, felt the claimant had chronic low back strain and functional overlay. The claimant also reported that his left leg had been giving out.

Claimant complained to the Orthopaedic Consultants of pain brought on by lifting, bending or sleeping in too soft a bed. He stated he couldn't drive over two hours or walk over 1/4 mile without experiencing pain. (His activities have been severely reduced. The testimony of claimant's girlfriend supports this.) He testified at the hearing that he is precluded from any of the jobs he is familiar with.

We find the claimant has suffered a greater loss of wage earning capacity than that for which he has been compensated. The medical evidence establishes that he cannot return to any occupation which requires heavy lifting. This restriction prevents him from returning to work as a garbage truck driver. Based on the evidence in this record and considering all the relevant factors to be used in determining an injured worker's loss of wage earning capacity, we find this claimant is entitled to an award of compensation equal to 80% for 25% unscheduled disability for his back injury. This is in lieu of all prior awards of unscheduled disability claimant has received for this injury.

ORDER

The Referee's order, dated June 20, 1980, is modified.

The claimant is hereby granted an award of compensation equal to 80% for 25% unscheduled disability for his low back injury. This is in lieu of all prior awards of unscheduled disability the claimant has received for this injury.

Claimant's attorney is granted a fee in an amount equal to 25% of the increased compensation, payable out of that compensation.

CLAIM NO. I-o21596

January 6, 1981

FRED OZAN, CLAIMANT
John Snarskis, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by a letter dated November 5, 1980, requested the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for conditions he contends arose out of his industrial injury of 1974 or 1975. Claimant's aggravation rights have run.

The employer/carrier, by and through its attorney, Mr. John Snarski, opposes any reopening and contends that claimant's present condition is unrelated to any injuries for which this employer/carrier was responsible.

Based on lack of evidence in the record upon which the Board can make a decision, the Board refers this matter to the Hearings Division. The Referee is to hold a hearing and take evidence on whether or not claimant's claim should be reopened pursuant to ORS 656.278 and to further have a transcript of this proceeding transcribed and submitted to the Board along with his recommendations on this issue.

IT IS SO ORDERED.

CLAIM NO. 360-051-2024

January 6, 1981

LENFORD G. SIMMONS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order Revoking Own Motion Order

This claim was reopened by the Board under its own motion jurisdiction on August 14, 1980 after the employer had advised the Board the claimant had been missing time from work due to his October 23, 1972 injury. This claim was first treated as a medical only claim and claimant did not lose any time from work and did not suffer any permanent partial disability due to his injury.

On November 14, 1980, the employer advised the Board that his condition was stationary and that he had paid the claimant temporary total disability compensation from July 7, 1980 through August 11, 1980 less time worked. The employer requested a determination be made of the compensation the claimant was due.

We have reviewed the file in this case and find that our Own Motion Order reopening this claim was in error. This claim has never been closed pursuant to ORS 656.268 and, therefore, the claimant's aggravation rights have not begun to run. Therefore, we revoke our Own Motion Order dated August 14, 1980 and refer this claim to Evaluation Division of Workers' Compensation Department for closure pursuant to ORS 656.268.

ORDER

This claim is hereby referred to the Evaluation Division of the Workers' Compensation Department for closure pursuant to ORS 656.268.

January 6, 1981

WALTER C. SMITH, CLAIMANT
S. David Eves, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 5, 1980, the claimant, by and through his attorney, requested the Board reopen this claim for his April 26, 1962 injury. The claimant's aggravation rights have expired.

In September 1980, Dr. McGee reported that the claimant continued to have complaints of low back pain and right upper leg discomfort. In October and November, Dr. McGee discussed the possibility of surgery to decompress the nerve root at the L3-4 and L4-5 level in an effort to relieve the claimant's intermittent right leg pain.

The SAIF Corporation, on December 17, 1980, advised the Board they would not oppose an Own Motion Order reopening this claim if further surgery was scheduled for the claimant's back condition.

After reviewing the reports submitted to it, the Board finds this claim should be reopened for the payment of compensation and other benefits as provided for by law until closed pursuant to ORS 656.278, if and when the claimant is hospitalized for the surgery suggested by Dr. McGee. The claimant's attorney is entitled to a fee for the services rendered in this case equal to 25% of the increased award of temporary total disability compensation not to exceed the sum of \$250.

IT IS SO ORDERED.

January 6, 1981

IRIS F. YOUNG, CLAIMANT

Doblie & Francesconi, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Own Motion Determination

The claimant suffered a compensable injury to her low back on May 4, 1972 while employed as a nurse's aid. The claim was initially closed by a May 13, 1973 Determination Order which granted her an award of permanent partial disability compensation equal to 10% unscheduled disability for her low back injury. The claim was subsequently reopened and again closed by a second Determination Order dated July 20, 1976 which did not grant the claimant any additional permanent partial disability. The claimant's aggravation rights have expired.

In August 1979, Drs. Todd and Danielson reported the claimant had a herniated disc at the C5-6 level and recommended that claimant undergo surgery to correct this condition. The Board reopened this claim under its own motion jurisdiction on March 5, 1980. The claim was to be reopened effective the date the claimant went into the hospital for the recommended surgery.

The claimant was admitted to the hospital on March 17, 1980 and underwent an anterior cervical disc excision and intercorporeal fusion plus bilateral anterior foraminotomies at the C5-6 level. After discharge from the hospital, the claimant was enrolled in the William Callahan Center and underwent extensive vocational assessment. She was discharged from the Callahan Center on September 15, 1980 and then referred to the Orthopaedic Consultants for a closing evaluation examination.

The Orthopaedic Consultants reported that claimant was 33 years old and had worked as a nurse's aide until her injury in 1972. She advised the Orthopaedic Consultants that she had worked as a housekeeper prior to being employed as a nurse's aide. They found that she had active neck motion of 75% flexion, 100% extension, 100% right and left rotation, 100% right and left lateral bending. It was their opinion that claimant's condition was medically stationary and the claim could be closed. They felt that claimant could be returned to a light occupation and might benefit from vocational assistance. They rated the total loss of function of the cervical spine as existed at that time as mildly moderate and attributed it to her May 26, 1972 injury.

On November 21, 1980, the SAIF Corporation requested a determination be made of the compensation to which the claimant was entitled. It indicated it had paid the claimant temporary total disability compensation from March 17, 1980 through November 16, 1980. The Evaluation Division of the Workers' Compensation Department, on December 12, 1980, recommended this claim be closed and that claimant be granted an additional award of temporary total disability compensation from March 17, 1980 through November 6, 1980 and an additional award of permanent partial disability equal to 10% unscheduled disability for her neck injury, making a total award of 20% unscheduled disability for this injury.

We have reviewed the record in this case and the recommendation of the Evaluation Division. We concur with the Evaluation Division's recommendation of temporary total disability compensation. However, we find that, based on the record in this case, that claimant is entitled to a larger increase of permanent partial disability compensation. She is 33 years old and has a tenth grade education. Prior to this injury, the claimant was performing work which could be classified as moderately heavy. Since this injury, she has been limited to performing work in the light category. We find the claimant is entitled to an additional award of compensation equal to 15% unscheduled disability.

ORDER

The claimant is hereby granted an additional award of temporary total disability compensation from March 17, 1980 through November 6, 1980, and an additional permanent partial disability award equal to 15% unscheduled disability for her neck injury, making a total award of 25% unscheduled disability for this injury.

Claimant's attorney was provided a reasonable attorney fee by the Board's Own Motion Order in this case.

WCB CASE NO. 79-6548

January 15, 1981

HERMAN FLEISHMAN, CLAIMANT

Welch, Bruun & Green, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Order of Abatement

The Board issued its Order on Review on December 16, 1980. On January 14, 1981, we received a request to reconsider. Since claimant's appeal rights run out on January 15, 1981, the Board's Order on Review is held in abeyance until such time as the Board can reconsider its Order on Review.

IT IS SO ORDERED.

OLE E. LARSON, CLAIMANT.
Panner, Johnson, et al, Claimant's Attys.
Lang; Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

A hearing was held in this case on May 15, 1980 and the Referee, on July 16, 1980, entered an Opinion and Order setting aside the employer/insurer's denial of the claimant's aggravation claim. The employer/insurer requested the Board review this Opinion and Order.

On December 19, 1980, the claimant, by and through his attorney, moved the Board to incorporate an August 4, 1980 report from Dr. Miller. In that report, Dr. Miller opined the claimant's 1975 injury caused his present symptoms. The claimant contends this report clarifies an earlier report from Dr. Miller.

The employer/insurer, on December 27, 1980, advised the Board it opposed the claimant's motion.

We have considered the claimant's motion and deny it. It is apparent from the record in this case that the report the claimant asks the Board to receive into evidence could have been produced prior to the hearing but was not produced. We do not find that this report can be considered by the Board in its review of this case. In addition, since claimant's brief to the Board discusses the Dr. Miller report, the Board will not consider that brief. The claimant's attorney is granted ten additional days from the date of receipt of this order to file a brief.

ORDER

The claimant's December 19, 1980 motion to admit Dr. Miller's August 4, 1980 report is denied.

January 15, 1981

KENNETH V. WARING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order of Abatement

On December 19, 1980, the Board issued an Own Motion Order in this claim ordering it reopened effective November 7, 1980 until closed pursuant to ORS 656.278. Travelers Insurance Company had indicated it did not oppose an Own Motion Order reopening this claim. This order contained an error in the Appeal Notice section. It provided that the SAIF Corporation (SAIF) could request a hearing on the Board's order. The Travelers, and not the SAIF, was the carrier responsible for this claim.

On January 15, 1981, the Travelers advised the Board it had not received a copy of the Board's order and now had additional information which might change its position in this case. It requested the Board abate its December 19, 1980 order and consider the additional evidence it has.

The Board has considered Travelers request and grants it. The Board's December 19, 1980 Own Motion Order is abated. Travelers shall have fifteen (15) days from the date of this order to provide the Board with additional evidence. The Board will reconsider this claim and issue a new Own Motion Order which shall contain a new appeal time.

IT IS SO ORDERED.

January 19, 1981

CHRISTINE NELSON GIVENS, CLAIMANT
Richard T. Kropp, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Remand for Consolidated Hearing

There are three claims involving this claimant. WCB Case No. 79-1366 dealt with an aggravation claim. The SAIF Corporation (SAIF) had denied this claim. A hearing was held and the Referee set aside the SAIF's denial and ordered it to reopen the claim for payment of temporary total disability compensation and to resubmit the claim to the Evaluation Division for determination of the claimant's permanent partial disability. The Board reversed the Referee's order and restored and affirmed the SAIF's denial. This case was appealed to the Court of Appeals which reversed the Board's decision and reinstated the Referee's Opinion and Order.

In the meantime, the claimant's aggravation claim was submitted to the Evaluation Division, and in December 1979 a Determination Order was issued. The claimant requested a hearing on this Determination Order. This case was assigned WCB Case No. 80-7341, and the hearing is scheduled for January 21, 1981 at 1:30 p.m. before Referee Peter W. McSwain.

On February 3, 1980, the claimant underwent surgery, and filed another aggravation claim. The SAIF denied it, and the claimant requested a hearing on this denial (WCB Case No. 80-5753). A hearing was held, and the Referee held the Board's decision in WCB Case No. 79-1366 was res judicata on the issue of whether or not the claimant had suffered an aggravation. This decision is before the Board for review.

On January 7, 1981, the claimant, by and through his attorney, requested the Board remand WCB Case No. 80-5753 to the Referee for the taking of additional evidence in consolidation with WCB Case No. 79-7341. The claimant feels that since the Court of Appeals affirmed the Referee's finding that the claimant did suffer an aggravation of her industrial injury, the issue now presented in WCB Case No. 80-5753 is whether or not the claimant was medically stationary in December of 1979 when the Determination Order was issued closing her claim. The claimant contends the Referee, in WCB Case No. 80-5753 did not reach this finding, and, inasmuch as both cases arise from the same claim of aggravation, both cases should be consolidated.

On January 14, 1981, the SAIF, through its attorney, advised the Board it had no opposition to the claimant's motion. A Judgment and Mandate in WCB Case No. 79-1366 was also issued on this date.

We have reviewed the claimant's motion and find that it is well taken. Therefore, the Board remands WCB Case No. 80-5753 to be consolidated with WCB Case No. 80-7341 and orders that additional evidence be taken by Referee McSwain. Referee McSwain shall determine whether or not the claimant's condition was medically stationary in December 1979 when the Determination Order was issued closing the claim.

IT IS SO ORDERED.

DAVID D. BLAIR, CLAIMANT
David A. Hytowitz, Claimant's Atty.
SAIF, Legal Services, Defense Atty.,
Own Motion Order

On December 12, 1980, the claimant, by and through his attorney, requested the Board reopen these claims for his May 1964, May 1967 or April 1973 injuries under its own motion jurisdiction or to refer his request for a hearing. All these claims were treated by the SAIF Corporation (SAIF) as "medical only" and no Determination Orders have ever been issued. The SAIF, on December 27, 1980, advised the Board that, because of these facts, these claims were not "eligible to be considered by the Board under its own motion jurisdiction."

We have reviewed the claimant's petition and the information supplied to us. We are unable to reopen these claims under our own motion jurisdiction. These claims were "medical only" and no Determination Orders have been entered in them. Consequently, the claimant's aggravation rights have not expired in them. Therefore, the Board cannot consider them under its own motion jurisdiction.

ORDER

The claimant's request to reopen these claims or to refer them for a hearing is denied.

CINDY GALLEA, CLAIMANT
James L. Francesconi, Claimant's Atty.
Lang, Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Request

On December 12, 1980, the claimant, by and through her attorney, requested the Board to admit an October 27, 1980 report by Dr. Cronk. A hearing had been held in this case on November 19, 1980 and this report was not submitted to the Referee. The employer/carrier was advised of this report, but the claimant's attorney did not submit it to the Referee.

The employer/carrier, through its attorney, on December 29, 1980, advised the Board it objected to the claimant's request.

The Board has considered the arguments of the parties in this case. We will not admit Dr. Cronk's October 27, 1980 report. This report was available prior to the Referee's entry of an Opinion and Order in this case. The claimant's attorney elected not to submit this report to the Referee. The Board does not find that this report constitutes "new evidence." It shall remain in the file, but it will not be considered by the Board.

ORDER

The claimant's request to admit additional evidence is denied.

CLAIM NO. U 11807

January 20, 1981

TOM O. KEEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board, on July 13, 1979, reopened this claim for the claimant's January 11, 1971 left knee injury. This claim was accepted and closed, and the claimant's aggravation rights have expired. The claimant has received a total award of compensation for permanent partial disability equal to "15% loss of the left leg due to this injury equal to 15%." This claim was ordered reopened effective the date claimant was hospitalized for the posterior medial meniscectomy which Dr. James had suggested.

On June 27, 1979, the claimant was hospitalized by Dr. James. The following day he underwent a posterior medial meniscectomy of the left knee. After this surgery, the claimant continued to complain of feelings of weakness in his knee and that the knee occasionally gave out on him. He also indicated he was unable to ride horses very well.

In June 1980 the claimant continued to complain of pain in his left knee. He was rehospitalized, and on June 30, 1980 he underwent an arthroscopy and partial synovectomy.

Dr. Baldwin, who had performed the June 1980 surgery, reported on November 12, 1980 that the claimant continued to experience intermittent pain in the anterior medial aspect of his knee and had some pain which radiated down the lateral side of his thigh. He reported that claimant had been unable to perform his job as a cowboy. In his physical examination, he found that claimant had a full range of motion in his knee and had some mild straight posterior instability and mild posterior medial rotatory instability. Dr. Baldwin reported that as of September 15, 1980, the claimant had begun a new job.

The insurer, on December 8, 1980, requested a determination be made in this case for the compensation to which the claimant is entitled and that the claim be closed. It indicated it had paid temporary total disability compensation from June 27, 1979 through November 7, 1980.

The Evaluation Division of the Workers' Compensation Department, on December 23, 1980, advised the Board that the award of compensation that the claimant had been granted in this case was inconsistent. It indicated that claimant had been granted an award of 15° for 15% loss of his left leg, and that the money value shown in that order was that which would apply to a 10% award. The Evaluation Division recommended that the claimant be granted a total award of 30% loss of the left leg to cover all residuals due to this injury, pain, instability and sensory loss, surgery and joint degeneration. Further, they recommended that the claimant be granted an award of temporary total disability compensation from June 27, 1979 through September 14, 1980 and temporary partial disability compensation from September 15, 1980 through November 12, 1980. It was their suggestion that the award of permanent partial disability compensation be in lieu of all prior awards for the claimant's leg injury.

The Board has reviewed the file in this case and concurs with the recommendation made by the Evaluation Division.

ORDER

The claimant is hereby granted an additional award of temporary total disability compensation from June 27, 1979 through September 14, 1980 and temporary partial disability from September 15, 1980 through November 12, 1980 and an award of permanent partial disability compensation equal to 30% loss of the left leg in lieu of all prior awards of scheduled disability the claimant has received for this injury.

January 20, 1981

DENNIS J. LANGAN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order and Determination

On January 30, 1973, the claimant sustained an injury to his low back. Following surgery, this claim was originally closed by an October 16, 1973 Determination Order which granted the claimant an award of compensation equal to 10% unscheduled disability for this injury. The claimant's aggravation rights have expired.

On May 29, 1979, the claimant was hospitalized by Dr. McHolick. The claimant had been complaining of difficulty with his low back. Dr. McHolick felt the claimant should undergo another myelogram. The myelogram revealed a large filling defect at the site of the previous laminectomy. Dr. McHolick performed a repeat laminectomy and found only dense scar tissue incorporating the nerve root rather than any extruded disc fragments or evidence of new injury. The claimant returned to work on August 30, 1979.

After his original injury, the claimant worked in the auto wrecking business. In June 1980, Dr. McHolick reported that claimant was unable to continue to work in this capacity. Dr. McHolick felt that at this time the claimant had reached the stationary point and that his claim could be closed without alteration of the previously awarded impairments.

On August 13, 1980, the Weyerhaeuser Company requested closure of this claim and a determination be made of claimant's entitlement to additional compensation. It indicated that it had paid temporary total disability compensation from May 29, 1979 through September 7, 1979.

The Evaluation Division of the Workers' Compensation Department on December 18, 1980 advised the Board that claimant had been released to light work and that his former work was classified as medium. The Evaluation Division felt that claimant had suffered a permanent loss of wage earning capacity as a result of this injury. Therefore, it recommended that this claim be closed with an additional award of temporary total disability compensation from May 29, 1979 through August 30, 1979 and an additional award of compensation equal to 15% unscheduled disability on the low back with 5% award of scheduled disability on the right foot. The right foot award was based on the claimant's persistent deficit in sensation and weakness in it. These were related to the permanent residuals of the claimant's injury and the treatment he had received for it.

The Board, after reviewing the evidence in this record, concurs with the Evaluation Division's recommendation.

ORDER

The claimant is hereby granted an additional award of temporary total disability compensation from May 29, 1979 through August 30, 1979 and an additional award of compensation equal to 15% unscheduled disability for his low back injury and an award of compensation equal to 5% scheduled disability for his loss of use of his right foot.

WCB CASE NO. 80-848

January 20, 1981

MARTIN J. LeDOUX, CLAIMANT

Keith Block, Claimant's Atty.

Lang, Klein, et al, and, David Horne, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Carrier

Wausau Insurance Companies (Wausau) seeks Board review of the Referee's order which set aside its denial of claimant's new injury claim and assessed a penalty for its "persistent" denial. The Referee found that Wausau continued to deny this claim without any supporting information and found that this constituted unreasonable delay in payment of temporary total disability compensation to the claimant. Wausau contends that its denial of the claimant's new injury claim should be reinstated and affirmed because the claimant's current condition is due to an aggravation of his 1978 injury. Further, Wausau contends the award of penalties is without legal or factual foundation.

We find that the Referee correctly recited the facts of this case in his Opinion and Order.

After a de novo review of the record in this case, we modify the Referee's order. We concur with the Referee that Wausau is responsible for the claimant's current condition, and find that claimant did suffer a "new injury" for the reasons stated by the Referee.

We do not find that the Referee's award of a penalty in this case is justified. The evidence indicates that at the time Wausau entered its original denial, it had information which raised a reasonable question of whether or not the claimant's current condition was due to his 1978 injury and represented a worsening thereof or whether it arose out of the course of his employment with this employer and was the responsibility of Wausau. The denial was issued in a timely manner and was reasonable when it was issued. However, the Referee felt that Wausau's persistence in a continuing denial of this claim was unreasonable after it had been advised by Dr. Carr that the claimant's current condition was related to his on-going work activities and that this last employment definitely contributed to his back condition. The Referee felt that a denial either made or maintained complete absence of tenable supporting information was unreasonable. He felt that Wausau's conduct unreasonably delayed the payment of temporary total disability compensation to the claimant for the period from April 3, 1980 to the date of his Opinion and Order and assessed a penalty for 15% of that amount.

We do not find that Wausau's continuing action in denying responsibility for this claim was unreasonable. Dr. Carr's report in January 1980 was but one piece of information for the insurer to consider in this case. The carrier has the responsibility to process the claim and to evaluate all medical evidence provided to it. In this case, Wausau felt that the totality of the evidence did not support the claimant's claim for a "new injury." We do not find that under these circumstances Wausau's persistence in denying responsibility for this claim constitutes unreasonable delay in the payment of compensation. Based on this finding, we do not find that claimant is entitled to a penalty as awarded by the Referee and reverse that portion of his order.

ORDER

The Referee's Opinion and Order dated June 2, 1980 is modified.

That portion of the Referee's order which ordered the Employers Insurance of Wausau to pay to the claimant an amount equal to 15% of the temporary total disability compensation payable to the claimant for the period of April 3, 1980 to the date of its Opinion and Order is reversed.

The remainder of the Referee's order is affirmed.

TYLER G. McHUGH, CLAIMANT
Blackhurst, Hornecker, et al, Claimant's Attys..
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which ordered it to pay the claimant \$21.25 a month for the heating of his hot tub and granted the claimant's attorney a fee. The SAIF contends it is not responsible for this.

We find the Referee correctly recited the facts of this case in his order.

After de novo review of the record in this case, we reverse the Referee. We do not find that the SAIF is obligated to pay for the increase in the claimant's electrical bills generated by his use of the hot tub. Under ORS 656.245, the phrase "other related services" makes it clear that the term "medical services" is to be given a broad interpretation. Under this view, the Board found the SAIF was responsible to provide the hot tub for the claimant's use. However, we do not feel the increased cost of electricity to heat the hot tub can be included in "other related services." Even giving a broad interpretation to the statute, we find that at some point a limit has to be established. In this case, while we feel the claimant is entitled to have the SAIF provide a hot tub for his use, however, we do not find that he is entitled to have the SAIF, pursuant to ORS 656.245, pay for the increase in his electrical bill due to his use of the hot tub. Therefore, we reinstate the SAIF's July 2, 1979 denial and affirm it.

ORDER

The Referee's order dated May 23, 1980 is reversed in its entirety.

The SAIF Corporation's denial dated July 2, 1979 is reinstated and affirmed.

January 20, 1981

MARVEAN MILLER, CLAIMANT

Ronald A. Fontana, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Order of Dismissal

On November 21, 1980, the Referee issued an Opinion and Order in this case. A Request for Review dated December 23, 1980 was filed with the Workers' Compensation Board by the claimant. The employer moved to dismiss the claimant's Request for Review on the grounds it was not filed within 30 days of the Referee's order.

We have reviewed the employer's motion and find that it is well taken. The claimant failed to timely request the Board to review the Referee's order. Therefore, the Board grants the employer's Motion for Dismissal.

IT IS SO ORDERED.

January 20, 1981

ROBERT NASH, CLAIMANT

M. Elliott Lynn, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Own Motion Order Referring for Hearing

On April 7, 1972, the claimant suffered a compensable injury to his right knee. This claim was initially closed by Determination Order dated August 1, 1972 which awarded the claimant temporary total disability compensation. The claimant's aggravation rights have expired.

Subsequently, this claim was reopened by the Board under its own motion jurisdiction. The claim was closed by an own motion order dated June 19, 1980 which awarded the claimant additional temporary total disability compensation and compensation equal to 37.5% for 25% loss of the right leg.

On September 12, 1980, the claimant, by and through his attorney, requested the Board reopen this claim under its own motion jurisdiction. The claimant indicated that after undergoing surgery in April 1979, he was released from the hospital and was to have been provided crutches. However, for some reason this was not done. On April 20, 1979, while at home, the claimant fell while carrying a glass of water and injured his right hand. The claimant requests the Board reopen this claim and accept the April 20, 1979 injury to the left index finger as a compensable injury resulting from his knee surgery. Further, the claimant contends that he developed a manic depressive reaction which was in existence prior to his industrial injury, but had been aggravated by his injury and permanently worsened. The claimant attached reports from Dr. Boucher-Leif. The claimant contends that he now has a permanently bent index finger, and that because of this and his knee injury and psychiatric condition, he is unable to work.

On August 14, 1980, Dr. Boucher-Leif reported that she had examined the claimant in October 1978 for the SAIF Corporation. Dr. Boucher-Leif stated that her diagnosis was a manic depressive reaction "of long-standing and present prior to the claimant's industrial injury of April 2, 1972." It was Dr. Boucher-Leif's opinion that this condition was definitely aggravated by that accident and undoubtedly made permanently worse.

On December 18, 1980 the SAIF Corporation advised the Board that it opposed an own motion order reopening this claim and providing treatment for the claimant's psychiatric condition and left index finger injury. It did not feel that either of these conditions were related to the injury for which this claim was established.

We have reviewed the evidence forwarded to us by the parties in this case and find that it would be in the best interest of justice if this case were referred to the Hearings Division to be set for hearing. The hearing shall be set and the Referee shall determine whether or not the claimant's left index finger injury and psychiatric condition are related to his April 7, 1972 injury and the treatment he has received for it. Further, the Referee shall determine if the claimant's condition is related to the 1972 injury or has worsened to justify the reopening of this claim under the Board's own motion jurisdiction. Upon the conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared. The Referee shall forward the transcript, all the other exhibits introduced at the hearing and a recommendation in this case to the Board for its consideration.

IT IS SO ORDERED.

January 20, 1981

NORMAN OLDS, CLAIMANT

Richardson, Murphy & Nelson, Claimant's Attys.

Keith Skelton, Employer's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

Cross Request by Employer

The claimant and the employer/insurer seek Board review of the Referee's order entered in this case. The claimant contends that the Referee erred in approving the denials issued by the employer/insurer of his claim for his psychiatric condition. The employer contends the Referee granted claimant an excessive award of permanent partial disability compensation.

We find that the Referee correctly recited the facts of this case in his order.

After a de novo review of the record in this case, we modify the Referee's order. We concur with the Referee's affirmation of the employer/carrier's denial of responsibility for the claimant's psychiatric condition. Dr. Achord was of the opinion that there is a direct relationship between the claimant's June 22, 1977 industrial injury and his psychological problems including his attempted suicide. Dr. Farley also opines that there are several factors contributing to the claimant's depression, including his right shoulder injury and the resulting unemployment the claimant faces. However, Dr. Quan was of the opinion that claimant's psychiatric problems are not related to his injury. The Orthopaedic Consultants also felt that the claimant had a pre-existing psychological disorder which was unrelated to his industrial injury and that he needed continuing treatment for that condition. Based on the record in this case, we do not find that the claimant has carried his burden of proof by establishing that his psychiatric condition is related to his industrial injury. Further, we do not find that the preponderance of the evidence establishes the claimant's pre-existing psychological condition was worsened by his industrial injury. Therefore, the Board affirms the Referee's affirmation of the denials issued by the employer/carrier of responsibility for the claimant's psychiatric condition.

We find that the award of permanent partial disability compensation granted by the Referee is excessive. We also find that the award of compensation granted by the Determination Order does not accurately reflect the claimant's loss of wage earning capacity due to this injury.

The Orthopaedic Consultants rated the impairment of the claimant's right shoulder as mild. They felt the claimant could perform light to medium work.

The claimant was evaluated at the William Callahan Center, and it was the opinion of the medical examiner that the claimant was capable of moderate work, not requiring lifting of over 50 pounds, or repetitive lifting of over 25 pounds, or work above shoulder level or repetitive push-pull type activity, and felt that the claimant did require a job change.

The claimant is now approximately 41 years old and has an eighth grade education. Testing reveals that claimant has an intellectual capacity which falls in the dull normal range. He has worked as a laborer, truck driver and as a mill worker.

We find, after reviewing all this evidence and comparing this case with numerous other cases we have reviewed, that the claimant is entitled to an award of compensation equal to 80° for 25% unscheduled disability for this injury. This award of compensation is in lieu of all prior awards of unscheduled disability for this injury.

ORDER

The Referee's Opinion and Order dated May 6, 1980 is modified.

The claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for his right shoulder injury. This award of compensation is in lieu of all prior awards of unscheduled disability the claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

January 20, 1981

JERRY REEVES, CLAIMANT

David Cromwell, Claimant's Atty.

Velure, Heysell, et al, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Employer

SWF Plywood Co. (SWF) seeks Board review of the Referee's order which set aside its denial of the claimant's aggravation claim and granted the claimant's attorney a fee. The Referee approved the SAIF Corporation's (SAIF) denial of the claimant's new injury claim. SWF contends that under the "last injurious exposure rule," Conifer Plywood Company (Conifer) (the claimant's employer in September 1978) and its insurer, SAIF, are responsible for the claimant's current condition.

The claimant, a 42-year-old spreaderman with SWF, on September 10, 1977, suffered a strain of his cervical spine while pushing on a load of veneer core. Dr. Campagna performed a myelogram and found an extruded cervical disc at the C6-C7 level on the left side. On October 24, 1977, the claimant underwent an anterior spinal cord decompression.

In January 1978, Dr. Campagna reported the claimant developed cramping in his left palm. The claimant denied any problems with his neck. Dr. Campagna diagnosed the claimant's left hand condition as Dupuytren's contracture and released the claimant to work as of February 6, 1978.

Dr. Campagna, on May 9, 1978, reported the claimant continued having difficulty with his left hand and arm. He felt the claimant's condition was stationary, and the claim could be closed. Dr. Campagna felt the claimant had mild neck disability due to his September 9, 1977 injury.

On May 25, 1978, this claim was closed by a Determination Order which granted the claimant a period of temporary total disability compensation and an award of compensation equal to 16° for 5% unscheduled disability for his neck injury.

The claimant worked for SWF from February 1978 through July 1978 at his old job. The claimant went to work for Conifer which was insured by the SAIF in July 1978 as a "busheler." In early September 1978, he reported he had again injured his neck while pulling a load of veneer. He returned to Dr. Campagna who diagnosed this injury as "nerve root compression C6, left, secondary to protruded cervical disk (sic), secondary to accident of September 1978."

The SAIF denied this claim on October 11, 1980 based on the information given to it by the claimant. The claimant had advised the SAIF his condition was the result of his earlier injury with another employer.

On October 18, 1978, SWF denied the claimant's aggravation claim on the basis that he had suffered a new injury while employed by Conifer.

The claimant was hospitalized in October 1978 and underwent a myelogram. The diagnosis was "cervical spondyl-osis, primarily at the C5-6 level."

On January 12, 1979, Dr. D. Smith reported the claimant was complaining of continuing left neck-shoulder-arm pain, headaches, jumping movements in his left triceps with weakness and atrophy of the triceps muscle and arm. Dr. Smith found the claimant had a full range of motion in his neck but had pain with certain movements. Dr. Smith opined the claimant's problems were related to spondylotic changes at the C5-6 level. He felt this problem could be surgically treated. Dr. Smith stated, "I believe that his (the claimant's) complaints at this time are the direct result of a basic aggravation of his original condition which has been largely precipitated and made acute by his most recent working injury of 2 September 1978. However, I believe that the basic progressive nature of this complaint would suggest that the key fundamental features of this have been retained ever since his original evaluation in October of 1977."

The Compliance Division, on January 16, 1979, issued an Order Designating Paying Agent Pursuant to ORS 656.307. SWF was ordered to provide workers' compensation benefits to the claimant.

Dr. Campagna, on January 23, 1979, reported he had released the claimant to return to work on December 4, 1978. However, six days later, Dr. Gosch reported the claimant had been unable to return to work on December 4, 1978.

On February 7, 1979, Dr. Smith reported he felt the claimant should undergo an anterior discectomy at C5-6 with bilateral decompression and/or fusion and removal of a methyl methacrylate plug at the C6-7 level. This was performed on February 8, 1979.

In June 1979, Dr. Smith opined that the original injury the claimant had suffered probably produced an acute cervical herniated disc associated with spondylosis at the C6-7 level on the left which was treated by Dr. Campagna. He felt the September 1978 injury aggravated the claimant's condition and concluded the aggravation produced the majority of the claimant's problems. He concluded that, although the claimant had had a pre-existing condition (due to the 1977 injury), the second injury, in all likelihood, produced acute symptoms but constituted an aggravation of the pre-existing condition as it manifested at C5-6 and "was a result then more directly of the second injury." In September 1979, Dr. Smith indicated he had treated the claimant for spondylosis with spondylotic and nerve root compression pain at the C5-6 level associated with a solid fusion at C6-7 resulting from an injury in September 1978.

On February 19, 1980, Dr. Smith, in response to a letter from the attorney representing SAIF, stated the claimant had a spondylotic condition with an acute disc herniation at the time he was originally treated by Dr. Campagna. He felt Dr. Campagna's operation was successful in relieving the specific aspects of the nerve root compression. It had been Dr. Smith's experience that in cases of significant spondylosis, many of the spondylotic lesions would subsequently develop signs and symptoms of the spondylotic process which then became the "clinical problem." He stated, "...I believe this is a natural aftermath of the condition for which the claimant underwent the surgery and that the changes in the mechanics of the cervical spine as they were influenced by a fusion at C6-7 most likely rendered the C5-6 level symptomatic as well."

The Referee found, based on Dr. Smith's opinion, that in September 1978 the claimant sustained an aggravation of his 1977 injury rather than a new injury.

After a de novo review of the record in this case, we reverse the Referee's order. Dr. Campagna, who treated the claimant after both of his injuries, relates the claimant's condition in September 1978, not to the 1977 injury, but to the September 1978 injury.

Dr. Smith, the claimant's current treating physician, felt the claimant's condition was "more directly" a result of the 1978 injury than of the 1977 injury.

After the 1977 injury, the claimant returned to his regular job with SWF and worked at that job until July 1978. In July, he went to work for Conifer, performing the same job, but at a faster pace. He continued to work for Conifer up until the time of the second injury. After this injury, the claimant required additional medical care and treatment.

We find that the greater weight of the evidence establishes that the claimant sustained a new injury while employed at Conifer in September 1978. The medical evidence clearly relates the claimant's condition following his 1978 injury, not to a worsening of his condition due to the 1977 injury, but to a new injury occurring September 1978.

ORDER

The Referee's order dated May 9, 1980 is reversed.

The SWF Plywood Company's denial of the claimant's aggravation claim is restored and affirmed.

The SAIF Corporation's denial of the claimant's new injury claim is set aside and the claim is remanded to it for acceptance and payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.268. The Referee's award of an attorney fee to claimant's attorney shall be paid by the SAIF Corporation.

The parties shall make the necessary adjustments so that the SWF Plywood Company is reimbursed for the payments it had made pursuant to Order Designating Paying Agent Pursuant to ORS 656.307 and the Referee's Opinion and Order.

CLAIM NO. C 103538 January 20, 1981

MABEL J. SCHALLBERGER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 31, 1980, the SAIF Corporation (SAIF) forwarded various information to the Board in this claim for the claimant's November 17, 1967 back injury. It advised the Board the claimant's aggravation rights had expired and it was referring this claim to the Board to be considered under its own motion jurisdiction. Attached were copies of medical reports from the Orthopaedic Consultants and Dr. Cherry.

The Orthopaedic Consultants, on December 15, 1980, reported the claimant's condition was stationary and that they saw no reason to reopen this claim. They felt the claimant's symptoms were the result of a gradual progression of her pre-existing severe degenerative disc disease and arthritis.

Dr. Cherry, in October 1980, had reported he felt the claimant continued to have a chronic back strain with severe attacks of charley-horses in her leg muscles. He felt she was unable to work on a full-time basis.

The SAIF indicated it opposed an own motion order reopening this claim for the claimant's current treatment. It felt the claimant's current problems were due to her pre-existing severe degenerative disc disease and arthritis and not to her on-the-job injury.

We have reviewed the information provided to us by the SAIF. We are unable to find that this information is sufficient to warrant reopening of this claim. The evidence does not relate the claimant's current problems to her November 17, 1967 back injury or a worsening of her condition due to that injury. Therefore, we will not order this claim reopened.

ORDER

This claim shall not be reopened at this time under the Board's own motion jurisdiction.

CLAIM NO. FC 373434

January 20, 1981

IRIS F. YOUNG, CLAIMANT

Doblie & Francesconi, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Amended Own Motion Determination

The Board issued its Own Motion Determination in the above-entitled matter on January 6, 1981. In that Order the Board failed to award claimant's attorney a reasonable attorney fee for his efforts on claimant's behalf on the issue of extent of permanent partial disability.

Claimant's attorney is hereby granted as and for a reasonable attorney fee 25% of the increased award granted by our Order for unscheduled disability, not to exceed \$250, payable out of the increased award.

The remainder of our Order remains unchanged.

IT IS SO ORDERED.

January 26, 1981

PAUL L. HART, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's Opinion and Order which: (1) Approved the employer/carrier's denial of his claim for a hearing loss in his right ear; (2) granted the claimant an award of compensation equal to 45% for 30% loss of his left leg; (3) affirmed the employer/carrier's denial of responsibility for the claimant's low back condition; and (4) found the claimant's left knee condition was not compensable. The claimant contends that his hearing loss is compensable and that he is entitled to an unscheduled disability award for his hip injury and that his low back condition is compensable.

We find that the Referee correctly recited the facts of this case in his Opinion and Order.

After a de novo review of the record in this case, the Board modifies the Referee's order. We agree with the Referee that the left knee and hearing loss in the claimant's right ear are not compensable and would affirm the Referee's decision on these matters. We find that the preponderance of the medical evidence supports the affirmation of these denials. Dr. Schwartz does not relate the surgery performed on the left knee in December of 1976 to the claimant's original injury. Further, Dr. Ventura found that, prior to his industrial injury, the claimant had a significant hearing loss in his right ear. We find the evidence does not establish a relationship between the left knee condition and the hearing loss in the right ear to the claimant's December 8, 1975 injury.

Concerning the issue of the claimant's entitlement to an award of unscheduled disability for his hip and back injury, we find that he is entitled only to a scheduled disability award. The claimant has received an award of compensation equal to 22.5% for 15% loss of his left leg. The claimant's injury was diagnosed as a fracture of the cervical neck of the left femur. OAR 436-65-535(3) states: "The leg begins with the knee joint and includes all structures of the lower extremity proximal thereto, including the femoral head and acetabulum." The medical evidence in this case does not establish that the claimant's injury was outside the area described by this rule. Therefore, we find the claimant is entitled only to an award of scheduled disability for this injury. Further, we find that the award granted by the Referee in this case is excessive. The medical evidence indicates the claimant has a minimal loss

of function of his leg due to this injury. We find that the Determination Order entered in this case correctly compensated the claimant for any loss of function he has due to this injury. Therefore, we order the Determination Order restored and affirmed.

With regards to claimant's contention that he suffered a back injury in his original injury, we agree with the Referee and affirm the denial of the employer/carrier of that condition. The claimant testified that, in his original fall, he injured his head and back. However, as was found by the Referee, the claimant's testimony is not credible. The Orthopaedic Consultants in 1979, based on claimant's history given to them, found that he had minimal loss of function of his back due to this injury. Approximately a year previously they had examined the claimant, and the claimant indicated he did not have any back difficulty due to his injury. We find that the preponderance of the evidence indicates that claimant did not suffer a back injury in his original injury. Therefore, we affirm the denial issued by the employer/carrier.

ORDER

The Referee's order dated May 29, 1980 is modified.

The Determination Order dated April 5, 1979 is restored and affirmed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-5139

January 26, 1981

BONNIE LANGFORD, CLAIMANT
Rick W. Roll, Claimant's Atty.
G. Howard Cliff, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Order on Review

The employer seeks Board review of the Referee's Opinion and Order which granted the claimant an award of compensation equal to 128° for 40% unscheduled disability for his low back injury. The employer contends this award of compensation is not supported by the evidence in this case.

After a de novo review of this record, the Board modifies the Referee's order. The claimant is 46 years old and has an eighth grade education. She has worked as an agricultural laborer, waitress, nurse's aide and machine operator in a drapery shop. The medical evidence indicated the claimant should not engage in any work which requires heavy lifting, stooping or bending. The myelogram performed on the claimant revealed an "essentially normal study with only slight diffuse of the L4-5 distposteriorly." She had not undergone any surgery and none has been suggested.

After considering the evidence in this case, we find the award of compensation granted by the Referee is excessive. However, we also find the previous awards of permanent partial disability compensation granted by the Determination Orders to be inadequate. Based on all the evidence in this case, we find the claimant is entitled to an award of compensation equal to 80% for 25% unscheduled disability for this injury. This is in lieu of all previous awards of unscheduled disability the claimant has received for this injury.

ORDER

The Referee's Opinion and Order dated June 16, 1980 is modified.

The claimant is hereby granted an award of compensation equal to 80% for 25% unscheduled disability for this injury. This is in lieu of all prior awards of unscheduled disability she has received for this injury.

The remainder of Referee's order is affirmed.

WCB CASE NO. 79-5641

January 26, 1981

RICHARD L. LEONE, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of that portion of the Referee's order which allowed the SAIF Corporation (SAIF) to deduct the sum of \$572.16 from the claimant's award of permanent partial disability compensation. The claimant contends that the SAIF should not be allowed to deduct that sum from his award of compensation for permanent partial disability.

The Board finds the Referee correctly recited the facts of this case in his Opinion and Order.

After de novo review of the record in this case, we reverse that portion of the Referee's order which approved the SAIF's deduction of \$572.16 from the claimant's award of permanent partial disability compensation. We find the facts of this case are distinguishable from those in the case of Lois Y. Jones, WCB Case No. 79-1293. In that case, the Determination Order awarded the claimant a period of temporary total disability compensation. The SAIF had paid temporary total disability compensation for six months beyond the date set by the Determination Order terminating the payment of compensation. After a hearing was held on the claimant's request, she received an award of permanent partial disability compensation. The SAIF advised the claimant it was "offsetting" the temporary total disability compensation which it had overpaid her against the permanent partial disability award. The SAIF advised the claimant at the same time as it made its first payment of compensation of permanent partial disability. The Board approved the SAIF's action in this case.

In the present case, a June 5, 1978 Determination Order awarded the claimant temporary total disability compensation from July 18, 1977 through April 13, 1978, less time worked. The claimant requested a hearing on this Determination Order. Subsequently, the parties introduced a stipulation dated June 1, 1979 which granted the claimant an award of compensation equal to 22.4° for 7% unscheduled disability. In the stipulation, there was no mention of the overpayment which SAIF had made of temporary total disability compensation. The SAIF, after calculating the dollar amount of the award granted the claimant by the stipulation, advised the claimant that an overpayment of temporary total disability compensation in the amount of \$572.16 had been made and was being deducted from his permanent partial disability compensation. It was apparent that at the time the stipulation was entered into, the SAIF had full knowledge that an overpayment had been made of compensation.

Under the facts of this case, we do not find that the SAIF is entitled to the deduction it claims. The SAIF had knowledge of its overpayment of temporary total disability compensation prior to the signing of the stipulation. The stipulation resolved all issues pending at the time it was entered into. In order to enter into such a stipulation, the parties must have "a meeting of the minds" similar to that in contract law. If the parties are mutually mistaken on a fact, then no "meeting of the minds" can be said to have occurred, and the contract would not be valid. In this case, the parties agree that the claimant was to receive an award of compensation equal to 22.4% for 7% unscheduled disability which equates to \$1,568. There is no recital in the stipulation that the parties agreed that the SAIF could deduct the overpayment of \$572.16. If it were allowed to do so, it would be unilaterally altering the stipulation. We do not feel that such action can be condoned. Therefore, we reject the SAIF's claim for the offset and order it to pay the claimant a sum of \$572.16. Further, we find that SAIF's unilateral deduction of this amount of compensation in this case equates to unreasonable resistance to the payment of compensation and warrants the assessment of a penalty and attorney fee in this case. We find that claimant is entitled to an additional award of compensation equal to 25% of the amount SAIF had withheld or deducted as a penalty for its unreasonable resistance to the payment of compensation. Further, the claimant's attorney is entitled to an attorney fee for the SAIF's unreasonable resistance to the payment of compensation and also an attorney fee for prevailing on this issue.

ORDER

The Referee's Opinion and Order dated July 7, 1980 is modified.

The SAIF Corporation's deduction of \$572.16 for claimant's award of permanent partial disability is disapproved.

The SAIF Corporation is ordered to pay the claimant the sum of \$572.16 plus an additional amount of compensation equal to 25% of that amount as a penalty for its unreasonable resistance to the payment of compensation.

The claimant's attorney is granted a fee equal to \$400 for the SAIF's unreasonable resistance to the payment of compensation and for prevailing in this case at the Board level and Hearing level.

January 26, 1981

JUANITA LEGORE MCGINNIS, CLAIMANT
Michael B. Dye, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 22, 1980, the claimant, by and through her attorney, requested the Board reopen this claim for her January 5, 1970 back injury under its own motion jurisdiction. The claim had originally been closed by Determination Order dated September 20, 1971 which granted the claimant an award of compensation equal to 32° for 10% unscheduled low back disability. The claim was subsequently closed with the claimant receiving an additional award of compensation equal to 32° for 10% unscheduled disability for her back injury. The claimant's aggravation rights have expired. Attached to her request was on October 15, 1980 report from Dr. Cherry in which he opined that her condition was considerably worse at that time than it was at the time her claim had been closed. Dr. Cherry indicated that the claimant did not suffer any further injuries and that she had an aggravation of her previous condition. Dr. Cherry requested this claim be reopened and the claimant be treated by conservative means.

The SAIF Corporation (SAIF) referred the claimant to the Orthopaedic Consultants to be examined. The Orthopaedic Consultants opined that the claimant's condition remained medically stationary and that she had reached "maximum improvement" from her injury. They felt there was no reason that this claim should be reopened. However, they felt the claimant might benefit from "low back school and psychiatric evaluation." It was their feeling that claimant should not return to her previous occupation with or without limitations. They felt that the degree of loss of function of the spine attributed to the January 1970 injury was moderate and unchanged from the previous examinations.

The SAIF, on December 31, 1980, advised the Board that it opposed an own motion order reopening this claim as it appeared that the claimant's condition remained stationary at that time. It indicated it would continue to pay for medical-related treatment under the provisions of ORS 656.245.

The Board has reviewed the medical information provided to it by the parties. We find that the evidence is insufficient at this time to warrant a reopening of this claim under our own motion jurisdiction. The preponderance of the evidence does not indicate the claimant's condition has worsened. The claimant is entitled to continue to receive medical care and treatment for her condition related to the January 1970 injury under the provisions of ORS 656.245.

ORDER

The claimant's request that the Board exercise its own motion jurisdiction to reopen this claim is denied.

WCB CASE NO. 79-10, 364 January 26, 1981

LINO B. PALANDRI, CLAIMANT
Dan O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's Opinion and Order which granted him an additional award of compensation equal to 48° for 15% unscheduled disability, making a total award of 272° for 85% unscheduled disability for his low back injury. The claimant contends he is permanently and totally disabled.

We find the Referee correctly recited the facts of this case in his order.

After a de novo review of this record, we affirm the Referee's conclusions. The Referee, in the opinion portion of his order, quotes the 1977 version of ORS 656.206. This was incorrect. The law in effect at the time of the injury is applied to the claim for that injury. The law in effect at the time of his injury did not require the injured worker to establish that he was willing to seek regular and gainful employment. Permanent total disability was defined as "...the loss, including pre-existing disability, of both feet or hands, or one foot and one hand, total loss of eyesight or such paralysis or other condition permanently incapacitating the workman from regularly performing any work at a gainful and suitable occupation." (ORS 656.206(1) (a) (1971))

We find that the preponderance of the evidence does not establish that the claimant is entitled to an award of compensation for permanent total disability under the law in effect at the time of his injury. The medical evidence alone does not establish the claimant is permanently and totally disabled. Therefore, other factors must be considered. Even though motivation was not required by the law in effect at the time of the claimant's injury, it still is a factor to be considered. In Deaton v. SAIF, 13 Or. App. 298, 509 P2d 1215 (1973), the Court of Appeals affirmed an award of less than permanent total disability on the grounds that absent a showing of motivation to return to work when the injuries

along with age, education, mental capacity and training did not themselves support a claimed inability to work, the claimant had not met the burden of proving his prima facie odd-lot status.

In this case, the claimant is 57 years old and has a fifth grade education. The claimant has held jobs working as a farmer, janitor, doing truck brake work, shipping and receiving, furniture assembly, truck driver and laborer. The claimant has made no effort to return to work or attempted to find work. Considering these facts and the medical evidence, we conclude that the claimant has failed to prove he is permanently and totally disabled and that the Referee correctly rated the claimant's loss of wage earning capacity due to this injury.

ORDER

The Referee's Opinion and Order dated June 6, 1980 is affirmed.

WCB CASE NOS. 79-9379 & 80-10, 062

January 26, 1981

JOE E. ROBERTSON, CLAIMANT
Cowling, Heyseell & Pocock, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 7, 1980 the Board entered an Own Motion Order Referring for Consolidated Hearing in regard to a January 14, 1975 injury and a new injury occurring in 1979 which was denied by the SAIF Corporation (SAIF). On January 7, 1980 the claimant, by and through his attorney, filed a motion for an Own Motion hearing on another injury occurring on August 2, 1972.

A hearing on the 1975 claim was convened on January 13, 1981 before the Board could act on claimant's new motion. The SAIF is the insurer for both the 1972 and 1975 claims. At the hearing, the SAIF indicated it did not oppose claimant's motion. Presentation of testimony relating to the 1972 as well as the 1975 injuries was allowed at the hearing in order to avoid the need for two hearings.

The Board, therefore, orders that the 1972 claim be considered in terms of the Board's November 7, 1980 order and that recommended findings and an order be prepared in both these claims.

IT IS SO ORDERED.

January 28, 1981

ANTHONY J. BRUGATO, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On January 6, 1981, the Board entered an Own Motion Determination in this case which granted claimant compensation for permanent total disability effective October 29, 1980. It has been brought to the Board's attention that claimant was unable to work since June 30, 1980. Dr. Lawrence J. Cohen, on November 11, 1980, indicated that claimant has been permanently and totally disabled since that date. The Board concludes that claimant should be considered to be permanently and totally disabled as of June 30, 1980, rather than October 29, 1980. Claimant's attorney fee should be adjusted accordingly based on the amount granted by our January 1981 Own Motion Determination.

IT IS SO ORDERED.

January 28, 1981

JOE HUNT, CLAIMANT
Stoel, Rives, Boley, Fraser & Wyse, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order Referring for Hearing

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an injury which occurred on June 20, 1975 on the basis of a worsened condition.

The Board is referring this matter to the Hearings Division to be set for hearing and heard on a consolidated basis with WCB Case No. 80-9453 which is claimant's appeal from a Third Determination Order. The own motion case is being referred because there is some ambiguity in the application of Coombs v. SAIF, 39 Or 293 (1979), to the facts of this case.

At this time it appears to the Board that claimant has medical evidence of a hospitalization on September 30, 1980 and with a discharge date of October 10, 1980 and said hospitalization, in the opinion of Dr. Reynolds, is compensably related to claimant's 1975 industrial injury. Therefore, the Board grants, at this time, compensation for temporary total disability to the claimant for that hospitalization.

The Referee is hereby ordered to hold a hearing on a consolidated basis and to take evidence on all issues to be raised at that hearing. The Referee is to submit to the Board a transcript of those proceedings together with his recommendation on claimant's request for the Board to exercise its own motion jurisdiction pursuant to ORS 656.278.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 30, 1980 to October 10, 1980, inclusively, and the balance of claimant's own motion request is referred to the Hearings Division.

WCB CASE NOS. 80-11282, 81-71 & January 28, 1981
81-228

STEVEN KASER, CLAIMANT
Allen & Vick, Claimant's Attys.
Scott Gilman, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order Referring for Consolidated Hearing

On December 16, 1980, claimant requested the Board exercise its own motion jurisdiction and reopen his claim for an injury sustained in 1972. Claimant's aggravation rights have expired.

Claimant sustained injuries on August 13, 1979 and on November 3, 1980. Mission Insurance Company issued its denial for the earlier injury, contending claimant's condition was the result of either his 1972 or 1974 injury. SAIF Corporation denied responsibility for the November 1980 injury on the same basis. Both of these denials have been appealed to the Hearings Division.

The Board concludes that it would be in the best interests of the parties if these cases were consolidated for hearing. Therefore, this case is referred to its Hearings Division to be set for hearing with the cases presently pending in this matter. The Referee is instructed to take evidence to determine whether claimant's condition is a result of his new injuries or is an aggravation of the injury sustained in 1972. Upon conclusion of the hearing, the Referee shall cause a copy of the transcript to be forwarded to the Board together with his recommendation with respect to the own motion matter. He shall dispose of the other cases with an appealable Opinion and Order.

IT IS SO ORDERED.

January 30, 1981

NORMA L. BRAUER, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
Lang, Klein, et al, Employer's Attys.
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 employer, and said request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of the law.

January 30, 1981

JAMES L. GROVER, CLAIMANT
Robert L. Chapman, Claimant's Atty.
Frank A. Moscato, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

The Board, on January 6, 1981, issued an Own Motion Order reopening this claim effective April 7, 1980 for the payment of temporary total disability compensation and other benefits provided for by law until closed pursuant to ORS 656.278 and granted the claimant's attorney a fee equal to 25% of the temporary total disability compensation awarded in this case, not to exceed the sum of \$300. The employer/carrier, on January 14, 1981, requested the Board to reconsider this order. It contends the claimant had not worked for almost ten years and that it was not obligated to pay temporary total disability compensation. It indicated it would continue to pay the claimant's necessary medical expenses whether under a reopened claim or continuing benefits under ORS 656.245.

We have reviewed the employer/carrier's request and find that it is well taken. Temporary total disability is defined in ORS 656.210. In subsection 2 of ORS 656.210, regularly employed is defined as actual employment or availability for such employment. In this case, it is apparent that the claimant has not worked, actually been employed or available for such employment for approximately ten years. Therefore, we find that the claimant is not entitled to temporary total disability compensation as granted by the original order. Accordingly, we amend our original order by deleting that portion which ordered this claim reopened effective April 7, 1980 for the payment of temporary total disability compensation until closed pursuant to ORS 656.278 and granting claimant's attorney a fee out of this award of compensation.

IT IS SO ORDERED.

WCB NOS. 79-4980, 79-10, 169 &
79-10, 606

January 30, 1981

GARY W. HUNTER AND MICHAEL LEROY, CLAIMANTS
Pozzi, Wilson, et al, Claimants' Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The Board issued an Order on Review on December 30, 1980 remanding this claim to Scott Wetzel for acceptance and payment of compensation due the claimants. On January 8, 1981, Multnomah County moved for reconsideration of this order.

The Board's Order on Review dated December 30, 1980 is abated. After we have reconsidered this case, we shall issue a new order which shall give the parties thirty (30) days from the date of the new order to appeal.

IT IS SO ORDERED.

January 30, 1981

KATHI MOZZILLO, CLAIMANT

Larry K. Bruun, Claimant's Atty.

Joseph D. Robertson, Employer's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which set aside its denial of responsibility for the claimant's condition. SAIF contends that either Boise Cascade is responsible for the claim as an aggravation or neither carrier is responsible.

The Board affirms and adopts as its own the facts as set out by the Referee in her order with the exception of a statement made in paragraph three of page two of the order. Dr. Fleshman's deposition did place the cause of claimant's condition before Boise Cascade. However, his medical reports, "with some hesitation," found the cause attributable to SAIF, claimant's latest employer.

After a de novo review of the record in this case, the Board affirms the Referee's order. We agree that applying the last injurious exposure rule to the facts in this case, one reaches the same conclusion as the Referee. We find that the greater weight of the evidence establishes that the claimant's employment with Simpson Lumber Company contributed independently to her difficulty with her hands, wrists and elbows. We also agree with the Referee that the claimant has failed in proving that she suffers any permanent disability because of her carpal tunnel syndrome. Therefore, we would affirm the Determination Order entered in that claim and would affirm the Referee's order entered in this case.

ORDER

The Referee's order dated June 19, 1980 is affirmed.

The Determination Order dated February 21, 1980 is affirmed.

The claimant's attorney is granted a fee equal to \$350 at the Board level in this case.

January 30, 1981

BETTY NOICE, CLAIMANT

Evohl F. Malagon & Steven C. Yates, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Order of Dismissal

On November 21, 1980, the Referee issued an Opinion and Order in the above entitled matter. On January 21, 1981, the SAIF Corporation requested Board review of the Referee's order. Pursuant to the provisions of ORS 656.289(3) the request for review is untimely and the case must be dismissed.

IT IS SO ORDERED.

CLAIM NO. KC 254011

January 30, 1981

ROGER D. YARBERRY, CLAIMANT

SAIF, Legal Services, Defense Atty.

Own Motion Order and Determination

On July 9, 1970, the claimant suffered multiple injuries, including fractures of his ribs, pelvis, collar bone and wrist, when he fell off a pole. The claim was first closed by Determination Order dated September 14, 1972 which granted the claimant an award of temporary total disability compensation and an award of compensation equal to 20% loss of the left forearm. Subsequently, the claim was reopened and closed by a second Determination Order and a stipulation was entered into which resulted in the claimant being granted a total award of compensation equal to 70% loss of the left forearm and compensation equal to 45% unscheduled disability for his back, right shoulder, pelvis and chest injuries. The claimant's aggravation rights have expired.

On March 19, 1979, Dr. Gill requested the claim be reopened for arthrodesis of the wrist. The SAIF Corporation (SAIF) voluntarily reopened this claim and commenced payment of temporary total disability compensation. On September 14, 1979, the claimant underwent surgery suggested by Dr. Gill. Dr. Gill removed the implant and released the carpal tunnel fusion. The claimant missed only one day from work due to this injury.

In March 1980, Dr. Gill reported the claimant would probably require arthrodesis of the wrist utilizing iliac bone graft in the future. The arthrodesis was not performed in the September 1979 surgery.

Dr. Harris, in December 1980, examined the claimant and reported the claimant's condition was medically stationary as far as his wrist was concerned. Dr. Harris felt there could be some improvement in the function of the wrist.

The SAIF, on December 31, 1980, requested the determination be made of compensation to which claimant was entitled. The Evaluation Division of the Workers' Compensation Department on January 12, 1980 recommended the claim be closed and the claimant be granted an award of additional temporary total disability compensation for September 14 only. The Evaluation Division did not recommend any additional award of permanent partial disability in excess of that granted by the Determination Orders and the stipulation.

The Board has reviewed the file in this case and concurs with the recommendations made by the Evaluation Division.

ORDER

The claimant is hereby granted an award of additional temporary total disability compensation for September 14, 1979, one day only.

WCB CASE NO. 80-3905

February 6, 1981

EDWARD R. CURRENT, CLAIMANT"
Keith Swanson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

In March 1980, the SAIF Corporation (SAIF) denied responsibility for the claimant's bilateral aseptic necrosis of the femoral heads of the hips. At the time of hearing, based upon medical information it had received, the SAIF accepted responsibility for the claimant's current right hip condition which included treatment and time loss as a result of the aseptic necrosis. The Referee found that the SAIF was responsible for the left hip condition as well. The SAIF seeks Board review of the that decision of the Referee.

After de novo review of this record, we find the Referee correctly recited the facts of this case in his Opinion and Order. However, we reach a different conclusion than that reached by the Referee. We find that the SAIF is responsible only for the claimant's right hip condition and is not responsible for his left hip condition.

Every doctor but one found the aseptic necrosis in the left hip was of undetermined etiology. Several found there was definitely no relationship between the condition and his compensable injury. Only Dr. Struckman found a relationship. This was based on the fact that he felt the trauma sustained was similar in both legs on July 31, 1978. He indicated that since SAIF had accepted the right hip condition (this was an erroneous assumption on the part of Dr. Struckman); then, based on similar trauma, the left hip condition would also be compensable. The Board finds claimant's original injury was to his right leg and there is no basis for the finding that both legs were injured at that time. The first problem in claimant's left hip did not surface until eight months after the injury. Based on this evidence, the Board concludes SAIF is not responsible for the aseptic necrosis in the left hip.

ORDER

The Referee's Opinion and Order dated July 1, 1980 is modified.

That portion of the SAIF Corporation's denial of March 26, 1980, as to responsibility for the claimant's left hip condition, is restored and affirmed. The attorney fee granted by the Referee for this condition is reversed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 80-2710

February 6, 1981

EARL L. HARRIS, CLAIMANT

Mike Dye, Claimant's Atty.

Schwabe, Williamson, et al, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Employer

This case arose due to the employer/carrier's denial of responsibility for the claimant's December 28, 1979 heart attack. The Referee found that the claimant had established both legal and medical causation and found that the claim was compensable. The employer/carrier seeks Board review of this order.

We find that the Referee correctly recited the facts of this case in his Opinion and Order.

After de novo review of the record in this case, we reverse. Although we agree with the Referee that legal causation has been established, we find the claimant has failed to establish medical causation. In this case three medical doctors rendered opinions. The Referee relied upon the opinion of Dr. Rosencrans, a board certified internist. Dr. Rosencrans found that because of the heavy lifting the claimant had performed and the anxiety that he was under, that his heart attack was related to his work activity. Dr. Rosencrans did not examine the claimant; he had examined the records and testified at the hearing.

The Board notes that, the evidence does not support a conclusion that claimant's job involved "a lot" of heavy lifting, certainly not at any time proximal to the "heart attack."

Dr. Sutherland, a board certified cardiologist, and the claimant's treating physician did not believe the claimant's work was the cause of his coronary artery disease or of his myocardial infarction. Dr. Griswold, also a well known cardiologist, reviewed the medical reports. Dr. Griswold could not state that there was no relationship between his work activity and his myocardial infarction, but any relationship could only be defined "in the realm of possibility and not reasonable probability."

We find that the preponderance of the medical evidence does not establish medical causation in this case. The Board finds that the opinion of Dr. Sutherland is persuasive. He is a board certified cardiologist and the claimant's treating physician. Further, Dr. Griswold is unable to state whether or not the claimant's work, in fact, did contribute to his myocardial infarction. Only Dr. Rosencrans who is not a board certified cardiologist, and like Dr. Griswold did not examine claimant, finds the claimant's work contributed to his heart attack. In evaluating the opinions of the doctors, we find that the evidence does not preponderate in the claimant's favor. Therefore, the Board reverses the Referee's Opinion and Order and orders the denial issued by the employer/carrier to be restored and affirmed.

ORDER

The Referee's Opinion and Order dated June 25, 1980 is reversed in its entirety.

The employer/carrier's denial dated March 10, 1980 is restored and affirmed.

February 6, 1981

WILLIAM C. MAY, CLAIMANT

Ralf H. Erlandson, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

The claimant appealed from a second Determination Order dated September 10, 1979 which did not grant him any additional permanent partial disability compensation for this injury. The first Determination Order dated October 2, 1978 awarded the claimant compensation equal to 37.5% for 25% loss of his left hand. The Referee granted the claimant an additional award of compensation equal to 15% for 10% loss of his hand and affirmed the SAIF Corporation's (SAIF) denial of responsibility for his wrist symptoms. The claimant contends that the award of compensation granted to him does not adequately reflect the loss he has suffered in his left hand and that his wrist condition is compensable since it is causally related to his April 10, 1978 left hand injury or that it constitutes a new injury.

After de novo review of this record, the Board finds the Referee correctly recited the facts of this case in his Opinion and Order. Further, the Board finds the Referee correctly found that the claimant's finger laceration and wrist injuries are not compensably related to his April 10, 1978 injury. The Board would affirm the SAIF's denial of responsibility for these conditions.

We next turn to the issue of extent of disability. Dr. Stolzberg suggested in her report that in determining disability, she would suggest using objective medical data rather than the claimant's subjective complaints. Dr. Nathan is the sole examiner who gave an opinion using strictly objective medical techniques. Dr. Nathan twice gave opinions as to the percentage of impairment that the claimant had in the left hand. The report most favorable to the claimant, Dr. Nathan felt the claimant had an impairment to the hand due to sensory loss of 4.5% which he combined with the impairment of the hand due to motor loss, 20% which gave a combined total impairment of 22% of the hand. Dr. Nathan felt that a total of 25% impairment of the left hand represented a fair evaluation of the impairment claimant had. We find that, based on the evidence in this case, particularly Dr. Nathan's most favorable report, that the claimant has been correctly awarded compensation for the loss of use of his hand due to this injury. We find that the evidence in this case does not support an increased award of compensation granted by the Referee. Therefore, we would reverse the Referee's award of increased compensation and would restore and affirm the second Determination Order entered in this case.

The Board has not considered the additional medical reports offered by the claimant in his brief to the Board. These reports were not offered at the time of the hearing, and the Board finds that they do not constitute newly discovered evidence. Therefore, they were not considered by the Board in its review of this case.

In his brief, claimant questions the accuracy of the transcript and the attentiveness of the Referee. The transcript errors cited by the claimant concern the misspelling of two names. There is no showing these misspellings affected the Referee's decision. Claimant also alleges the Referee was so busy writing during the hearing that he missed visual evidence. Claimant did not identify the kind or import of the visual evidence allegedly missed. A Referee is not expected to rely solely on memory when writing an opinion and order. To ensure accurate findings of fact, Referees make notes during hearings.

The Board has confidence in the ability of the referees who are carefully selected professionals to conduct fair and impartial hearings. The Board finds no showing this hearing was conducted unfairly or that the record was incompletely developed.

ORDER

The Referee's Opinion and Order dated July 11, 1980 is modified.

The second Determination Order dated September 10, 1979 is restored and affirmed.

WCB CASE NO. 76-3717

February 6, 1981

The Beneficiaries of DAVID M. ROGERS, Deceased
Martin Sharp, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Supplemental Order

This case has run the entire gauntlet of available review procedures in workers' compensation cases in the almost five years since the worker died in February 1976. It is now before the Board to write the final chapter, which includes a statutory interpretation question regarding awards of attorney fees.

SAIF originally denied the claim. On November 16, 1978, a Referee's order ruled the claim was compensable. On May 10, 1979, the Board affirmed the Referee's finding of compensability. The Court of Appeals reversed the Board. Rogers v. SAIF, 43 Or. App. 692 (1979). The Supreme Court reversed the Court of Appeals. Rogers v. SAIF, 289 Or. 633 (1980).

The Supreme Court's mandate provides in part:

"The decision of the Court of Appeals is reversed and the decision of the Workers' Compensation Board is affirmed, and the cause is remanded through the Court of Appeals to the Workers' Compensation Board for further proceedings in conformity with the opinion of this Court."

Pursuant to these directions, the Board hereby reinstates its May 10, 1979 Order.

We turn to the attorney fee issue. Because this was a denied claim that the Referee found to be compensable, the Referee ordered SAIF to pay \$3,000 to claimant's attorney as a reasonable fee pursuant to ORS 656.386(1). Because SAIF's appeal to this Board was unsuccessful, we ordered SAIF to pay claimant's attorney an additional \$350 as a reasonable attorney's fee pursuant to ORS 656.382(2). The records now before us contain no information about attorney's fees awarded at the Court of Appeals level; presumably, no fees were awarded to claimant because claimant did not prevail at that level.

After prevailing in the Supreme Court, claimant petitioned that Court for an award of attorney fees. The Supreme Court denied that petition on the basis of Brown v. EBI Companies, 289 Or. 895 (1980). The claimant now requests that this Board

"order the State Accident Insurance Fund to remit to claimant's attorney the previous award of \$3,350...plus a reasonable attorney fee for review at the Supreme Court level...In the event the Board should determine it is without authority to order a reasonable attorney fee at the Supreme Court level, it is requested that attorneys fees in the sum of \$1,500 be approved, payable from the compensation awarded decedent's spouse."

The first prong of claimant's request is simple. The Supreme Court's mandate states that this Board's Order of May 10, 1979 "is affirmed." We have reinstated that Order. Therefore, SAIF now stands ordered to pay to claimant's attorney a total of \$3,350 for previous representation of claimant before the Referee and Board.

The Board concludes that it lacks statutory authority to grant claimant's request that we set a reasonable attorney fee for services rendered at the Supreme Court level. There are two possibly relevant statutes. ORS 656.382(2) provides:

"If a request for hearing, request for review or court appeal is initiated by an employer or the corporation, and the referee, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or corporation shall be required to pay to the claimant or his attorney a reasonable attorney's fee in the amount set by the referee, board or the court for legal representation by an attorney for the claimant at the hearing, review or appeal." (Emphasis supplied.)

The emphasized language refers to a Referee setting a fee for representation at a hearing; this Board setting a fee for representation on Board review; and a court setting the fee for representation on appeal. Each tribunal only has authority to set fees for representation rendered before it.

ORS 656.386(1) provides in part:

"...Where a claimant prevails in an appeal to the Court of Appeals from a Board order denying his claim for compensation, the Court shall allow a reasonable attorney fee to the claimant's attorney. In such rejected cases where the claimant prevails finally in a hearing before the Referee or in a review by the Board itself, then the Referee or Board shall allow a reasonable attorney fee..."

Unlike ORS 656.382(2), this statute does not limit each tribunal's authority to awarding fees only for representation rendered before it. For example, under ORS 656.386(1) and this Board's rules, this Board can award attorney fees for representation before both the Referee and the Board when the Board is the first to rule that the claim is compensable. See OAR 438-47-040(2). There is, however, no suggestion in ORS 656.386(1) that a lower level of the review process can award fees for representation rendered at a higher level of the review process.

Claimant's final request is that we approve the sum of \$1,500 as a reasonable attorney's fee for representation in the Supreme Court, payable from the compensation awarded. The requested amount is eminently reasonable. Unfortunately, however, the claimant is seeking approval from the wrong tribunal. ORS 656.388(1) provides:

"No claim for legal services or for any other services rendered before a referee or the board, as the case may be, in respect to any claim or award for compensation, to or on account of any person, shall be valid unless approved by the referee or board, or if proceedings on appeal from the order of the board in respect to such claim or award are had before any court, unless approved by such court."

As is apparent, ratification of changes for legal services for representation "before any court" must be obtained from "such court." Thus, the approval of attorney's fees for representation in the Supreme Court that claimant seeks must come from the Supreme Court.

IT IS SO ORDERED.

WCB CASE NOS. 78-3310 & 78-7638

February 6, 1981

DALE SCOFIELD, CLAIMANT

Starr & Vinson, Claimant's Attys.

Lyle Velure, and, Frank A. Moscato, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Employer

The Employers Insurance of Wausau (Wausau) seeks review by the Board of the order of the Referee which remanded claimant's claim to it to be accepted and for payment of benefits as required by law. Wausau contends claimant's condition and need for surgery arises out of a new injury.

Claimant, 58 years of age, had a prior back injury and a laminectomy in 1951 and returned thereafter to full activity.

In October 1973, while employed with this employer, Lane Electric Corporation, as a line serviceman, the claimant was unloading a transformer pad and injured his low back. The SAIF Corporation (SAIF) was the employer's workers' compensation insurance carrier, and the claim was accepted.

On August 27, 1974, claimant was pulling wire up a hill and fell backwards over a log and injured his left leg and hip. Claimant testified that he filed an employer's accident report; however, the employer's file doesn't contain such a report. Wausau had become the employer's carrier and provided the coverage when the August injury allegedly occurred.

Claimant testified that with the passage of time his back and left leg condition worsened, and he was treated by Dr. Erpelding in 1975.

On May 23, 1977, claimant was unloading a 25 pound yard light, and when he picked it up and swung it towards the dock, he fell to his knees from a sensation like "somebody hit me between the ears." Claimant experienced severe radiating back pain. National Farmers Insurance provided the workers' compensation coverage at the time of this incident. General Adjustment Bureau (GAB) provided claim service to the carrier.

On August 17, 1977, Dr. Serbu reported a history only of the 1974 injury. On March 30, 1978, Dr. Serbu related claimant's present problems to the 1974 injury.

On April 11, 1978, GAB, in behalf of National Farmers Insurance, denied claimant's claim contending that claimant's 1977 disabling back condition was related to the industrial injury of 1974.

On May 15, 1978, Dr. Serbu reported that he now had a history of the May 1977 incident involving the yard light. It was his opinion that if that history were true, then he would have to relate claimant's present symptomatology more to the 1977 industrial injury than to the 1974 industrial injury.

The Referee concluded that claimant's present condition and his need for surgery were the result of his industrial injury of 1974 and remanded the claim to Wausau for acceptance and payment of benefits. He further affirmed the denials issued by SAIF and GAB for National Farmers.

The Board, after de novo review, disagrees with the conclusion reached by the Referee. We think the claimant suffered a new injury May 23, 1977.

The Board finds the opinion of Dr. Serbu persuasive when taken together with claimant's description of the May 23, 1977 onset of symptoms.

The evidence indicates that the injury of May 23, 1977 independently and materially contributed to the worsening of claimant's back condition. Claimant testified that at the time of the May 1977 injury, he experienced pain much more severe than he had experienced ever before. Dr. Serbu's opinion supports this finding.

Therefore, the Board concludes that National Farmers Insurance is responsible for claimant's condition and subsequent need for surgery.

ORDER

The order of the Referee dated February 29, 1980 is hereby modified.

SAIF's denial is affirmed.

It is hereby ordered that the denial issued by Employers Insurance of Wausau dated May 3, 1979 is affirmed.

The claimant's claim for his disabling low back condition and his subsequent surgery is hereby remanded to the employer, Lane Electric Cooperative, and its carrier, National Farmers Insurance, for acceptance and payment of benefits as required by law.

The General Adjustment Bureau, Inc., is hereby ordered to reimburse Employers Insurance of Wausau for all monies expended pursuant to the order of the Referee.

Claimant's attorney is hereby granted, as a reasonable attorney fee for his services at Board review, the sum of \$150 payable by National Farmers Insurance.

WCB CASE NOS. 77-1889 & 78-1678

February 6, 1981

JOHNNY R. SMITH, CLAIMANT

Doug Green, Claimant's Atty.

R. Kenney Roberts, and, Dennis VavRosky, Employer's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Carrier

United Pacific/Reliance Insurance Company (United) seeks Board review of that portion of the Referee's Opinion and Order which ordered it to accept responsibility for the claimant's condition and found his condition medically stationary and awarded him compensation for permanent total disability effective the date of the hearing. United contends that the claimant's condition was stable prior to his August 1976 injury, which is the responsibility of the Employers Benefit Insurance Company (EBI) and that injury, coupled with a change of work style necessitated by that injury, independently contributed to the claimant's resulting disability. Therefore, United contends responsibility for the claimant's right shoulder condition lies with EBI and further the record does not establish that the claimant is permanently and totally disabled. United contends its denial should be affirmed and that EBI should be ordered to accept responsibility for the claimant's right shoulder condition.

On March 7, 1975, the claimant, then a 48-year-old skidder operator with Brooks-Scanlon, Inc., hit a stump and injured his right shoulder. This employer's insurer was United.

Dr. Conner diagnosed the claimant's condition as acute bursitis or tendonitis of the right shoulder. Dr. Conner later changed his diagnosis and felt that claimant had a tear of the rotator cuff. The claimant was released for regular work on May 13, 1975. The claim was closed by Determination Order of September 19, 1975 with an award of 16% for 5% unscheduled disability. The claimant returned to his regular work and testified he continued to have some weakness in the shoulder and pain with external rotation.

On August 6, 1976, the claimant, while still employed by Brooks-Scanlon, suffered an injury to his left shoulder when the skidder he was operating again struck a stump which tossed claimant into the side of the cage, causing injury to his left shoulder. At this time, the employer's insurer was EBI.

Dr. Carroll diagnosed this injury as a contusion of the left shoulder and possible tear of the supraspinatus tendon. On November 17, 1976, Dr. Carroll reported the claimant's condition was medically stationary and released him for regular work.

Claimant returned to work, but his right shoulder condition flared up. Dr. Carroll found no new injury but an aggravation of the 1975 injury.

Dr. Carroll, on December 16, 1976, performed a reimplantation of bicep tendons and repair of the rotator cuff.

On February 28, 1977, EBI advised the claimant it would deny his aggravation claim. This is based on the fact that at the time of his March 1975 injury at Brooks-Scanlon, Inc., it did not carry workers' compensation for that employer. The claimant filed a request for hearing on this denial.

In June 1977, the claimant was enrolled in the Disability Prevention Center. The medical examiner found partial "frozen shoulder syndrome" on the left and severe frozen shoulder syndrome on the right. They found claimant's physical disability moderately severe of the right shoulder and mild on the left. They opined that claimant was certainly in need of a job change. Right shoulder restriction was permanent but claimant could tolerate moderate work not above shoulder level.

Dr. Carroll in late October 1977 reported that the claimant had very little strength in his right shoulder. He felt the claimant's condition was stationary with a total loss of the right shoulder and the left shoulder was not much better. He recommended that the claimant retire from work, obtain Social Security and accept permanent disability for his right shoulder.

On December 20, 1977, Dr. Carroll indicated claimant had underlying psychopathology with very poor motivation to return to work, but with both shoulders disability, claimant was permanently and totally disabled.

In March 1978, the Orthopaedic Consultants examined the claimant. The claimant complained of pain solely in his left shoulder. The diagnosis was a contusion of the left shoulder, by history, and tendonitis with mild secondary adhesive capsulitis. They did not feel that the claimant's left shoulder condition was stationary and felt that he would benefit from a short period of further treatment by Dr. Carroll. They rated the impairment in the left shoulder as a result of his injury as moderate. They felt that the claimant would be able to return to light work from the standpoint of his left shoulder disability if he avoided work which required using both of his hands above shoulder level. They felt that a job change was indicated because of his left and right shoulder injuries and recommended job retraining.

On April 11, 1978, Dr. Carroll, reiterated his opinion that the claimant was permanently and totally disabled.

In May 1980, Dr. Specht reported that he had examined the claimant at the request of United. The claimant indicated he continued to fish and hunt and spent the majority of his time either watching T.V. or going to physical therapy. The claimant told this doctor that he considered himself to be significantly disabled and was on Social Security disability. The claimant stated he did not have any idea what type of work he would be capable of doing. Dr. Specht stated: "In actual fact, he can be rehabilitated to work at desk level and any kind of occupation which does not put excessive demands on his shoulders. He, therefore, would be capable of using any sort of machine with keys or writing. He should not be required to lift more than ten pounds of weight. Given his level of education, however, this may be very difficult to bring about." Dr. Specht felt that the right shoulder injury had become sufficiently stable for him to return to work during early 1976, and that the 1976 left shoulder injury aggravated the right shoulder.

In January 1979, Dr. Gripekoven examined the claimant and diagnosed a right shoulder rotator cuff tear, status post operative repair, and a contusion and sprain of the left shoulder. He felt that the claimant had residual disability in both shoulders which precluded his return to operation of heavy equipment, however, he felt that the claimant could be employed on a full time basis in a more sedentary type of job, which did not involve heavy lifting or use of the arm in an elevated position. Dr. Gripekoven felt the claimant was capable of returning to a limited type of employment and the left shoulder injury did cause a significant aggravation of the right shoulder injury, although that was an indirect result of the demand of his employment and his inability to protect the right shoulder.

The claim for the August 6, 1976 injury was closed by a February 2, 1979 Determination Order which granted the claimant a period of temporary total disability compensation and an award of compensation equal to 32° for 10% unscheduled disability for his left shoulder injury.

United, on February 16, 1979, denied the claimant's aggravation claim for his right shoulder injury. This is based on its feeling that the claimant's right shoulder condition was related to the left shoulder injury. It advised the claimant it was requesting an order designating a paying agent.

An order designating paying agent pursuant to ORS 656.307 was issued on February 27, 1979. United was ordered to immediately commence payment of benefits due this claimant pursuant to the workers' compensation law and to continue to pay such payments until such time as the responsible party had been determined.

A second Determination Order in the claim for the March 1975 injury was issued on March 13, 1979 and awarded the claimant an additional period of temporary total disability compensation and compensation equal to 144° for 45% unscheduled disability for his right shoulder injury.

The claimant was evaluated by Mr. Adolph, a vocational consultant. He interviewed the claimant and reviewed the medical reports and opined that there were no significant number of jobs in the area he lived in which the claimant could perform.

The Vocational Rehabilitation Department closed their file on this claimant in October 1977. It was closed on the basis that the claimant had no employment in mind at that time because the doctor would not release him for work and had recommended early retirement.

At the hearing, the claimant testified that he was 52 years old and had finished the seventh grade. He stated he had worked on a farm, in the oil fields, in the woods, on the railroad, as a gold dredger and with heavy equipment. He stated that since ceasing work he has not sought employment by going to the employment office or contacting potential employers. He stated he has not done so because he is not sure what type of work he could do.

The Referee found that the injury of November 1976 was an aggravation of the 1975 injury and United was ordered to accept that claim and provide the claimant with all benefits to which he is entitled. The Referee further ordered that the aggravation claim was to be closed as of the date of the hearing when claimant was found to be permanently and totally disabled as a result thereof. Further, the Referee ordered EBI to pay claimant compensation equal to 30% unscheduled disability for his left shoulder injury. The Referee affirmed the denial issued by EBI of the claimant's November 1976 injury.

After de novo review of the record in this case, we modify the Referee's order. We find that the preponderance of evidence indicates that EBI is responsible for the claimant's current condition. We find that the 1976 injury caused or is responsible for the claimant's current right shoulder condition. We find that after the November 1976 injury, by applying the last injurious exposure rule to the facts in this case, the claimant's right shoulder condition is the responsibility of EBI. The claimant's condition was stable following his March 1975 injury. We find the evidence establishes that the claimant's left shoulder injury and the change of work style independently contributed to his disability and need for medical care after November 29, 1976. Therefore, we reverse the Referee's order which found the claimant's right shoulder condition was the responsibility of United.

Further, we find that the claimant is not permanently and totally disabled. The law in effect at the time of the claimant's injury required that permanent disability required the claimant be permanently incapacitated from regularly performing any work at a gainful and suitable occupation. ORS 656.206(2) provided that: The workman has the burden of proving permanent disability status. Unless the medical evidence of the workman's unscheduled physical impairment, coupled with other relevant factors affecting his employment, establishes, prima facie, the workman's permanent total disability status, he must also establish his willingness to seek gainful and suitable regular employment. The medical evidence in this case does not, when coupled with other relevant factors affecting the claimant's employability, establish, prima facie, that he is permanently and totally disabled. Therefore, the claimant must also establish that he has willingly sought gainful and suitable regular employment.

The evidence in this case clearly indicates that the claimant has not done so. The claimant elected to retire and to file for Social Security disability. Therefore, we find the claimant has failed to prove that he is permanently and totally disabled.

Additionally, the Board finds that the Referee's increased award of compensation for the left shoulder injury is not supported by the evidence. The claimant's impairment of his left shoulder has been rated in the mild category. Therefore, the Board would reverse the Referee's award of increased compensation and order that the Determination Order award of compensation for that injury be reinstated and affirmed.

ORDER

The Referee's Opinion and Order dated April 15, 1980, as amended April 22, 1980 is modified.

United Pacific/Reliance Insurance Company's denial of the claimant's aggravation claim is restored and affirmed. The Employers Benefit Insurance Company's denial issued on February 28, 1977 is set aside. It is responsible for the claimant's current right shoulder condition and his left shoulder condition. The right shoulder condition is stationary, and the claimant is hereby awarded an award of compensation equal to 256° for 80% unscheduled disability for his right shoulder injury.

The claimant's attorney is granted a fee payable by the EBI in the sum of \$1,000 to be paid in addition to that compensation granted the claimant for the hearing request on the issue of this denial. Further, claimant's attorney is granted a fee equal to 25% of the increased compensation of the award granted by this order to be paid by the EBI, not to exceed the sum of \$3,000.

It is further ordered that the Referee's granting of additional compensation for the claimant's left shoulder injury of August 6, 1978 is reversed. The February 1979 Determination Order is restored and affirmed.

February 6, 1981

DENNIS E. STEVENS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his February 4, 1970 industrial injury. Claimant's aggravation rights have expired.

SAIF is unopposed to a claim reopening and voluntarily paid claimant compensation for temporary total disability from October 3, 1980 to January 2, 1981.

The medical evidence indicates claimant was hospitalized in May 1980 and underwent a surgical procedure. Claimant evidently returned to work. Surgery was recommended and claimant was taken off work as of October 28, 1980. This information was varified by Dr. Ragsdale's report of January 7, 1981.

Claimant is entitled to compensation for temporary total disability for the May 1980 hospitalization and for compensation for temporary total disability commencing October 28, 1980 until closure is authorized pursuant to ORS 656.278.

SAIF is allowed to make whatever monetary adjustments as are necessary.

IT IS SO ORDERED.

WCB CASE NO. 795835

February 6, 1981

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

This claim was originally closed by Determination Order which granted claimant an award of compensation equal to 64° for 20% unscheduled disability for his injuries. The claimant requested a hearing on this, and the Referee, after hearing all the testimony and reviewing the evidence offered in the case, affirmed the Determination Order. The claimant contends he is permanently and totally disabled.

After a de novo review of the record in this case, we do not find that the claimant is permanently and totally disabled. However, we also find that the award of compensation granted to the claimant by the Determination Order does not adequately reflect his loss of wage earning capacity due to this injury.

The claimant is now 66 years old and has a seventh grade education. He has worked as a farm laborer and also has been employed by the gas company as a scoop mobile operator and a pipe man for approximately 35 years. The claimant has a history of numerous injuries to his hips and back. The medical evidence indicates that the claimant is unable to perform the heavy, strenuous physical labor type of work that he previously has done. The evidence indicates that the claimant is limited to sedentary types of work. The Orthopaedic Consultants found that the loss of function of the lumbar spine due to the injury was minimal. They felt the claimant had a moderately severe loss of function in the right hip, but only a mild to moderate amount of loss of function due to the most recent injury.

Dr. Cherry felt that, based on the claimant's age, education, experience and present limitation, the claimant could not be retrained for any occupation. Dr. Cherry felt that the claimant was permanently and totally disabled. The claimant underwent surgery for his hip and last worked on December 9, 1975. The claimant at this point elected to take an early retirement and has not attempted to work or to find other employment within his limitations since that time.

Under the law in effect at the time of the claimant's injury, permanent total disability was defined as: "Loss, including pre-existing disability, of use of function of any scheduled or unscheduled portions of the body which permanently incapacitates the workman regularly performing any work at a gainful and suitable occupation." We find that the medical evidence by itself does not indicate that the claimant is permanently and totally disabled. Under the law in effect at the time of the claimant's injury, motivation to return to work or to find work within his limitations, was one factor that must be considered in determining an injured worker's loss of wage earning capacity.

In this case, the claimant has not attempted to return to work or to find other employment within his abilities. Instead, the claimant elected to retire from the work force. The claimant's retirement does not affect his loss of wage earning capacity due to his injuries, but can be considered when trying to determine his motivation to find employment or to return to employment. Based on all the evidence in this case, we find that the claimant is entitled to an award of compensation equal to 160% for 50% unscheduled disability for his right hip and low back injuries.

ORDER

The Referee's Opinion and Order dated June 24, 1980 is modified.

The claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for his right hip and low back injuries. This award of compensation is in lieu of all prior awards of unscheduled disability that the claimant has received for these injuries.

CLAIM NO. B53-157860

February 6, 1981

BILL G. WALLS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left knee on April 15, 1974. His claim was accepted and first closed on February 28, 1975. Claimant was then granted a total equal to 15° for 10% loss of the left leg as a result of this injury. His aggravation rights have expired.

The carrier voluntarily reopened this claim on September 15, 1980 for surgery which was done the following day. The diagnosis was chronic synovitis, which was a continuation of claimant's 1974 industrial injury. Claimant was declared to be medically stationary on October 13, 1980 and released for regular work on October 18, 1980.

On January 15, 1981, the carrier requested a determination of claimant's current disability. The Evaluation Division recommended to the Board that claimant be granted additional compensation for temporary total disability from September 15, 1980 through October 17, 1980 with no additional permanent partial disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 15, 1980 through October 17, 1980, less time worked.

CLAIM NO. C 49505

February 10, 1981

FRANKLIN D. BARNETTE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order Referring for Hearing

This is an amended Own Motion Order Referring for Hearing to correct the order dated December 30, 1980 which allowed appeal rights.

There are no appeal rights on this type of order. Therefore, the appeal rights as shown on page 2 of said order are hereby deleted.

IT IS SO ORDERED.

WCB CASE NO. 79-4967-E

February 10, 1981

HARRY CRUCHELOW, CLAIMANT
Lang, Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation seeks Board review of the Referee's order which found it was not entitled to reimbursement from United Pacific Reliance for expenses incurred in claimant's claim. SAIF contends that claimant's injury resulting in a hernia occurred while United Pacific Reliance was the carrier and they should assume responsibility even though the injury did not result in the need for medical services or disability until later.

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.

This is a dispute between two insurance companies. The claimant is only a nominal party.

United Pacific insured claimant's employer for workers' compensation purposes until December 31, 1976. SAIF assumed that coverage on January 1, 1977.

In November 1976--while United Pacific was on the risk--claimant felt a pain in his groin while performing tasks that could cause an inguinal hernia. In December 1976--while United Pacific was still on the risk--claimant was told he had an inguinal hernia during a routine physical examination. Claimant did not miss any work or receive any medical treatment for his hernia before the end of 1976 when United Pacific dropped out of the picture.

Claimant continued to work into 1977. His job involved a lot of lifting. His groin pain worsened. In June 1977, claimant's hernia was surgically repaired. Thus, all workers' compensation benefits that are payable in this case--medical services and time-loss--arose after SAIF assumed the risk on January 1, 1977.

SAIF originally accepted claimant's claim. Subsequently, SAIF took the position that the claim was the responsibility of United Pacific. By way of this proceeding, SAIF seeks reimbursement from United Pacific for the benefits SAIF paid to claimant. The Referee denied the relief requested by SAIF. SAIF appeals. We affirm.

United Pacific's brief persuasively argues that claimant's hernia is more like an occupational disease than an injury. In order for an occupational disease to be compensable, it must be disabling or require medical treatment. In this case, there was no disability or treatment until after January 1, 1977 when SAIF assumed workers' compensation coverage.

SAIF's only argument for a contrary result is that this Board should "consider the equities in this case." This Board's short answer is that we regard it as equitable for SAIF to pay for disability that arose and treatment that was required after SAIF assumed the risk.

Furthermore, in the opinion of one Board member, it is unfortunate that this Board lacks authority to order SAIF to pay United Pacific's attorney fee for effective defense of a rather frivolous claim.

ORDER

The order of the Referee, dated July 8, 1980 is affirmed.

WCB CASE NO. 80-778
HERBERT CUMMINGS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

February 10, 1981

The SAIF Corporation seeks Board review of the Referee's order which granted claimant an award of 240° for 75% unscheduled disability. The SAIF contends the award is excessive.

The facts as recited by the Referee are adopted and made a part of our order.

The Board, after de novo review, modifies the Referee's order. Dr. Hockey rated claimant's impairment as minimal to moderate but seems to base that rating on claimant's preclusion from his prior job. The doctor indicated claimant's vast experience in the construction business should afford him employment.

Claimant is 57 years of age with an eighth grade education and his GED for which his grades were high. The Board feels that the Referee's award was excessive compared to similar cases and would modify the award to 50% unscheduled disability.

ORDER

The order of the Referee dated May 5, 1980 is modified.

Claimant is hereby awarded 160° for 50% unscheduled disability in lieu of all other awards.

CLAIM NO. ZC 378279
STEARNS CUSHING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

February 10, 1981

On May 30, 1980 the Board issued an Own Motion Order re-opening claimant's claim effective April 30, 1980, the date claimant was hospitalized until closure pursuant to ORS 656.278.

The claim was submitted for closure and the Evaluation Division of the Workers' Compensation Department recommends claimant be granted additional compensation for temporary total disability from April 30, 1980 through October 15, 1980 and to no further award of permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

WCB CASE NOS. 79-860 & 79-966

February 10, 1981

A. L. FLORENCE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF
Cross Request by Claimant

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which remanded claimant's claim for a right knee condition to it for acceptance and payment of benefits as required by law.

Prior to July 1, 1978, SAIF was the workers' compensation carrier for Multnomah County (County). As of July 1, 1978, the County became self-insured. Claimant was employed by the County as a heavy equipment operator.

Claimant testified he had had prior problems with his legs, the left knee commencing in 1949 and the right knee in 1964.

On May 24, 1978, claimant was climbing off a road grader when his foot slipped and he twisted his left knee. Dr. Eilers diagnosed chondromalacia of the left patella. No complaints of right knee injury or symptoms were noted. Claimant returned to work.

On September 21, 1978, claimant's right leg gave way and he fell out of the road grader backwards landing on his shoulder, back and elbows.

Claimant testified that when he returned to work after the May 1978 injury, he guarded his left knee and this placed increased stress on the right leg. About 24 hours after the May 1978 injury, he developed right leg symptoms. On October 18, 1978 Dr. Eilers reported that claimant last worked on October 17, 1978 and was off work because of a right knee condition.

On October 20, 1978 Dr. Pasquesi examined claimant and diagnosed right knee degeneration and severe chondromalacia of the right patella. The doctor noted that claimant had had both knee cartilages removed in the past, and he had a propensity to the development of degenerative changes at a faster rate than the average person. Dr. Pasquesi opined that the injury of May 24, 1978 was an aggravation of this condition.

On November 8, 1978, Dr. Pasquesi advised SAIF that although the May 1978 injury was to the left leg, the claimant's physical position required as an operator of the grader aggravated his right leg condition.

Claimant was examined by the Orthopaedic Consultants on December 29, 1978. Claimant's chief complaints were pain in both knees with grating and popping. The diagnosis was degenerative osteoarthritis medial joint compartment of both knees, the right being the worse and the right knee was not stationary. The physicians felt that the recent injury precipitated symptoms of underlying pre-existing disorders of both knees. The left knee was stationary with no loss of function.

On January 17, 1979, the SAIF issued its denial of the right knee condition. On January 23, 1979, the County (self-insured) denied responsibility for claimant's bilateral knee conditions. Determination Order of February 6, 1979 granted claimant compensation for temporary total disability only.

Dr. Eilers opined on July 20, 1979 that the job and the May 1978 injury aggravated claimant's left knee and that the right knee was not symptomatic until August 21, 1978 and his work aggravated that condition also.

Dr. Eilers' deposition was taken, and he testified claimant probably had "a little" right knee aggravation from the May 1978 injury because he favored the left knee. He indicated that claimant would have had trouble anyway; this just accelerated the time element. He testified "almost anything" will now aggravate claimant's knees. When he examined claimant on May 25, claimant's right knee had only the disease process. The doctor felt that with no injuries at all, claimant would have needed total knee replacement and would be where he is, condition-wise, now.

The Referee affirmed County's denial and set aside the SAIF's denial and ordered SAIF to accept the claim for the right knee condition. The Referee further found the right knee condition was not stationary, and, for that reason, found the issue of extent of disability premature.

The Board, after de novo review, would modify the order of the Referee.

The Board finds claimant has not met his burden of proof in establishing that his claim for a right knee condition is compensable. In the case of Weller v. Union Carbide, 288 Or. 27, ___ P2d ___ (1979), the Supreme Court stated that in order to prevail a claimant would have to prove by a preponderance of the evidence that (1) his work activity and conditions (2) caused a worsening of his underlying disease (3) resulting in increased pain (4) to the extent that it produces disability or requires medical services. We find that the evidence in this case does not establish that claimant's underlying condition was worsened by his work activity.

Dr. Eilers testified that without any injuries whatsoever, claimant's condition would be the same and he would be a candidate for total knee replacements.

ORDER

The order of the Referee dated January 3, 1980 as re-published and amended by his June 19, 1980 order, is hereby modified.

The January 23, 1979 denial by the direct responsibility employer is hereby affirmed.

The denial issued by the SAIF of January 17, 1979 is hereby affirmed.

WCB CASE NO. 79-6689

February 10, 1981

DELORES A. HANNER, CLAIMANT
Jack Polance, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation seeks Board review of the Referee's order which found claimant's condition was the result of an occupational disease sustained in September 1978 and remanded the claim to it for acceptance and payment of compensation to which claimant is entitled.

In ordering acceptance of this denied claim, the Referee commented that claimant's case was "thin." The Board reverses the Referee based on a finding that claimant's case is thin to the point of legal nonexistence.

As a preliminary matter, the Board is concerned about the procedures followed in this case. The claim was made on the basis of an accidental injury. The claim was denied on the understanding that it was for an accidental injury. Both parties conducted the hearing as if the king pin issue was accidental injury. However, more than two months after the conclusion of the hearing, the Referee wrote to the parties: "I am hereby reopening the record in the above case...I believe that I must, alternatively, consider whether it is an occupational disease claim..."

The Board does not understand the source of the Referee's sense of obligation. When a claim is litigated on one theory, from the initial claim through hearing closure, it is far from obvious to the Board why it is necessary--or even desirable--for a Referee on his own initiative to inject a new and different legal theory into the matter. However, since the parties did not object to the Referee's activism, we will make no further comment on it other than to note that the thinness of the evidence could have been due in part to the case having been litigated on one theory and decided by the Referee on a different theory.

On the merits, the Referee found that claimant's repeated lifting of 2 x 4 studs caused her right shoulder traumatic bursitis. The only evidence to support this conclusion is: (1) a form entitled Physicians Initial Report from Dr. Keith Woolpert on which the doctor checked a "yes" box after the question "Is the condition requiring treatment the result of the industrial injury or exposure described?" and (2) the same doctor's chart notes that state "the patient's difficulty began at work ...". There are no narrative reports from any doctor in record.

Regarding the first item of evidence, the Referee's analysis was: "This record contains only Dr. Woolpert's diagnosis of the claimant's right shoulder condition, and only Dr. Woolpert's opinion on the cause of that condition. His opinion, brief as it is, must be given some weight." Abstractly, the Board agrees that even something as cryptic as a check box on a form is entitled to "some weight". It does not follow, however, that evidence entitled to some weight is sufficient evidence to carry the claimant's burden of proof.

The probative value of the second item of evidence depends entirely upon the claimant's credibility. Because Dr. Woolpert's chart note merely reported what the claimant had told him. The Referee expressly found parts of claimant's testimony not to be credible. Claimant testified that she had told her foreman that she had been struck in this right shoulder by a 2 x 4 stud; the Referee found "I am not persuaded by the evidence that the foreman was told of it." The claimant testified that she was not aware of the procedures for making Workers' Compensation claims; the Referee found "I am not persuaded that she had such a lack of knowledge ..." Under the circumstances, the Board does not find Dr. Woolpert's chart notes sufficiently persuasive to sustain claimant's burden of proof.

The Board concludes that claimant has failed to sustain her burden of proof.

ORDER

The order of the Referee dated July 14, 1980 is reversed.

The denial of SAIF Corporation dated July 17, 1979 is affirmed.

CLAIM NO. D 15013

February 10, 1981

NORMAN R. JARVIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 13, 1980, the Board issued its own motion order reopening claimant's claim the date of his hospitalization for the July 7, 1980 myelogram and other benefits through July 10, 1980.

On July 10, 1980, claimant returned to work and by report of December 16, 1980, Dr. Woolpert indicated claimant was medically stationary.

The claim was submitted for closure and Evaluation Division of the Workers' Compensation Department recommended claimant be granted additional compensation for temporary total disability from July 7, 1980 through July 10, 1980 and to an award of 5% unscheduled low back disability.

The Board concurs with the recommended compensation for temporary total disability but does not grant any award for permanent partial disability. Claimant has returned to his regular occupation with no limitations and the record reflects no loss of wage earning capacity.

IT IS SO ORDERED.

WCB CASE NO. 78-9443

February 10, 1981

JOSEPH R. JOHNSON, CLAIMANT
Jerry E. Gastineau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross Request by SAIF

Claimant seeks Board review of the Referee's order which: (1) Found the SAIF Corporation (SAIF) paid temporary total disability at the proper rate; (2) found the claim was properly closed by the Evaluation Division; (3) granted additional temporary total disability from November 11, 1978 through December 1, 1978; (4) affirmed the December 13, 1978 Determination Order whereby claimant was granted no compensation for permanent partial disability; and (5) granted claimant's attorney a fee of \$300 for SAIF's failure to pay temporary total disability from November 11 through December 1, 1978. SAIF crossappeals this case contending the Referee erred in granting the attorney fee in addition to the time loss benefits and should have actually granted a fee equal to 25% of the compensation granted to claimant.

The Board adopts the facts as recited in the Referee's order.

After de novo review, the Board modifies the Referee's order. The Board concurs in the Referee's finding that the claim was properly closed by the second Determination Order which granted compensation through January 31, 1978. We also agree that claimant has sustained no permanent disability as a result of the November 26, 1977 injury.

As to the issue of the rate of temporary total disability compensation, the Board finds there should be some elaboration. At the hearing, SAIF agreed to raise the weekly wage on which to compute the amount of compensation due to claimant. We feel the Referee's order should be clarified to show that fact.

The Board does not agree with the finding of the Referee that claimant is entitled to compensation from November 11, 1978 through December 1, 1978. On November 11, 1978, claimant saw Dr. John Corson with complaints of increasing low back pain. He recommended bedrest at home, heat and hot tub baths. He told claimant to call him in 48 hours to report on claimant's condition. Claimant was not to return to work or leave his apartment during that period of time. There is no evidence in the record that claimant reported to Dr. Corson as he was asked to do.

Claimant was treated in a hospital emergency room on November 19, 1978 with acute urinary tract infection. He was also seen on November 28 and December 1 for the same problem. The Board finds no credible evidence that claimant's urinary tract infection was causally linked to his back injury.

Therefore, claimant is only entitled to compensation for the two days authorized by Dr. Corson in November 1978. Claimant's attorney is entitled to 25% of that award as a reasonable attorney's fee.

ORDER

The Referee's order dated June 6, 1980 is modified.

The SAIF Corporation is directed to administratively correct its computation of claimant's temporary total disability benefits in accordance with its agreement at the hearing..

Claimant is entitled to temporary total disability compensation for two days only, November 11 and November 12, 1978. The Referee's award of greater temporary total disability is reversed.

Claimant's attorney is granted as a reasonable attorney's fee 25% of the increased compensation granted to claimant by this order, including the increase after the rate change agreed to by SAIF and the temporary total disability award, not to exceed \$300. The attorney fee granted by the Referee is reversed.

The remainder of the Referee's order is affirmed..

February 10, 1981

PATRICIA PANKRATZ, CLAIMANT
Emmons, Kyle, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

The Board entered an Own Motion Determination Order in this case on February 27, 1980. That order increased claimant's permanent partial disability rating.

On December 17, 1980, claimant, through counsel, again requested that the Board reopen under its own motion jurisdiction. That request was accompanied by a report from Dr. Stanley K. Neal, dated September 23, 1980, reporting the results of a single examination of the claimant on that date.

The Board declines to reopen for two reasons. First, claimant offers no explanation of why she was not examined by Dr. Neal until seven months after the question of the extent of her disability was previously pending before the Board in early 1980. The Board expects claimants to assemble and tender all relevant medical information when they first request the Board to exercise own motion jurisdiction. The Board is not willing to consider a potentially endless series of requests for own motion relief, with a new one being filed each time a claimant gets a new medical report.

Our second reason for denying relief is that we find Dr. Neal's September 23, 1980 report adds little or nothing to the medical evidence that was before the Board when it issued its prior Own Motion Determination in this case. In other words, the Board is not persuaded that claimant's condition worsened between February 27, 1980--the date of our prior determination--and September 23, 1980--the date of Dr. Neal's examination of claimant. Claimant's request for own motion reopening, dated December 17, 1980, should be denied.

IT IS SO ORDERED.

February 10, 1981

IVAN LEE PHIPPS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

The Board has been requested to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen claimant's claim for a worsened condition arising out of his December 1974 industrial injury. Claimant's aggravation rights have expired.

The medical reports support a reopening and the SAIF is unopposed.

Therefore, claimant's claim is hereby reopened as of January 5, 1981 and remanded to the SAIF to provide benefits until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

February 10, 1981

WILLIAM T. SCHAECHER, CLAIMANT
Rolf Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

SAIF Corporation seeks Board review of the Referee's order which granted claimant compensation for permanent total disability, remanded his claim for a rheumatoid arthritis condition to it for acceptance and payment of compensation, directed that this part of the claim be closed and considered in the permanent disability award above, and granted appropriate attorney fees. SAIF contends claimant's rheumatoid arthritis condition is not a result of his compensable injury in November 1977 and also that claimant is not permanently and totally disabled.

Claimant sustained a compensable injury to his low back on November 28, 1977 when he slipped while getting out of a well driller carrier. He testified that earlier that same month he slipped in some grease in the shop and had missed several days of work. He did not report the incident because he felt he would be all right. He apparently has had other incidences involving his back while at work over the last several years. The January 8, 1979 Determination Order granted claimant compensation equal to 112° for 35% unscheduled disability for injury to his low back sustained on November 28, 1977.

There is no question that claimant is severely disabled, but a determination must be made regarding how much of this disability is related to his November 1977 injury. Claimant's problems include back trouble, depression, alcoholism, liver disease and rheumatoid arthritis. All of these conditions pre-existed the injury except the rheumatoid arthritis.

Dr. Chester, claimant's treating physician, diagnosed degenerative arthrosis of the low back and interscapular back about a week after the injury. Chart notes of November 1977 indicated that claimant had had back symptoms for the last several months. Every time he tried to work during November he became symptomatic. Dr. Chester had claimant use a transcutaneous nerve stimulator, but it was hard to judge his progress due to claimant's alcohol problem. The doctor indicated that claimant's back had severe degenerative changes prior to this injury, but he was able to function satisfactorily. Claimant now cannot return to any work that he has done in the past.

With respect to the rheumatoid arthritis condition, it is Dr. Chester's opinion that claimant had the appropriate physical and emotional stress levels to trip this process, although this cannot be proved. All the doctors have been prevented from aggressively treating claimant's problems because of his alcoholism. Dr. Chester feels that claimant's capacity to handle his life stresses is unstable enough that this industrial injury is a significant factor in his condition today. He finds claimant's impairment, due to all the factors involved, is severe.

Dr. May, an internist, examined claimant at Dr. Chester's request. He found rheumatoid arthritis, but was unable to relate it to the industrial injury. He said several factors play a part in this disease and he was not willing to even speculate as to a relationship. Dr. Chester, in an April 14, 1980 report to the SAIF, indicated he concurred with Dr. May totally.

Dr. Spady examined claimant in November 1978 and found limitation of motion of the lumbar spine, paravertebral muscle spasm and cautious gait related to the injury. Unrelated to the injury was the arthritic changes in the low back and cervical spine. He saw claimant again in April 1980 and found that his condition had deteriorated significantly, but felt much of this was due to unrelated problems. Dr. Chester indicated he did not agree with this. He felt claimant's general health and deterioration were related to the injury in that claimant would not be in this condition if it were not for the sequence of events initiated by the industrial injury.

On March 10, 1980, Dr. Metzger, a psychologist, indicated that claimant "is a person who is reacting to emotionally producing life stresses with physical symptoms that substitute for the depression and anxiety associated with the trauma...However...he continues to experience high levels of anxiety as exemplified by nervousness, tension and restless behavior." He noted that despite claimant's pessimism, he is as capable of learning as most people. Claimant's understanding of mechanical principles is superior and he has an average level of intellectual ability. One of claimant's major problems is that with his loss of manual skills, he has no way of demonstrating competency and his prospects for vocational rehabilitation are poor.

Dr. Maltby felt claimant was exaggerating his complaints and that much of claimant's problems, including possible organic brain damage, was due to his alcoholism. Claimant's thoughts and speech were rambling, although his memory was good. Dr. Maltby does not believe claimant's back injury is responsible for his psychiatric impairment.

Claimant has an eighth grade education. He worked 18-1/2 years as a truck driver, 5-1/2 years as a rock crusher operator, and approximately 16 years for this employer as a mechanic rebuilding heavy equipment. In the record is a letter of recommendation from the last employer highly recommending claimant to any future employer. At the hearing, the author of the letter, Mr. Michael Kearney, indicated that he was requested by the SAIF to write the letter for any possible light duty jobs which claimant could do. He indicated that claimant was an excellent worker, but sometime around 1973 his attendance began slacking off. In 1976 and 1977 claimant's attendance record was extremely poor. He felt this was mostly attributable to alcoholism. On a number of occasions, claimant showed up to work intoxicated. Claimant testified that much of his absences was due to lung surgery, a broken ankle and slack time at work.

The Board, after de novo review, finds that the preponderance of the evidence does not support a finding that claimant's rheumatoid arthritis is compensable. Dr. May, the specialist in this matter, did not find a relationship and Dr. Chester concurred with this. Dr. Chester, at the hearing, indicated that claimant's stresses and the trauma of the accident could have caused the rheumatoid arthritis condition, but no one could relate it to any degree of medical probability that the Board finds persuasive. It appears from the medical reports that this condition is a significant part of claimant's disability, as is claimant's alcoholism and his degenerative back condition. There is no doubt that claimant used alcohol to get relief from the pain in his body, but a significant part of this problem was evident prior to his injury. Little is documented with respect to claimant's psychological condition prior to the injury, but his numerous absences from work together with

the psychological reports indicate this was a definite problem in claimant's life, prior to his industrial injury.

The Board finds that claimant is not permanently and totally disabled as a result of the compensable injury of November 28, 1977. Claimant also has shown no motivation to return to work, even though he has been offered jobs at different times. He is convinced he is totally disabled and, therefore, has made no effort to help himself. Claimant is 54 years old, with an eighth grade education and is precluded from any previous types of work he has done. Although his disability is severe, it is not felt that all of his problems are related to the industrial injury. Claimant would be better compensated with an award equal to 192° for 60% unscheduled disability for injury to the low back.

ORDER

The Referee's order, dated July 2, 1980, is modified.

Claimant is hereby granted compensation equal to 192° for 60% unscheduled disability for injury to the low back. This award is in lieu of that granted by the Referee in her order.

The SAIF Corporation's denial of claimant's claim for rheumatoid arthritis is affirmed. The attorney fee granted by the Referee for prevailing on this issue is deleted.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-4285

February 10, 1981

EDWARD J. SHACKLEFORD, CLAIMANT
Brand, Lee, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which upheld SAIF's partial denial of this claim. Claimant raises two issues: (1) The compensability of his rheumatic fever heart disease; and (2) the propriety of SAIF's unilateral termination of benefits after having initially accepted the claim. The second issue has been resolved contrary to claimant's position in Frasuer v. Agripac, ___ Or. ___ (1980).

On October 3, 1975, while on the job, claimant received a puncture wound in his left hand from wood splinters. A localized infection developed. SAIF does not deny responsibility for payment of workers' compensation benefits for those problems; indeed, SAIF has paid those benefits.

The dispute involves claimant's theory as follows: That from the puncture wound and local infection, he developed septicemia, or blood poisoning; that this septicemia in turn caused rheumatic fever, an inflammation of the valves of the heart; which in turn caused a variety of additional cardiac problems for which claimant has been treated. It is true that shortly after the puncture wound incident, claimant was diagnosed as suffering from septicemia; however, the absence of positive blood culture at least makes that diagnosis inconclusive, assuming it does not negate the major premise of claimant's syllogism.

Nevertheless, assuming some form of blood poisoning and accepting the unanimous medical evidence that infection can cause rheumatic fever, we still confront a battle of the experts on the ultimate causation question. Both parties presented strong evidence. The Board finds that the opinions and explanations of Doctors Cohen and Lee--that it was "very, very unlikely" there was the causal link claimant theorized from his puncture wound to his heart disease--raise sufficient doubt that we cannot say that claimant has carried his burden of proof.

The Referee complimented both counsel for their professional presentation of complicated medical evidence. The Board joins in that compliment.

ORDER

The order of the Referee dated June 4, 1980 is affirmed in its entirety.

February 10, 1981

TONY SMITH, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Referred for Hearing

On November 18, 1980, the claimant, by and through his attorney, requested the Board reopen this claim for his 1972 injury. The claimant had previously received a total award of compensation equal to 96° for 30% unscheduled disability for his right shoulder injury. The claimant, in his petition, stated that he now has problems in his shoulder and cervical areas and that the evidence indicates his condition has severely worsened.

The SAIF Corporation, on December 31, 1980, advised the Board it opposed an own motion order reopening this claim. It felt that the evidence indicated that claimant's condition remained medically stationary and that he was not in need of additional treatment at this time.

We have reviewed the information provided to us by the parties. We find it would be in the best interest of the parties to refer this case to the Hearings Division. The Referee shall determine whether or not the claimant's current right shoulder and neck condition are related to his 1972 injury and represent a worsening thereof since the last award of compensation. The Referee shall also, if he finds these conditions to be related to the 1972 injury, make a recommendation on the appropriate award of compensation that claimant should be granted at this time. On the conclusion of the hearing, the Referee shall cause a transcript of the proceedings be prepared and forwarded along with his recommendation and the other exhibits of this case to the Board for its consideration.

IT IS SO ORDERED.

February 10, 1981

RALPH SPURGEON, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board, under its own motion jurisdiction, pursuant to ORS 656.278, originally reopened claimant's claim by an own motion order dated March 31, 1978.

The claim was then closed by an own motion determination of September 30, 1980 which granted claimant compensation for temporary total disability and an award of 80% unscheduled disability.

At the time of that order, the Evaluation Division of the Workers' Compensation Department had recommended that vocational assistance be given priority. This recommendation was overlooked by the Board, so an Order of Reconsideration on Own Motion Determination was entered on December 2, 1980. This order reopened claimant's claim effective July 19, 1980 with instructions to Field Services Division of Workers' Compensation Department to immediately contact claimant and to evaluate and assist him in job placement assistance and report back to the Board by February 1, 1981.

Field Services Division contacted claimant and he was referred to a private vocational rehabilitation agency and claimant was most cooperative. It was the consensus of that agency, after thoroughly evaluating claimant, that he, at this time, is completely unemployable.

Therefore, the Board finds that claimant is entitled to an award of permanent total disability effective February 1, 1981. Claimant is only 46 years of age but is functionally illiterate and suffers from post-traumatic surgeries as well as mild organic brain syndrome. These conditions produce impairment of consciousness. Based on these facts, the Board reached its conclusion that claimant is permanently and totally disabled.

ORDER

Claimant is hereby granted an award of permanent total disability commencing February 1, 1981.

WCB CASE NO. 78-3110

February 10, 1981

VICTOR STEWART, CLAIMANT
William H. Replogle, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer appeals from a Referee's Opinion and Order that disapproved the employer's denial of this aggravation claim. The Board reverses the Referee.

A compensable aggravation under ORS 656.273 is a worsening of the claimant's condition resulting from the initial injury. It is not sufficient merely to show that the claimant, once injured, got worse. A causal connection must be established between the original injury and the worsened condition. Anderson v. West Union Village Square, 43 Or. App. 295 (1979).

Applying those requirements to this case illustrates both the extremely abbreviated nature of evidence in workers' compensation cases and the folly of trying to carve the human body into its component parts.

On June 5, 1974 the claimant compensably injured his back. On May 14, 1975 that claim was closed by Determination Order with no award for permanent disability. The claimant did not request a hearing. So far as the present record reflects, the claimant received no medical services between April 1975 and January 1977. At that time the claimant returned to his doctor complaining of a variety of problems: Headaches, neck symptoms and low back pain.

The employer strenuously argues that it is absolutely incredible that claimant's 1974 injury--which apparently involved his upper back/lower neck--could in any way be causally linked to claimant's present low back pain. The employer overlooks the fact that 1974 medical reports stated the claimant was having "difficulty with his low back." More significantly, the employer overlooks the fact that back injuries frequently produce symptoms in other, at times distant, parts of the body. In other words, this Board has no doubt that an injury to one part of the body can produce symptoms in another part of the body. In such a situation, however, there is a greater obligation upon the claimant to prove causation by expert, medical evidence that this Board finds persuasive. Jacobsen v. SAIF, 36 Or. App. 789 (1978).

The real problem in this case is a dirth of evidence. It would seem elementary that if one intended to show a "worsening" of his condition since a prior injury, step one would be to show what his condition was after the prior injury. There is amazingly little evidence in this record about claimant's condition after his 1974 injury. It would be safe to say that injury involved claimant's back; any greater differentiation would be somewhat speculative, except we note that claimant's contemporaneous report of the accident suggests only upper back involvement. X-rays taken in 1974 showed degenerative disc disease in claimant's upper and lower back. The Board finds nothing in this record that shows any causal link between claimant's 1974 low back problem and his 1974 injury.

Having introduced so little evidence about his condition after his 1974 injury, claimant, of course, encounters a significant problem at step two--showing a worsening of his condition. The most persuasive evidence of worsening could be, for example, comparison of earlier x-rays with later x-rays. The only evidence of this type in the record comes from Dr. Matthews, who stated:

"The patient has advanced degenerative changes in both neck and back. These changes are present on the earliest x-rays and were, no doubt, well established at the time of the various industrial injuries. There was no evidence that the various industrial injuries have worsened the basic level of degenerative change."

Dr. Dunn, who first examined claimant in December of 1977, did opine that claimant's condition had worsened since his 1974 injury. Absent something more, such as comparative x-ray interpretations, the Board does not find this opinion particularly persuasive.

Assuming arguendo that claimant sustained the burden of proving worsened condition, step three is to show a causal connection between the original injury and the worsening. Anderson v. West Union Village Square, supra. The only evidence of a causal relationship is, again, the opinion of Dr. Dunn. However, given all the other ambiguities in this record about the nature of claimant's 1974 injury and whether his condition has objectively worsened, the Board does not find Dr. Dunn's opinion persuasive. The Board concludes that the carrier's denial of claimant's aggravation claim should be affirmed.

ORDER

The order of the Referee dated March 25, 1980 is reversed.

The denial dated March 21, 1978 is hereby affirmed.

CLAIM NO. FC 373434

February 10, 1981

IRIS YOUNG, CLAIMANT

Doblie & Francesconi, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Own Motion Determination on Reconsideration

By letter dated January 26, 1981, claimant's attorney requested the Board to amend its January 20, 1981 Own Motion Determination and grant claimant additional compensation for temporary total disability. The Board denies the requested relief.

Claimant suggests she has been temporarily and totally disabled since her 1972 injury. The Board's own motion jurisdiction is no substitute for appealing a Determination Order or making an aggravation claim during the five years allowed. Therefore, this Board will generally not grant own motion relief for matters that could have been, but were not, raised by a request for hearing and/or an aggravation claim.

IT IS SO ORDERED.

WCB CASE NO. 78-9001

February 11, 1981

EDWIN A. BOLLIGER, CLAIMANT

David W. Hittle, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's amended order which remanded claimant's aggravation claim for a May 1977 injury to it for acceptance and ordered it to pay claimant compensation for temporary total disability plus a penalty of 25% of such compensation with attorney fee of \$150 for its failure to comply with ORS 656.273(6).

We find the facts as recited by the Referee are correct and hereby incorporate and make them a part of this order.

The Board, after de novo review, would reverse the Referee's order in its entirety.

The Board finds that the evidence establishes the diagnosis of claimant's condition arising from the May 1977 industrial injury was lumbosacral strain. Dr. Paluska, upon finding claimant medically stationary, indicated there were no permanent residuals from this injury.

The non-compensable intervening injury occurring in August 1977 produced a new symptom and, for the first time, claimant complained of radiating pain into his right leg. The diagnosis after this injury was herniated disc made by Dr. Hoda. This diagnosis led to Dr. Buza's surgery in August 1978.

The Board finds this situation falls within the "last injurious exposure rule" as the second injury was not merely a recurrence of the first but was, in itself, a significant event.

Therefore, the Board finds claimant's surgery in August 1978 arose out of the non-compensable intervening injury of August 1977 and would affirm the SAIF's denial.

On the award of penalties and attorney fees for SAIF's failure to commence payment of compensation for temporary total disability upon its receipt in October 1978 of the hospital records, the Board also reverses.

The hospital reports submitted to the SAIF on October 23 do not indicate whether or not the need for surgery arose out of the compensable injury of May 1977, and, because of this lack of proof of any causal relationship of claimant's need for surgery and the August 1978 hospitalization, there was no valid claim for aggravation nor indication that SAIF was responsible.

ORDER

The order of the Referee as amended dated July 11, 1980 is reversed in its entirety.

The denial issued by SAIF of claimant's claim for aggravation is affirmed.

WCB CASE NO. 79-3146

February 11, 1981

JOHN A. CLARKE, CLAIMANT
Lang, Klein, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of that portion of the Referee's order which affirmed the February 29, 1980 Determination Order whereby he was granted compensation equal to 32° for 10% unscheduled back disability. Claimant contends this award is inadequate.

The Board, after de novo review, concludes that claimant is entitled to an increased award of compensation for his injury of April 12, 1978. Claimant has a fairly varied work background but basically is precluded from these areas of work. He has been told to avoid work requiring lifting, stooping and twisting. His impairment has been rated at 10% based on chronic moderate pain. The Board concludes that he is entitled to compensation equal to 64° for 20% unscheduled back disability. This has been determined based on a consideration of all pertinent factors and a comparison with other cases of a similar nature.

The Board feels that a comment is necessary on the Referee's finding that claimant should be provided a suitable program of vocational rehabilitation. Under the provisions of ORS 656.283(1) the Referee correctly determined that claimant is a handicapped worker and, as such, is eligible to be placed in an approved rehabilitation program. However, the Referee is not authorized to direct the Field Services Division to provide a suitable program of vocational rehabilitation for claimant. That determination is the prerogative of the Workers' Compensation Department alone.

ORDER

The order of the Referee, dated April 24, 1980, is modified.

Claimant is hereby granted compensation equal to 64° for 20% unscheduled back disability for his injury of April 12, 1978. This award is in lieu of the previous award granted by the February 29, 1980 Determination Order.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to 25% of the increased award granted by this order, payable out of said compensation as paid, not to exceed \$3,000.

The attorney fee granted by the Referee out of the payments made to claimant pursuant to his finding that claimant is a vocationally handicapped person is hereby deleted.

February 11, 1981

MARVIN K. GIBBS, CLAIMANT
Brian L. Welch, Claimant's Atty.
Marshall C. Cheney, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer/carrier seeks review by the Board of the Referee's order which increased claimant's award from the Determination Order to 75° for 50% loss of his left leg. It contends that the award granted is excessive.

The Board adopts the Referee's finding of facts.

After de novo review, the Board reverses the Referee's award.

The evidence of record indicated claimant returned to his regular occupation which requires him to be on his feet most of the day and claimant has missed no time from work. Claimant takes no medication and has not sought medical care since December 1979.

The medical evidence by Dr. Carroll, the treating physician throughout, finds claimant's loss of function and impairment from this injury to be mild. Although claimant testified to many difficulties with his left knee, these are not substantiated by the medical evidence. The medical evidence clearly reflects that claimant retains more than 50% function of his left leg. Claimant testified to constant pain, but this pain is not disabling.

The Board concludes that claimant is entitled to an award of 15% loss of function of his left leg.

ORDER

The order of the Referee dated July 18, 1980 is reversed.

The Determination Order dated February 14, 1980 is restored which grants 22.5° for 15% loss to claimant's left leg.

ORRY W. HARMON, CLAIMANT
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF seeks Board review of the Referee's order which remanded claimant's claim for aggravation to it for acceptance commencing November 28, 1979 and until closure, ordered it to pay Dr. Thompson's medical bills and the physical therapy prescribed, ordered a penalty of 25% of the outstanding medical bills and an attorney fee to claimant's attorney of \$800.

The Board finds the facts as recited by the Referee in his Opinion and Order are correct.

The Board, after de novo review, modifies the Referee's order. The Board finds that the medical record evidence is insufficient to support a claim for aggravation. The reports do not indicate a worsening of claimant's condition since the last closure. Only the University of Oregon Health Sciences Center chart notes of December 5, 1979 indicate claimant was unable to work for 31 days. That report, however, does not indicate that claimant's condition had worsened nor does it recommend any medical treatment that could be considered curative in nature. The only recommended treatment by that institution and also Dr. Thompson was a trial of physical therapy which can be handled under the provisions of ORS 656.245.

The Board concurs with the Referee's ordering of the payment of medical bills and treatment costs and the assessment of a penalty and attorney fee payable by the SAIF for its unreasonable resistance and refusal to pay compensation.

ORDER

The order of the Referee dated July 28, 1980 is modified.

The SAIF's denial of aggravation dated January 15, 1980 is affirmed.

The claimant's attorney is granted the sum of \$200 as a reasonable attorney fee under the provisions of ORS 656.382(1).

The remainder of the Referee's order is affirmed.

February 11, 1981

DOLORES LOSCAR, CLAIMANT
Bischoff, Murray & Strooband, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF seeks review by the Board of the order of the Referee which remanded claimant's claim for surgeries of October 2, 1978 and April 24, 1979 to it for acceptance and the payment of benefits as required by law.

The facts as recited by the Referee are hereby incorporated and made a part of our order.

The Board, after de novo review, would modify the Referee's order. The Board first takes notice that the case of Frasure v. Agripac, 41 Or. App. 7 (1979) is not applicable to this case.

Claimant's injury was diagnosed as fracture of the tibial sesamoid of the left foot, and this condition was accepted by SAIF. Dr. Franden, who performed the first surgery of October 2, 1978, had requested authorization to perform a bunionectomy. The evidence does not establish causal relationship between the injury and the need for bunionectomy. Dr. Franden, at surgery, actually did three procedures: (1) Excised the lateral sesamoid, (2) excised the osseous portions of the first metatarsal and (3) a bunion. The first procedure corrected the injury related condition, and possibly the second, but the bunion removal is not the responsibility of SAIF as arising out of claimant's compensable injury.

The second surgery performed on April 24, 1979 was for removal of regrowth of neo-osseous mass. The medical evidence in the record causally relates both surgeries to the industrial injury. However, the evidence does not establish that claimant's bunion condition was related, and the Board concludes SAIF is not responsible for any surgical procedure performed to correct bunions or for their removal.

ORDER

The order of the Referee dated July 7, 1980 is modified.

SAIF is hereby ordered to pay for the surgical procedures performed on October 2, 1978 and April 24, 1979 only as related to the fractured tibial sesamoid but not responsible for any surgical procedure regarding bunions.

Claimant's attorney is granted a fee in the amount of \$150 for his services at this Board review, payable by the employer/carrier.

February 11, 1981

DAVID L. MITCHELL, CLAIMANT
Olson, Hittle, et al, Claimant's Attys.
Cheney & Kelley, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review was received by the Board for the above entitled matter on the 30th day of January 1981. This request was hand delivered.

The claimant, not having mailed the request for review within the 30 day period, i.e., the last day for doing so being January 29, 1981, he has not complied with the statute for timely filing, and

IT IS THEREFORE ORDERED that the request for review is hereby dismissed and the order of the Referee is final by operation of law.

February 11, 1981

DIANNA M. MORTON, CLAIMANT
Malagon & Yates, Claimant's Attys.
Foss, Whitty & Roess, Attys. for SAIF
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which set aside the March 19, 1980 Determination Order and reopened the claim to be processed according to ORS 656.268. SAIF contends the claim was properly closed in March 1980.

The Board finds that the facts as recited by the Referee are accurate and adopts them, except that an error on page two should be corrected. In paragraph three, line nine, "May 1978" should read "May 1980."

The Board, after de novo review, reverses the order of the Referee. Claimant was found not to be medically stationary on June 16, 1980 by Dr. Campagna. This has nothing to do with her condition at the time of claim closure on March 19, 1980. Claimant's doctors, Dr. Dunn and Dr. Samuel, indicated that she should be stationary around the end of November 1979. There is no other report from these doctors in the record. On November 21, 1979, the Orthopaedic Consultants indicated that her condition was stationary and the claim was probably ready for closure. Evaluation Division indicated that it would defer a determination since she was to be enrolled at the Callahan Center in the near future. Claimant spent just over a week at the Callahan Center in January 1980. On March 19, 1980, the Determination Order granted compensation for temporary total disability from March 31, 1979 through November 12, 1979 and from January 9, 1980 through January 18, 1980. The Board concludes that the claim was properly closed based on the evidence in the record at that time.

Based on this finding, it is now proper for the Board to rate claimant's disability. When claimant reached medical stationary status, there was no doctor that said she could not return to her previous work. There was evidence she would have some limitation on her lifting and might need retraining. The Orthopaedic Consultants rated her disability as minimal. The Board concludes that claimant is entitled to an award equal to 48° for 15% unscheduled disability for injury to the neck.

At the time claimant was examined by Dr. Campagna in April 1980, there was no evidence that her condition had worsened. The Board finds that although she has not proven an aggravation claim, she is entitled to temporary total disability for the time she was hospitalized by Dr. Campagna in May 1980.

ORDER

The order of the Referee, dated July 16, 1980, is reversed.

The Determination Order, dated March 19, 1980, is hereby reinstated.

Claimant is granted compensation equal to 48° for 15% unscheduled disability for injury to her neck.

Claimant is also granted compensation for temporary total disability for the period of time she was hospitalized from May 12, 1980 through May 20, 1980.

Claimant's attorney is entitled to an attorney fee equal to 25% of the increased compensation granted by this order for temporary total disability and permanent partial disability, payable out of said compensation as paid, not to exceed \$3,000.

WCB CASE NO. 80-3295. February 11, 1981

BARBARA J. WALKER, CLAIMANT
McNutt, Gant, et al, Claimant's Attys.
Foss Whitty & Roess, Employer's Attys.
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 Referee is final by operation of law.

WCB CASE NO. 79-7251 February 11, 1981

EDWARD ZOZOSKY, CLAIMANT
Merten & Saltveit, Claimant's Attys.
Schwabe, Williamson, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which denied his claim for psoriasis.

The Board adopts the facts as recited by the Referee as correct.

The Board, after de novo review, would affirm the conclusion reached by the Referee that claimant's psoriasis condition was not compensably related to his allergic reaction to the belt at work. However, the carrier, in its denial of August 6, 1979, denied dermatitis, not psoriasis. The Board concludes that the employer/carrier is not responsible for claimant's psoriasis but remains responsible for claimant's condition originally diagnosed as contact dermatitis and that denial is reversed.

ORDER

The order of the Referee dated July 31, 1980 is affirmed.

The denial of August 6, 1979 is reversed.

WCB NO. 81-0012M February 12, 1981

RAYMOND E. FAUST, CLAIMANT
Walter T. Aho, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 17, 1980 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim. However, the date of injury and date of first determination remains unknown. Therefore, based upon no information whatsoever, the Board must deny claimant's request until such time as the Board can be provided with the necessary information to make such a decision.

IT IS SO ORDERED.

CLAIM NO. 05X 020005 February 12, 1981

KARL NUSE, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant's January 23, 1981 request that the Board grant own motion relief is denied.

IT IS SO ORDERED.

WCB CASE NO. 79-4865 February 12, 1981

RONALD J. PORTER, CLAIMANT
Allan H. Coons, Claimant's Atty.
Steven R. Reinisch, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which reduced the Determination Order's award of 50% to 25% unscheduled disability. Claimant contends the award is inadequate.

The Board adopts the facts as recited by the Referee in his Opinion and Order.

The Board, after de novo review, modifies the order of the Referee.

The medical evidence reflects claimant's impairment is mild from this industrial injury. However, claimant returned to his regular occupation without modifications and at his regular wage. Claimant's foreman testified at the hearing that claimant is a good worker and has made no complaints and the foreman did not observe any physical disability. The totality of evidence does not reflect a 25% loss of wage earning capacity and the Board modifies that award to 15% unscheduled disability.

ORDER

The order of the Referee dated June 17, 1980 is modified.

Claimant is hereby granted an award of 48° for 15% unscheduled disability in lieu of all other awards.

CLAIM NO. C 382943 February 12, 1981

CLIFFORD W. SMITH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

The Board is hereby exercising its own motion jurisdiction pursuant to ORS 656.278 and reopening claimant's claim as of January 2, 1981 for cornea surgery arising out of his industrial injury of 1972. The SAIF is unopposed to this reopening.

IT IS SO ORDERED.

February 12, 1981

GLENN R. STOSE, CLAIMANT
Bloom, Ruben, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF
Cross Request by Claimant

The SAIF Corporation (SAIF) seeks Board review and the claimant cross-appeals the order of the Referee. SAIF contends the Referee erred in remanding claimant's aggravation claim to it for acceptance. Claimant cross-appeals and contends the SAIF's denial of compensability of his left ankle condition should be reversed.

The Board adopts the Referee's citing of the facts in this case and incorporates them as part of this order.

The Board, after de novo review, would modify the Referee's order. The Board concurs with the Referee that claimant's left ankle condition is not compensable and would also affirm the SAIF's denial.

On the issue of claimant's claim for psychological problems being a compensable aggravation of claimant's industrial injury, the Board would reverse the Referee. It should first be noted that no psychiatrist nor medical doctor referred claimant initially to Dr. Fleming who is a psychologist. Even though Dr. Fleming makes the necessary causal relationship of claimant's psychological problems to the industrial injury, the sequence of events does not bear this out.

Claimant suffered a back injury on June 27, 1977 while employed by Built-Rite Upholstery Products. His claim was closed April 4, 1978 with no permanent residuals, and claimant was released for work on April 10, 1978 with a 50-pound lifting restriction.

Claimant appealed and had a hearing on extent of permanent partial disability in July 1978 and one week later went to work for Alexander Manufacturing. During this period of time, claimant sought no medical care, and there is no indication in the record of any psychological problems to this point.

On November 1, 1978, claimant was fired or laid off, which is the same day claimant filed his claim for an ankle injury.

The claimant began working with vocational rehabilitation personnel and had difficulty finding employment or avenues of retraining. Now the record indicates claimant becomes depressed and anxious. A vocational rehabilitation counselor refers claimant to Dr. Fleming who commences counseling services and relates claimant's psychological problems to the June 1977 injury, seemingly not even aware of claimant's alleged injury of November 1, 1978.

The overall view of the sequence of events indicates from the injury of June 1977 claimant had no psychological problems. It is not until he loses his employment with a different employer, Alexander, that he develops emotional problems.

Therefore, the Board concludes that the totality of evidence precludes a finding that claimant's psychological problems are the responsibility of Built-Rite and its carrier, SAIF.

ORDER

The order of the Referee dated July 1, 1980 is modified.

The denial of aggravation dated May 11, 1979 is affirmed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 77-7548

February 12, 1981

REBA JEAN TAYLOR, CLAIMANT
Allan B deSchweinitz, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which found claimant's urinary tract infection to be causally related to claimant's low back injury and subsequent hospitalization and surgeries.

The facts as recited by the Referee are incorporated and made a part of our order.

The Board, on de novo review, reverses the order of the Referee. Dr. Dunn's report of December 7, 1978 indicates it was his opinion that causal relationship of claimant's infection and her prior injury and subsequent hospitalization was a possibility, not a probability. Dr. O'Brien, a urologist, found no relationship. Further, the hospital records indicate when claimant was discharged in April 1977 she had no urinary infection.

Therefore, the preponderance of evidence precludes a finding of compensability.

ORDER

The order of the Referee dated May 9, 1980 is reversed.

WCB CASE NO. 79-7258 February 13, 1981

ARYE NELL COLBERT, CLAIMANT
Bloom, Ruben, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) appeals that portion of the Referee's order dated July 1, 1980 which remanded this claim to SAIF to re-open as of August 17, 1979 and ordered SAIF to pay a medical bill in the amount of \$56.00.

The Board adopts the facts recited by the Referee as being correct.

The Board, after de novo review, finds that the claimant has failed to prove her claim for aggravation by a preponderance of the evidence. Since claimant's last arrangement of compensation, many physicians had examined the claimant. They reported among other things that she was experiencing severe functional overlay. There is no evidence in the record that indicates the claimant had ever been treated for this condition. Only Dr. Cherry opined that claimant's claim should be re-opened for compensation and treatment on the basis of aggravation. Contrary to Dr. Cherry's opinion, the other physicians indicated that there was no worsening of the claimant's underlying condition.

The Board affirms the Referee's decision on the medical bill for the reasons stated in his Opinion and Order.

ORDER

The Referee's order dated July 1, 1980 is modified.

The order to reopen the claim as of August 17, 1979 is reversed and the order awarding attorney fees is reversed.

The remainder of the Referee's order is affirmed.

February 13, 1981

ROBERT M. DOWNHAM, CLAIMANT
Carney, Probst & Cornelius, Claimant's Attys.
Keith Skelton, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which granted claimant compensation equal to 80° for 25% unscheduled disability for injury to his low back. The employer contends this award is excessive and contends the Determination Order should be restored and affirmed.

The Board is at a loss to understand the parties' preoccupation with claimant's credibility, his head injury and the alleged bursitis. This case should be evaluated purely on the medical evidence and other factors as set forth in Surratt v. Gunderson Bros., 259 Or. 65 (1971). Of great significance is the fact that claimant is basically performing the same work he did prior to his industrial injury. The Board acknowledges that he is not able to perform all the duties required in iron work, but he is able to continue doing the same type of work and is, in fact, doing so. Claimant's impairment has been rated as mild. His limitations include lifting no more than 30 pounds, no prolonged lifting, twisting or bending. Claimant advised Dr. Miller that he was able to perform reasonably well with the lifting restriction, although he was having some difficulty finding work with his disability. However, this disability includes a head injury and probable cervical spine condition. The Board concludes that claimant was adequately compensated by the Determination Order of August 22, 1979 whereby he was granted 32° for 10% unscheduled disability for his low back injury. The Referee's order is reversed.

ORDER

The order of the Referee dated June 27, 1980 is reversed.

The August 22, 1979 Determination Order is restored and affirmed.

February 13, 1981

JANE HILLS, CLAIMANT

Welch, Bruun & Green, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

The claimant seeks Board review of the Referee's order which granted claimant compensation for temporary total disability from November 23, 1978 through December 6, 1978 and 15° for 10% loss of her right leg. Claimant contends her claim was prematurely closed and that she was entitled to a greater award of permanent partial disability for both her low back and right leg conditions.

The facts as recited by the Referee are hereby incorporated and made a part of our order.

The Board, after de novo review, would modify the Referee's order.

The Board finds the claimant's injury in May 1977 was to her right foot and Dr. Wells found minimal disability. Therefore, the Referee's award of 15° for 10% loss of claimant's right leg is modified to 13.5° for 10% loss her right foot.

ORDER

The order of the Referee dated April 30, 1980 is modified.

The claimant is hereby granted an award of 13.5° for 10% loss of her right foot in lieu of the award granted by the Referee.

The remainder of the Referee's order is affirmed in its entirety.

February 13, 1981

SHIRLEY B. JOHNSON, CLAIMANT
Coons & Anderson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant and the SAIF Corporation (SAIF) seek Board review of the Referee's order which found claimant's claim for an occupational disease, although compensable, was barred for untimely filing. He also directed that claimant be granted compensation for temporary total disability from July 30, 1979 until September 7, 1979, plus penalties and attorney's fees based on that amount.

The Board, after de novo review, would modify the Referee's order. After a thorough consideration of the facts surrounding the issue of timeliness, the Board concludes that claimant has proven that she filed her occupational disease claim in a timely manner and is entitled to have the claim considered for compensability. Based on Templeton v. Pope and Talbot, Inc., 7 Or. App. 119 (1971), claimant was never given enough information to render her responsible for the filing of an Oregon claim. Dr. Streitz advised claimant that he was treating her for a continuation of her California claim; in fact, all his reports were sent directly to SAFECO, the carrier at the time of her injury in California in 1973. Dr. Wilson did not see claimant until March 27, 1979; therefore, regardless of what he told her, the claim was filed within 180 days of that visit. Claimant was not advised that her condition was a result of her work at Douglas Community Hospital until she talked with her attorney in July 1979. Claimant was well within the statutory time for filing an occupational disease claim on July 30, 1979 based on the facts in this case.

Based on the Supreme Court's ruling in Weller v. Aetna Life & Casualty Company, ___ Or. ___ (1979), the Board concludes that claimant's claim is not compensable. Claimant must prove by a preponderance of the evidence that her (1) work activity and conditions (2) caused a worsening of her underlying disease (3) resulting in an increase in her pain (4) to the extent that it produces disability or requires medical services. After a quite lengthy discussion by deposition with Dr. Streitz, claimant's attorney was unable to solicit the opinion that her underlying psuedoarthrosis condition was worsened by her work at Douglas. It was undisputed that claimant's symptoms worsened, but no doctor would say with reasonable medical probability that her underlying condition had worsened. Dr. Wilson felt that claimant's symptoms were speeded up as a result of claimant's work at Douglas, but the condition itself was not altered. The Board concludes that claimant has failed to prove by a preponderance of the evidence that she has sustained a compensable occupational disease as a result of her work activity at Douglas.

The Board concurs with the Referee's conclusion with respect to the temporary total disability issue, penalties and attorney fee.

ORDER

The order of the Referee dated July 21, 1980 is modified.

Although claimant's claim has been determined to have been filed in a timely manner, the Board finds her claim is not compensable and the denial, dated September 7, 1979, is affirmed.

The remainder of the Referee's order is affirmed.

CLAIM NO. C 54410 February 13, 1981

RAY C. PIEFER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board issued its own motion order on May 28, 1980 re-opening claimant's claim for a worsened condition and surgery related to his December 21, 1966 industrial injury.

The claim was submitted for closure and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from May 13, 1980 through July 30, 1980 and an award of additional 15% for 10% loss of his right leg for a total award of 20% loss of his right leg. The Board concurs with this recommendation.

IT IS SO ORDERED.

GERALD O. WILLSON, CLAIMANT
SAIF, Legal Services, Defense Atty..
Own Motion Order and Determination

On June 1, 1973, the claimant suffered a compensable injury to his right hand. The claim was originally closed by a Determination Order dated February 19, 1974 which granted the claimant an award of permanent partial disability compensation equal to 82.5% for 55% loss of his right hand. The claim was subsequently reopened and closed by a second Determination Order dated April 25, 1975 which granted the claimant an award of additional temporary total disability compensation. The claimant's aggravation rights have expired.

The claimant was rehospitalized on December 12, 1979 for additional surgery. Dr. Edwards performed the following procedures: Defatting of the distal end of the right long finger with release of contracture, and multiple z-plasty of the volar aspect of the right long finger. Subsequent to this operation, Dr. Edwards reported the claimant could return to work as of January 28, 1980.

On May 14, 1980, the insurer requested determination be made of the compensation to which the claimant was entitled. It indicated it had paid the claimant compensation for temporary total disability from December 12, 1979 through January 27, 1980. The Evaluation Division of the Workers' Compensation Department on January 12, 1981 recommended this claim be closed and claimant be granted an additional award of temporary total disability compensation from December 12, 1979 through January 27, 1980 and recommended that claimant not be awarded any additional permanent partial disability compensation.

The Board has reviewed the record in this case and the recommendation of the Evaluation Division. We find that it is correct and therefore grant the claimant the additional compensation recommended by the Evaluation Division.

ORDER

The claimant is hereby granted an additional award of temporary total disability compensation from December 12, 1979 through January 27, 1980. The record reflects this compensation has already been paid to the claimant.

CLAIM NO. YC 408279

February 13, 1981

NORMAN L. WILSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board issued an Own Motion Order on November 14, 1980 which reopened claimant's claim effective the date of his hospitalization for the April 9, 1980 surgery.

The claim was submitted for closure and Evaluation Division of the Workers' Compensation Department recommended claimant be granted compensation for temporary total disability from April 9, 1980 through May 19, 1980, temporary partial disability from August 7, 1980 through October 31, 1980 and further temporary disability from November 1, 1980 through December 9, 1980 and compensation for permanent partial disability of 105° for 70% loss of the right leg in lieu of other awards and 64° for 20% unscheduled low back disability.

The Board concurs with the recommended compensation for temporary total disability and temporary partial disability.

The Board disagrees with the recommended awards for permanent partial disability. The Board finds and so orders that claimant is entitled to an award of 112.5° for 75% loss of his right leg and no award of unscheduled disability as claimant's low back condition has not been established to our satisfaction to be causally connected to the November 17, 1972 injury.

IT IS SO ORDERED.

CLAIM NO. C 366457

February 17, 1981

DALE C. BROWN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

By letter dated October 18, 1980 claimant sought to have his claim reopened for a worsened condition related to an April 1972 industrial injury pursuant to ORS 656.278.

By letter dated January 22, 1981 the SAIF wrote the Board that it opposed any reopening on the grounds that claimant's condition had not worsened.

The Board, based on the medical evidence provided, finds claimant's condition arising from his 1972 injury has not worsened and he is not entitled to a claim reopening. This decision is based upon the medical reports of the Orthopaedic Consultants and Dr. Silver. Claimant is, however, entitled to payment of his medical care and treatment as related to his compensable back condition under the provisions of ORS 656.245 both now and in the future.

Claimant's request for the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 is hereby denied.

IT IS SO ORDERED.

WCB CASE NO. 78-4618

February 17, 1981

SHIRLEY ANN BUNCH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order

This case is now and has been for a considerable length of time pending before the Board pursuant to a request for review of the Referee's Opinion and Order. Despite herculean efforts, the Board has been unable to obtain a transcript from the hearing reporter. Therefore, this case is remanded to the Hearings Division for further proceedings. See ORS 656.295(5).

CLAIM NO. C 243139

February 17, 1981

LILY PETERSON CODY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requests the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for a worsened condition related to an industrial injury of April 1970.

By letter of January 22, 1981, the SAIF indicated it was not opposed to such reopening.

The Board finds that the medical evidence supports claimant's request that her condition has worsened and required hospitalization and surgery for a laminectomy related to her 1970 industrial injury. It is noted that the SAIF paid claimant compensation for temporary total disability from September 16, 1980 to January 14, 1981 on a claim for injury of September 15, 1980.

ORDER

Claimant's claim is hereby reopened and remanded to the SAIF with compensation for temporary total disability to commence October 17, 1980, the date of her myelogram, and until closure is authorized pursuant to ORS 656.278.

SAIF is to offset any payments made on the September 15, 1980 injury which overlap the time loss herein granted.

CLAIM NO. 75000086

February 17, 1981

DONALD D. FAST, JR., CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board issued its Own Motion Order of September 22, 1980 reopening claimant's claim for a worsened condition related to claimant's September 19, 1972 industrial injury.

The claim was submitted for closure and the Evaluation Division of the Workers' Compensation Department recommends claimant be granted additional compensation for temporary total disability from June 13, 1980 through July 21, 1980 and an award of 37.5% for 25% loss of his right leg in lieu of prior awards.

The Board concurs with the recommendation of the Evaluation Division with the exception that temporary total disability should be from July 21, 1980 through July 31, 1980.

IT IS SO ORDERED.

CLAIM NO. C 88978

February 17, 1981

EUGENE W. FISHER, CLAIMANT
Mike Dye, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, request the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim from a July 27, 1967 industrial injury for a worsened condition. Claimant's aggravation rights expired September 11, 1973.

The Board, after giving due consideration to this matter, based on the evidence presented, denies claimant's request. The Board finds the report of Dr. Hoda dated June 20, 1980 is not sufficient to establish that claimant's worsened condition is related to his 1967 injury. The report by the Orthopaedic Consultants of December 16, 1980, offered by SAIF, finds a worsening of impairment due entirely to the natural progression of claimant's underlying degenerative disc disease.

Claimant's request for the Board to exercise its own motion jurisdiction is denied.

IT IS SO ORDERED.

CLAIM NO. C 364445

February 17, 1981

ROBERT GREGOR, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On December 23, 1980 the Board issued its own motion order reopening claimant's claim, from an April 17, 1972 injury until closure pursuant to ORS 656.278.

Claimant underwent surgery to correct neuromas in the painful forearm stump. Claimant was medically stationary on January 7, 1981.

The claim was submitted for closure and the Evaluation Division of the Workers' Compensation Department recommended claimant be granted additional compensation for temporary total disability from November 11, 1980 through January 7, 1981 and no greater award of permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

-497-

CLAIM NO. 3W-10-9357

February 17, 1981

WALLACE E. JOHNSON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board issued its Own Motion Order on September 15, 1980 reopening claimant's claim for a worsened condition as of May 16, 1980 as related to his March 1, 1974 industrial injury.

The claim was submitted for closure and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from May 16, 1980 through December 10, 1980 and no further award of permanent partial disability above the 40% previously granted.

The Board concurs with the recommended compensation for temporary total disability, but feels that the prior award of 40% unscheduled disability does not adequately compensate this claimant for his loss of wage earning capacity.

Claimant is 54 years of age and forever precluded from his regular occupation as a trucking yard foreman and driver. Dr. Gritzka's closing report indicates claimant has significant physical impairment. Attempts at vocational rehabilitation have failed. Claimant has a high school education with only other work experience in logging. The Board, based on the above, feels claimant is entitled to an award of 65% unscheduled disability.

IT IS SO ORDERED.

CLAIM NO. C604-13464

February 17, 1981

PATRICIA L. ENGLISH KEZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Schwabe, Williamson, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board issued its Own Motion Order on December 1, 1980 and reopened claimant's claim pursuant to ORS 656.278.

The claim was submitted for closure and the Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from September 29, 1980 through October 12, 1980 and temporary partial disability from October 13, 1980 through December 3, 1980 and no further award be granted for permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

CLAIM NO. 131-7G0507 February 17, 1981

EDWARD O. MILLER, CLAIMANT
Richard A. Sly, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278.

The Board, having reviewed claimant's request and considered the contentions of the parties, finds claimant's request is without merit. Claimant's request is hereby denied.

IT IS SO ORDERED.

WCB CASE NO. 79-8496 February 17, 1981

TOM MOORE, CLAIMANT
Peter Hansen, Claimant's Atty.
Mary Danford, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks review by the Board of the order of the Referee which affirmed the findings by the Field Services Division that claimant was ineligible for an authorized vocational rehabilitation program.

The Board, after de novo review, reverses that order. The Workers' Compensation Department's Administrative Rules define a vocationally handicapped worker as one "unable to return to his regular occupation because of permanent residuals of an occupational injury or disease and who has no other skills, aptitudes or abilities which would enable him to return to gainful employment." The Board finds claimant fits this definition and had it not been for claimant taking it upon himself to commence school while awaiting the actions of Field Services Division and then finding himself in a financial bind and being forced to seek employment, claimant would have been found to be vocationally handicapped by that Division.

It is difficult for the Board to conceive of a worker who earned \$7.00 per hour in 1977, whose pay would now be \$9.00 per hour, but who went to work in 1979 at 3.79 per hour as having been returned to gainful employment.

Taking into consideration the definition of "gainful" according to OAR 438-22-304 "to be gainful requires an occupation to be something at which a worker can make a reasonable wage." The Board finds claimant's wages with Tektronics did not constitute a "reasonable wage."

At the time of hearing, claimant was employed using the skills he learned from his schooling, albeit though he did not quite complete the required courses. The Board concludes that claimant is eligible for vocational rehabilitation services and is a vocationally handicapped worker. Further the Board concludes that the finding by the Field Services Division that claimant was not a vocationally handicapped worker since he was employed is, in our opinion, a violation of the Department's own rules.

ORDER

The order of the Referee, dated April 24, 1980, is reversed.

The Department is hereby ordered to reimburse claimant for his expenditures of tuition, mileage, etc., while he was in machinist school and the carrier is to pay him compensation for temporary total disability. The carrier is allowed to apply for reimburseable temporary total disability from the Department.

February 17, 1981

BILL E. PAINTER, CLAIMANT
Brian L. Welch, Claimant's Atty.
Marcus K. Ward, Attorney for SAIF.
Order

A request for review was received by the Board on the Interim Order issued by Referee McSwain dated December 16, 1980.

Said order carries no appeal rights, and, as such, the Board has no jurisdiction to review this case. The order of the Referee stands.

IT IS SO ORDERED.

February 17, 1981

JOHN SIMMONS, CLAIMANT
Lyle C. Velure and Jerry E. Gastineau, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which remanded claimant's claim to it for reopening to provide further medical services and temporary total disability compensation. Compensation was to commence June 13, 1979 with penalties assessed on amounts not paid from that date forward. Attorney fees were granted equal to \$750, plus 25% of the temporary total disability compensation not to exceed \$750, plus 25% of the subsequent permanent partial disability compensation which claimant may receive when the claim is closed.

The Board, after de novo review, affirms and adopts the findings and the majority of the conclusions reached by the Referee in his order, a copy of which is attached hereto and made a part hereof. The Board does not find the claimant's attorney is entitled to an attorney fee out of any subsequent permanent partial disability claimant may receive at the time the claim is closed. That portion of the Referee's order should be deleted.

ORDER

The order of the Referee, dated May 14, 1980, is modified.

The last paragraph on page seven of the Referee's order is hereby deleted.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee the sum of \$200, payable by the SAIF Corporation.

CLAIM NO. C 444778

February 18, 1981

CRAIG E. ATWELL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board on November 27, 1979 issued its Own Motion Order reopening claimant's claim on October 25, 1979.

The claim was submitted for closure and the Evaluation Division of the Workers' Compensation Department recommended claimant be granted compensation for temporary total disability from October 25, 1979 through December 18, 1980 and no further award of permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

WCB CASE NO. 80-5440

February 18, 1981

LARRY J. BARNETT, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

Since the Order by the Referee dated December 18, 1980 is not a final order, it is not appealable. Therefore, the Board is without jurisdiction to review this case at this time.

IT IS HEREBY ORDERED that this Request for Review is dismissed.

February 18, 1981

MYRL C. BLUMM, CLAIMANT

Lang, Klein, et al, Claimant's Attys.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

Claimant seeks Board review of the Referee's order which found she was not in need of further medical treatment or time loss after September 15, 1978 nor entitled to reimbursement of mileage expense for travel to medical treatment, and granted her an award equal to 80% for 25% unscheduled disability for injury to the low back.

A correction should be made on page four of the Referee's order. In the second full paragraph, the Referee's statement that claimant received unemployment compensation from January 1979 through April 1979 is incorrect. Claimant applied for benefits between January and April 1978 but was denied benefits due to the reason she quit work and the fact that she was unwilling to work nights and weekends. Also, the date of the original injury was March 20, 1977, not March 21. With these expectations, the Board finds the Referee correctly recited the facts of this case in his order and adopts them as its own.

On January 2, 1978, according to the testimony and the medical reports, claimant suffered an aggravation of her March 20, 1977 industrial injury. She continued to work, however, until January 14 when she quit because of tension caused by a co-worker. The employer was aware that claimant strained her back in early January and is not prejudiced by claimant's failure to file a claim. Claimant first saw a doctor on January 26. Dr. Reuer indicated the claim should be reopened for treatments so that she could be re-employed. Although he didn't write this report until March 22, he later indicated that as of January 26, 1978, claimant was not capable of doing her regular work and she needed additional medical care due to this aggravation of her original injury. The claim was accepted as an aggravation claim by the SAIF Corporation, but time loss was not commenced until June 3, 1978 based on a report by Dr. Peterson. The Board concludes that under the provisions of ORS 656.273(3), claimant is entitled to temporary total disability compensation from January 26, 1978 until closure, September 15, 1978.

The Board concludes that claimant's claim has been properly closed based on Dr. Pasquesi's examination of September 15, 1978. However, under the provisions of ORS 656.245, claimant is entitled to medical services for conditions related to her industrial injury. There is no doubt that the services provided by Dr. Peterson are related to her injury. Dr. Peterson was claimant's treating physician when she lived in Hermiston and she has total confidence in him. Dr. Pfeiffer's testimony at the hearing actually strengthened claimant's contention that she should be allowed treatment with this doctor rather than one in her hometown of LaGrande. There is no authority which allows SAIF to unilaterally terminate payment of services and mileage for reasonable costs incurred as a result of the industrial injury. Penalties should be assessed for the SAIF's failure to pay for Dr. Peterson's services and for unilaterally cutting off mileage costs.

The Board agrees with claimant that there is no medical basis for the Referee's statement that her psychological condition "pre-existed" her injury.

The Board concludes claimant has been adequately compensated by the 25% award granted by the Referee and would affirm that portion of the order.

ORDER

The Referee's order dated April 4, 1980 as amended on May 30, 1980 is modified.

Claimant is entitled to additional temporary total disability from January 26, 1978 through June 2, 1978.

Claimant is entitled to medical services provided by Dr. Peterson which are related to her back injury of March 20, 1977. Claimant shall be paid for any reasonable mileage incurred as a result of these visits. SAIF shall pay to claimant as a penalty 25% of these amounts due and owing as of the date of the hearing. Claimant's attorney is entitled to a reasonable attorney's fee equal to \$350 for his efforts on claimant's behalf.

The remainder of the Referee's order not dealing with the above issues is affirmed.

Claimant's attorney is granted as a reasonable fee a sum equal to 25% of the increased temporary total disability granted by this order, payable out of said compensation as paid, not to exceed \$750.

February 13, 1981

RICHARD L. HOSLEY, CLAIMANT
Rolf Olson, Claimant's Atty.
Noreen K. Saltveit, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the insurance carrier's denial of industrial injury.

The issues are compensability of the claim and failure to give timely notice pursuant to ORS 656.265.

Claimant alleges that he is disabled as a result of the heavy physical work he was required to perform for two days in July 1977 while assigned to the "Americana" line of the cannery where he worked. (Tr. 34-37, 35) When claimant felt he could no longer bear the pain of the "palletizing" assignment, he requested assignment to lighter work. (Tr. 33, 38) He continued working at the cannery until November 29, 1977. (Tr. 39)

Claimant reported no industrial injury or illness, although it is a procedure at the employer's plant to report all injuries. (Tr. 8) and despite the advice to report to the nurse that he received from the person with whom he rode to and from work. (Tr. 33) The first report of injuries was when claimant filed an industrial claim on May 11, 1978. (Hr. Ex. B-1)

Claimant has a prior history of neck problems dating back to a logging accident in 1955 in which he suffered a broken neck when a tree fell on him. (Tr. 38, 46) Claimant underwent surgery in 1966 involving an anterior cervical fusion performed by Dr. H. A. Spady (Hr. Ex. A-3), and suffered neck pain in 1970 following a head injury caused by a blow from a bumper jack. (Tr. 45, 46)

Following the alleged 1977 industrial injury, claimant first sought medical treatment in May of 1978 when he consulted Dr. Spady, the surgeon who had performed his 1966 fusion. (Tr. 40) He then attempted to reopen an old 1966 disability claim but was told that too much time had elapsed. (Tr. 49)

Respondent alleges that there is no causal relationship between any alleged palletizing over a two day period in July 1977 and claimant's present disabilities; that the claimant's medical problems result from a gradual deterioration of claimant's prior fusion. Respondent asserts that claimant is now barred from asserting a claim as a result of his failure to give timely notice to the employer as provided by ORS 656.265, and that the employer has, in fact, been prejudiced by the lack of notice.

Failure to give notice to an employer within 30 days after an accident or injury is excused by ORS 656.265(4) if:

- (1) the employer had knowledge of the accident or injury, or was not prejudiced by reason of the failure to give notice; or
- (2) the insurer or employer had begun making compensation payments; or
- (3) the notice is given within one year after the date of the injury and the worker can establish in a hearing that he had good cause for his failure to notify the employer within 30 days.

Only one of the above statutory exceptions need be satisfied. Wilson v. SAIF, 3 Or. App. 573, 475 P2d 992; Widener v. LaPac. Corp., 40 Or. App. 3, 594 P2d 832. Since the statutory provisions are separate, independent clauses, if the employer fails to show that prejudice did, in fact, result, then claimant need not sustain the burden of establishing good cause for his late filing. On the other hand, if the claimant established good cause at the hearing for his late filing, it is immaterial whether prejudice to the employer resulted from that late filing.

Whether an industrial injury did, in fact, occur is not yet in point, but whether the claimant sustained the burden of establishing good cause for late notice of his claim, alleging that an industrial injury occurred.

Claimant has the burden of establishing that good cause did exist. Claimant testified that he did not file a claim or notify the employer at the outset of his physical problems in July 1977 for several reasons:

- (1) He feared he would be fired and needed the job (Tr. 37, 38, 54, 62) and hoped to return to work at the cannery the following season. (Tr. 39)

- (2) He initially thought his neck and arm pains might be a "continuation" of earlier problems surrounding his earlier industrial accident and spinal fusion performed in 1966. (Tr. 35) The confusion is further evidenced by his unsuccessful efforts to reopen his earlier claim. (Tr. 49)
- (3) Believing the pain would simply go away if he could get transferred to lighter work and away from the particular job on the Americana belt (Tr. 39, 63), he was not certain whether he had actually suffered an injury until the pain did not subside. No until after he consulted a surgeon in May 1978 did he believe he had suffered an injury for which a claim should be filed. (Tr. ____)
- (4) His emotional and mental state, diagnosed by the Veterans' Administration Hospital as manic-depressive, and his heavy drinking habits prevented the clear thinking necessary to decide to file a claim. (Tr. 40)

In Wilson v. SAIF, supra, the court noted:

"The hearing officer found that because claimant had suffered prior industrial accidents, he must have had some awareness of the requirements of the Workmen's Compensation Law; that claimant was not diligent in pursuing other possibilities of industrial coverage such as workmen's compensation in Idaho...; and that, for these reasons, claimant did not have 'good cause.' The circuit court found otherwise.

"...justice would be vexed if claimant's injury went uncompensated solely because his own confusion resulted in his failure to file within the 30-day period. We hold, in agreement with the circuit court, that the claimant has established good cause for failure to give notice within 30 days..." (emphasis added).

Claimant's testimony concerning his decision not to tell the employer of his physical problems is uncontroverted and, absent evidence to the contrary or a finding that the witness is less than credible, must be accepted.

Consistent with the dictum of the Wilson decision, the Board finds that claimant established good cause at the hearing for his failure to give notice within 30 days.

Because the provisions of ORS 656.265(4) are separate, independent clauses, one of which has already been satisfied, a showing of prejudice to the employer, if any, is immaterial.

Did the claimant sustain a compensable injury? Dr. H. A. Spady, who treated the claimant since September 1966, could not relate the type of work that claimant was doing to the kind of problem he had because the type of work involved would cause low back problems, not neck problems. Dr. Spady concluded that claimant's symptoms were related to a degenerative change in claimant's neck. (Cl. Ex. 1)

The only other witness called to testify concerning the possible causal relationship between the work and the claimant's medical problems were Kenneth Shober with whom claimant rode to and from work each day. Shober testified that claimant told him he had injured his right arm by lifting too much while palletizing (Tr. 32) Shober then advised him to talk to the superintendent or his supervisor to ask for lighter work. (Tr. 31)

Compensation cannot be awarded unless there is competent medical evidence that a medical-causal relationship exists between the employment and any resultant disability. Riutta v. Mayflower Farms, 19 Or. App. 278, 527 P2d 424 (1974).

The Board finds that claimant failed to prove by a preponderance of the evidence that a medical-causal relationship exists between an industrial injury and any resultant disability. Consequently, the Referee's denial of industrial injury must be affirmed.

ORDER

The order of the Referee, dated June 30, 1980, is affirmed.

WCB CASE NO. 80-4432

February 18, 1981

JOSEPH J. KOPPERT, CLAIMANT
Michael Rosenbaum, Claimant's Atty.
Daryll Klein, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which awarded 60% unscheduled permanent partial disability for claimant's low back injury from which claimant developed a low back strain superimposed upon a degenerative spine condition, arising from his employment as a shipping clerk for a toy warehouse distributing plant. The Referee's July 22, 1980 award represented an increase of 50% over the Determination Order which, on April 23, 1980, awarded 10% permanent partial disability compensation.

The issue is the extent of claimant's permanent partial disability.

Appellant argues that medical evidence in the record indicates a 25% disability rating; that the medical evidence is uncontroverted and does not support even one-half of the amount awarded; and that the claimant has been retrained in a field which would bring earnings of between \$1,000 and \$1,500 per month according to expert testimony presented at the hearing.

Review of the record reveals that as far back as December 1977, a vocational rehabilitation counselor observed that, This claimant's prognosis is somewhat questionable due to his age and limited positive aptitudes (Ex. 40-8).

It should be noted that medical evidence of a 25% physical impairment does not automatically dictate an identical or numerically similar finding of the extent of permanent partial disability. It would be error to attempt to separate physical disability and loss of earning capacity in making an award. Ford v. SAIF, 7 Or. App. 549.

Oregon Revised Statutes provide:

"The criteria for rating of disability shall be the permanent loss of earning capacity due to the compensable injury. Earning capacity is the ability to obtain and hold gainful employment in the broad field of general occupations, training, skills and work experience." ORS. 656.214(5)

The Board finds that the Referee properly considered all these factors in arriving at his determination.

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 July 22, 1980, is affirmed.

Attorney's fee in the sum of \$250 is hereby awarded to claimant's attorney, as and for a reasonable fee for representation of claimant in this appeal.

February 18, 1981

LAUNZO MURPHY, CLAIMANT

Charles Paulson, Claimant's Atty.

Thomas E. McDermott, Employer's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by Employer

The employer seeks Board review of the Referee's order which found no compensable worsening of claimant's condition but reversed the denial for medical care and psychological care from claimant's hospitalization.

The Board, after de novo review, would reverse the Referee's order in its entirety. The evidence indicates that on December 10, 1978 claimant and his wife had a family dispute and the police were called. Mr. Sauter, a witness and manager of the apartment complex, testified he did not see any physical contact made between the police and the claimant. The claimant, however, testified he was in the street trying to get the car keys away from his wife and the police restrained him by grabbing him by the shoulders from behind and pulling on him. Claimant was asked:

Q. Do you think that the policemen holding you made it worse?

A. It could have. It's worser now. (TR 26)

Claimant testified that following this incident he had increased pain and sought out medical attention.

This testimony of the claimant is totally supported by Dr. Thomas who saw claimant two days later, December 12, 1978. Dr. Thomas felt this new injury complicated things and made it impossible for him to differentiate how much of claimant's present pain was caused by the new injury and how much was caused by the prior injury.

The Board concludes that the totality of evidence is that claimant suffered a new and intervening injury in December 1978.

Dr. Thomas hospitalized claimant from November 16, 1979 to November 23, 1979 and a report dated November 20, 1979 again reiterated that he could not state which injury was responsible. Therefore, claimant has failed in his burden of proof.

ORDER

The order of the Referee, dated July 8, 1980, is reversed in its entirety.

The denial of reopening and medical care dated November 26, 1979 is affirmed.

WCB CASE NO. 78-4951

February 23, 1981

SEERE E. BEESON, CLAIMANT
Walter Aho, Claimant's Atty.
Keith D. Skelton, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction and reopen claimant's claim for a worsened condition related to her January 1972 occupational disease.

By letter dated February 4, 1981 the employer, by and through its attorney, opposed such reopening.

The Board finds that claimant's request to reopen is without merit. The evidence presented offers no medical proof of any worsened condition related to her industrial exposure. Claimant's request for the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, is denied.

IT IS SO ORDERED.

WCB CASE NOS. 80-9781 & 80-11,106

February 23, 1981

LARRY BRUCE, CLAIMANT
Dan O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Referring for Consolidated Hearing

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition arising out of his August 21, 1971 industrial injury.

Claimant has requested a hearing on a denied claim for an alleged injury of July 31, 1980 which is set for March 5, 1981.

The Board hereby refers this own motion matter to the Hearings Division for the Referee to take evidence on the issue of whether claimant's present condition is related to the 1971 industrial injury at the same time as he hears the issue of compensability on the alleged July 31, 1980 injury. The Referee is hereby instructed to have a transcript of the proceeding prepared and submit it to the Board together with all other evidence introduced at the hearing on the own motion matter.

IT IS SO ORDERED.

SAIF CLAIM NO. GC 242435

February 23, 1981

RICHARD BULT, CLAIMANT
J. David Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board issued its Own Motion Order on December 1, 1980 reopening claimant's claim for a worsened condition resulting from his April 28, 1970 industrial injury.

The claim having now been submitted for closure, the Evaluation Division of the Workers' Compensation Department has recommended that claimant be granted compensation for temporary total disability from September 6, 1979 through December 30, 1980, less time worked but no additional award for permanent partial disability. The Board concurs with this recommendation.

Claimant's attorney did not provide an attorney fee agreement and therefore the Board will not grant claimant's attorney a fee at this time.

IT IS SO ORDERED.

WCB CASE NO. 80-1786

February 23, 1981

LEE COLE, CLAIMANT
James O'Neal, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

A motion to dismiss board review of the above entitled matter was received by the Board February 11, 1981 on the contention that the SAIF Corporation was not served with notice of request for review.

The request for review by the claimant dated January 22, 1981 shows service on the SAIF Corporation. Therefore, the request to dismiss is hereby denied, and this matter will be placed on the review docket to be reviewed by the Board in due course.

WCB CASE NO. 80-1007

February 23, 1981

RICHARD A. DAVIDSON, CLAIMANT
Michael R. Stebbins, Claimant's Atty.
Paul L. Poess, Atty. for SAIF.
Request for Review by SAIF

This is an appeal by the SAIF. They contend:

"...that the case of Weller v. Union Carbide Corp., 288 Or. 27, 602 P2d 259 (1979) is applicable in this case, and when applied to the facts, the claim will be found not compensable."

The issue raised by the employer is whether the rule of Weller (supra) applies in both injury and occupational disease claims.

The narrower issue is whether claimant's carpal tunnel syndrome (bilateral) is compensably related to the December 12, 1979 industrial accident (emphasis added).

The Referee found that the rule of Weller does not apply to accidental injury claims but is applicable only to occupational disease claims. We disagree. Although Weller involved an occupational disease, we find nothing in that decision which restricts its application only to claims of occupational disease. Weller and those cases decided with it speak in terms of "work activity and conditions;" in Gibson v. SAIF, (citation omitted), the court noted that no one involved was sure whether the claim for compensation was based on injury or occupational disease and proceeded to apply the test set forth in Weller. We believe this line of cases should be applied where evidence demonstrates an underlying pathological condition in the worker's body. The question then is not whether we are dealing with an occupational disease or an occupational injury but whether the underlying disease (pathological condition) has been worsened. We find Weller does apply in this case and agree with the Referee that under Weller carpal tunnel syndrome (bilateral) is not compensable.

We find there is no proof in this record to establish the industrial accident of December 12, 1979 caused any injury to the claimant's wrists. We find compelling evidence that the claimant had carpal tunnel syndrome before December 12, 1979 and that it was symptomatic. The claimant had symptomatic carpal tunnel syndrome when he was first examined subsequent to the December 12, 1979 accident, and it had been symptomatic for an indeterminate period of time. It is for this reason we give little weight to Dr. Ellison's opinion on causation. His "temporal relationship" opinion must fail in the face of his statement that claimant had no symptoms prior to the December 12, 1979 fall. This is contrary to the early history.

Dr. Nathan, who performed the surgery, felt that his findings at surgery indicated a long standing compression of both median nerves. Dr. Nathan's opinion was that he did not feel that claimant's employment from November 6, 1979 to December 12, 1979 and including the accident (fall) of December 12, 1979 had caused or aggravated the bilateral carpal tunnel syndrome. The mechanism of the December 12, 1979 fall, as related to Dr. Nathan by the claimant, indicated no injury to either wrist.

We find Dr. Nathan's opinion persuasive. He was the treating physician, he performed the surgery, he had a complete and accurate history. The claimant has failed to prove his case. The denial is approved.

ORDER

The order of the Referee, dated July 25, 1980, is reversed in its entirety.

The SAIF's denial of January 22, 1980 is restored and affirmed.

February 23, 1981

WAYNE FLISRAM, CLAIMANT

Willner, Bennett et al, Claimant's Attys.

Keith D. Skelton, Employer's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

Claimant seeks Board review of the Referee's order which granted him compensation from July 2, 1979 to August 8, 1979 on account of a temporary aggravation. Claimant contends he is entitled to compensation through August 14, 1979 and compensation from August 14, 1979 through January 1, 1980, the period of time he was working with Comprehensive Rehabilitation Services before being placed in a vocational rehabilitation program.

The Board, after de novo review, concludes that claimant has failed to prove his case. ORS 656.268(5) indicates that claimant's temporary total disability compensation is paid "... while he is enrolled in the authorized vocational rehabilitation program." He was not enrolled until January 1980, and the Board affirms the Referee's decision in this matter.

The Board also finds that claimant failed to prove his claim for temporary aggravation during the period July 1, 1979 through August 8, 1979. The doctor who first saw claimant failed to submit a report of his findings. Dr. Utterback wrote several reports, but only one comes even close to fulfilling the requirements set out in ORS 656.273. In Dr. Utterback's July 25, 1979 report, he stated that claimant had been off work for about ten days when he was first seen on July 11 and he would probably be off another two weeks. He failed to indicate that he authorized time loss and the strong inference is that claimant was off because he chose to be off. The doctor found nothing objective on which to base claimant's complaints. The x-rays of the shoulder taken on July 11 were normal. Another statement made by Dr. Utterback which has convinced the Board that this is not an aggravation claim notes: "We consider him essentially the same as was his status when declared medically stationary on 1 March 1978." There is no evidence that claimant's condition related to his original industrial injury has worsened. The only treatment provided during this time was injections. Claimant indicated that he was not released to work until August 14, 1979, but there is no evidence in the record to indicate this. The Board is permitted to review only the evidence that was before the Referee unless an agreement is reached to admit additional evidence. The Board cannot consider any reports attached to claimant's brief at this time.

The Board concludes that claimant has not proven by a preponderance of the evidence that he has suffered an aggravation of his 1975 industrial injury, nor that he is entitled to compensation for the period August 14, 1979 through January 1, 1980. The Referee's order should be modified.

ORDER

The order of the Referee, dated July 24, 1980, is modified.

The denial of the carrier, dated July 24, 1979, is affirmed.

That portion of the Referee's opinion that found claimant was not entitled to temporary total disability from August 21, 1979 to January 1, 1980 is affirmed.

WCB CASE NO. 80-7560

February 23, 1981

DAVID W. GORDON, CLAIMANT
J. David Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 9, 1980 the Board referred claimant's request for own motion reopening to its Hearings Division to be set for a hearing to determine if claimant's condition is related to his February 28, 1973 injury and whether it has worsened since the last award or arrangement of compensation. If the Referee so found, he was to determine the claimant's extent of permanent disability.

On January 30, 1981 the Referee recommended the Board deny claimant's request for own motion based on his failure to prove a worsened condition related to the industrial injury. The Board affirms and adopts the Referee's recommendation as its own, a copy of which is attached hereto and made a part hereof.

ORDER

Claimant's request for own motion relief, dated January 2, 1980, is hereby denied.

INTRODUCTION

Pursuant to notice hearing convened on November 17, 1980 in Salem, Oregon and was continued for further evidence and a Transcript of the Proceedings. The claimant was present and was represented by Mr. J. David Kryger. The SAIF Corporation was represented by Mr. Quintin B. Estell. Post-hearing, Exhibits 1 through 149 were received in evidence. The record was closed on December 10, 1980, after receipt of the Transcript of the Proceedings.

ISSUE

Whether the Workers' Compensation Board should issue an Own Motion Order and reopen claimant's claim pursuant to claimant's request of January 2, 1980, i.e., whether claimant's condition has worsened since the last award or arrangement of compensation of December 6, 1977 and, if so, the extent of claimant's permanent disability.

FINDINGS OF FACT

Claimant, then a sign painter, was compensably injured on February 28, 1970 when he fell from a scaffold. His injury was diagnosed as a compression fracture at the tenth dorsal vertebra. On April 6, 1971, surgery was performed to correct the condition, i.e., a fusion from D9 to D11. Claimant, thereafter, received extensive conservative treatment. The claim was finally closed by Stipulation of the Parties of December 6, 1977. To date, claimant has received a total unscheduled permanent partial disability award of 80 percent, equal to 256 degrees, and a scheduled permanent partial disability award of 15 percent, equal to 22.5 degrees, for loss of use of the right leg. December 6, 1977 was claimant's last award or arrangement of compensation.

Claimant's chronic symptoms since his industrial injury of February 28, 1970 have been of chronic back pain, limitation of motion of the back, left leg pain and loss of strength of the left leg. Claimant's left leg buckles, or gives out, periodically. Claimant's chronic symptoms result in limitations on activities requiring lifting, prolonged sitting, prolonged walking, prolonged standing and twisting and turning movements.

Claimant's chronic back symptoms and resulting limitations, based on the subjective assertions of he and his wife, have worsened since December 6, 1977. Claimant's daily activities are now minimal. He has given up playing cards, shooting pool and fishing.

Claimant's chronic back symptoms and residuals prevent his return to regular work as a sign painter, i.e., his primary occupation before the industrial injury. Claimant has not worked regularly since the industrial injury of February 28, 1970. He has not worked since December 6, 1977, the date of the last award or arrangement of compensation.

Claimant's source of income, and only income, is from a Veteran's Administration disability pension in the amount of \$550.00 per month. He has drawn such pension for approximately the last four years.

Claimant has not been retrained under the auspices of the Field Services Division of the Workers' Compensation Department even though he has been determined to be a vocationally handicapped person. The vocational representatives did not feel that retraining was feasible in claimant's case because of his chronic physical condition.

Dr. Chester, claimant's treating physician before the last award or arrangement of compensation, examined claimant on October 5, 1979 regarding his chronic back complaints. The doctor felt that claimant had significant residuals because of his industrial injury. The doctor was unable to tell from an objective medical standpoint whether claimant's condition had worsened with the passage of time. The doctor did not recommend any curative treatment, or surgical intervention, to correct claimant's back condition. The doctor felt that claimant should be considered for disability retirement because he felt that claimant was not a suitable candidate to return to regular work taking into consideration claimant's age, training, background and his subjective complaints about his physical symptoms and residuals.

The staff of Orthopaedic Consultants, P.C., located in Portland, Oregon, examined claimant in consultation on March 27, 1980. X-rays of the dorsal spine, among other things, revealed a solid fusion from D9 to D11 and increased dorsal kyphosis secondary to the compression fracture at D10. The staff did not recommend any curative treatment for claimant's back condition. The staff felt, however, that claimant's overall strength had deteriorated. The staff opined, and felt, that claimant was not physically able to perform a gainful occupation.

Claimant is now age 56.

Claimant has a formal eighth grade education. He has no other formal training or experience.

Claimant, on January 2, 1980, requested that the Workers' Compensation Board exercise its own motion jurisdiction and reopen the claim for the payment of workers' compensation benefits because his condition had worsened after the last award or arrangement of compensation of December 6, 1977. The SAIF Corporation, on April 18, 1980, opposed an Own Motion Order to reopen the claim because the treating doctor had not recommended any curative treatment. SAIF did not oppose an Order granting additional award of permanent partial disability. Thereafter, the Board, by Order of May 9, 1980, referred claimant's Own Motion Request to the Hearings Division of the Workers' Compensation Board so that a referee could determine whether claimant's condition had worsened after the last award or arrangement of compensation due to the industrial injury and, if so, the extent of claimant's permanent disability.

All lay testimonies contained in the record are credible.

CONCLUSIONS OF LAW

Claimant has failed to prove, by a preponderance of the evidence, a compensable aggravation claim. In short, claimant has failed to establish that his condition has worsened since December 6, 1977. Lay testimony is insufficient to establish a "worsening" as this does not appear to be a simple or uncomplicated situation. Expert opinion is required to support the lay testimonies about claimant's worsened condition after December 6, 1977. Jacobson v. SAIF, 36 Or App 789, 585 P2d 1146 (1978). Dr. Chester was unable to establish, from an objective medical standpoint, that claimant's condition had worsened. Dr. Chester's comments about claimant's inability to return to regular work is based on claimant's subjective complaints only, about his chronic symptoms and limitations. The staff of Orthopaedic Consultants expressed no opinion about whether claimant's back condition worsened after December 6, 1977. Neither Dr. Chester nor the staff of Orthopaedic Consultants recommended any curative medical treatment for correction of claimant's chronic back condition after December 6, 1977. Additionally, the findings on examination made by the staff of Orthopaedic Consultants, on March 27, 1980, when compared with the findings on examinations made by other doctors before the last award or arrangement of compensation do not appear to be substantially different. On the entire record, I am of the opinion there is a failure of proof. Also, I am of the opinion that the issue of extent of permanent disability is rendered moot and should not be decided, since claimant has not proven an aggravation claim.

RECOMMENDATIONS

I recommend that the Workers' Compensation Board decline to exercise its own motion jurisdiction under ORS 656.278.

WCB CASE NO. 78-6919

February 23, 1981

JOYCE DEAN HULL, CLAIMANT
Michael L. Mowrey, Claimant's Atty.
Keith D. Skelton, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

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 Referee is final by operation of law.

WCB CASE NOS. 80-11, 282, 81-71 & February 23, 1981
81-228

STEVEN KASER, CLAIMANT
Allen & Vick, Claimant's Attys.
Scott Gilman, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order Referring for Consolidated Hearing

The Board issued an Own Motion Order Referring for Consolidated Hearing on January 28, 1981. The last paragraph on page 1 is hereby amended to read as follows:

The Board concludes that it would be in the best interests of the parties if these cases were consolidated for hearing. Therefore, this case is referred to its Hearings Division to be set for hearing with the cases presently pending in this matter. The Referee is instructed to take evidence to determine whether claimant's present condition is the result of claimant's injury of 1972, 1979, 1980 or not the responsibility of any of them. Upon conclusion of the hearing, the Referee shall cause a copy of the transcript to be forwarded to the Board together with his recommendation with respect to the own motion matter. He shall dispose of the other cases with an appealable order.

IT IS SO ORDERED.

WCB CASE NO. 80-11, 084 February 23, 1981

HAZEL STANTON LOVELL, CLAIMANT
Rolf Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through her attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for a worsened condition related to her industrial injury of March 30, 1975.

The medical evidence indicates that Dr. Lahiri recommends claimant be hospitalized for a myelogram to see if claimant possibly has a herniated disc. On December 19, 1980 claimant was examined by the Orthopaedic Consultants who concurred with the recommendation of Dr. Lahiri.

Based on the evidence before us, the Board finds that claimant is entitled to have her claim reopened upon the hospitalization for the recommended myelogram.

IT IS SO ORDERED.

CLAIM NO. I-021596

February 23, 1981

FRED OZAN, CLAIMANT

John Snarskis, Employer's Atty.

SAIF, Legal Services, Defense Atty.

Amended Own Motion Order (Referring for Hearing)

On January 6, 1981, the Board issued an Own Motion Order in the above entitled matter referring this case to the Hearings Division. The Appeal Notice was inadvertently included on that order.

Please be notified that the Appeal Notice is hereby omitted from that Order.

IT IS SO ORDERED.

WCB CASE NO. 79-3058-E

February 23, 1981

LANCE P. REYNOLDS, CLAIMANT

Delbert J. Brenneman, Employer's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by SAIF

The SAIF Corporation seeks Board review of the Referee's order which determined he did not have jurisdiction to grant the relief it required.

The Board, after de novo review, reverses the Referee's order. The case cited, Lynn W. Fletcher, WCB Case No. 79-1808, is not on point with this case. The Fletcher case concerned the issue of attorney fees payable by one insurance carrier to another and should not be used to determine the issue before us. In the instant case, the Board finds that the Referee does have jurisdiction to hear the matter and has considered remanding this case to him for a decision. However, the Board feels that it is preferable to do whatever possible to prevent prolongation of litigation and has chosen to decide the case on the merits. Under the set of facts in this case, the Board concludes that the basic concept of equity is of primary importance. The period of time in question was unquestionably the responsibility of Royal Globe and there is no reason they should be unjustly enriched because SAIF paid the compensation for them. SAIF is entitled to be reimbursed for any payments made on and after August 3, 1977, except for any duplicate payments made to claimant by Royal Globe.

ORDER

The order of the Referee, dated July 24, 1980, is reversed.

Royal Globe Indemnity is hereby ordered to pay to SAIF Corporation all sums paid by SAIF to claimant or as reimbursement to others as temporary total disability of claimant for periods on and after August 3, 1977. This does not include any amounts which may have been made as duplicate payments to claimant by Royal Globe.

WCB CASE NO. 80-10, 596 February 23, 1981

ADA C. DEL RIO, CLAIMANT
Thomas A. Caruso, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Dismissal

A motion to dismiss SAIF's request for review was received by the Board on the ground that the request for review was untimely filed.

Due to the 30 days falling within a weekend, the request is considered timely, and this case will be entered on the docket and reviewed as requested.

Therefore, claimant's request for dismissal of the request for review in this matter is denied.

IT IS SO ORDERED.

WCB CASE NO. 80-1803 February 23, 1981

BARBARA RUPP, CLAIMANT
Dennis Reese, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

The Board received claimant's request for review on February 5, 1981. Although service on the Board was timely, the service on the other parties was late. ORS 656.289 requires timely service on all parties. Therefore, this request for Board review is hereby dismissed, and the order of the Referee is final by operation of law.

IT IS SO ORDERED.

WCB CASE NOS. 80-1854 & 80-1855 February 23, 1981

VENDA SHACKELFORD, CLAIMANT
Mike Dye, Claimant's Atty.
Gary D. Hull, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

A motion to dismiss board review of the above entitled case was received by the Board February 3, 1981 with the contention that the employer, Dallas Nursing Home, was not served with a notice of request for review.

The request for review by the SAIF Corporation dated January 19, 1981 shows service on Dallas Nursing Home. Therefore, the request to dismiss is hereby denied, and this matter will be placed on the review docket to be reviewed by the Board in due course.

February 23, 1981

MICHAEL TORHAN, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Order on Review

This is an amendment to the Board's Order on Review dated February 6, 1981 in which a provision for attorney's fee was inadvertently omitted.

Claimant's attorney is hereby awarded a sum equal to 25% of the increased compensation granted claimant in the February 6, 1981 Order on Review, payable out of that increased compensation.

IT IS SO ORDERED.

February 25, 1981

LORRAINE ADAMSON, CLAIMANT
Ronald M. Somers, Claimant's Atty.
Roger Warren, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed the Determination Order denying the claim on the ground that claimant's injury was not a compensable injury within the meaning of the Act. The issue is whether claimant's fall on a public street before working hours was a compensable injury.

The facts of this case are not in dispute:

On January 15, 1980, following a severe snow storm, claimant arrived in front of her place of employment at a cherry processing plant in The Dalles where she had worked for eight years. Finding one employee parking lot filled with snow and the place where she usually parked to have no vacancies, she parked parallel to the curb on the west side of Madison Street. Employer's plant facilities are located on both sides of Madison Street. Claimant worked in a plant building located on the east side of the street.

It was claimant's customary practice to arrive early enough each morning to stop for a 20 or 30 minute visit at the plant's business office before reporting to work across the street. Not all employees go to the office before work, and there is no requirement that a plant worker do so.

On the day of the accident, rather than walk on the sidewalk adjacent to the curb where claimant had parked, she walked down a traffic lane of the street because the sidewalk was covered in snow, on her way to visit the office.

After walking approximately two car lengths, claimant slipped on the icy surface and fell on the public street. She told the personnel manager about her fall. When the 8 o'clock bell rang, she crossed back over Madison Street and reported to work for about three hours before going home because she was not feeling well. At 3:30 she called the personnel manager to tell her she could not move. Her husband was called home and took her to the emergency room of the local hospital.

The general rule is that injuries sustained off the employer's premises while traveling to or from work are not compensable. Rohrs v. SAIF, 27 Or. App. 505 (1973). Some cases have recognized an exception to this general rule and suggested injuries are compensable when they occur on a public street adjacent to the employer's premises if the employer exercised control or partial control over the street where the injury occurred. Kringen v. SAIF, 28 Or. App. 19 (1977); Willis v. SAIF, 3 Or. App. 565 (1970).

Claimant argues that her employer exercised partial control over the public street where she fell based upon evidence that the employer spread salt on that street later on the day of claimant's fall. The Board finds this evidence insufficient to establish partial control based on the same policy reasons that prohibit use of "subsequent repairs" evidence in tort litigation.

Even if the element of partial control were present, there is an additional reason claimant's injury is not compensable. At the time of her fall, claimant was not walking toward the plant building where she worked on the east side of Madison Street. Claimant was instead traveling in the opposite direction for a purely social purpose--a visit in the plant office.

Based on both the location of the accident (off premises, public street, no employer control) and the nature of claimant's activities (pursuit of personal interests, rather than employer interests), the Board finds that claimant's injury is not compensable.

ORDER

The order of the Referee dated July 2, 1980 is affirmed.

OWN MOTION NO. 81-0035M February 25, 1981
CLAIM NO. D 68938

HOWARD ALDERSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition arising out of his industrial injury of December 20, 1974 which necessitated surgery.

The medical evidence indicates that claimant underwent surgery for repair of a left inguinal hernia, recurrent, which Dr. McAllister found to be directly related to his previous repair surgery in December 1974.

The Board concludes that the hospitalization, surgery and medical care and treatment will be provided under the provisions of ORS 656.245 and the claim will not be reopened. The Board lacks pertinent information regarding claimant's employment or lack thereof and, until this information is provided, claimant is not entitled to compensation for temporary total disability.

IT IS SO ORDERED.

CLAIM NO. C 322560 February 25, 1981

WILLIAM A. FRANKS, CLAIMANT
Steven C. Yates, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, requests the Board to reopen his claim pursuant to ORS 656.278 for a worsened condition arising out of his compensable industrial injury of August 1971.

The Board, after reviewing the record, denies claimant's request for the Board to exercise its own motion jurisdiction. The evidence indicates that claimant has not been employed since 1975 and is, therefore, not entitled to compensation for temporary total disability. Claimant is entitled, however, to continued psychological care and treatment under the provisions of ORS 656.245 so long as it is causally linked to his 1971 injury.

IT IS SO ORDERED.

CLAIM NO. C 363657

February 25, 1981

ERNEST GAGE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board issued its Own Motion Order on September 22, 1980 reopening claimant's claim on July 31, 1980 when he was hospitalized.

The claim has now been submitted for closure and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from July 31, 1980 through November 2, 1980 and to an additional award of 6.75⁰ for 5% loss of the left foot for a total award to date of 57.9%.

The Board concurs with the award granted for permanent partial disability but must deny any compensation for temporary total disability. The evidence in the record is insufficient as to claimant's employment or lack thereof. If this information can be provided to the Board with proof of actual time loss from work, the Board will consider it.

IT IS SO ORDERED.

February 25, 1981

ARCHIE D. LAPPING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

The Board issued its Own Motion Determination on the above-entitled matter on October 22, 1980. That order granted claimant compensation for temporary total disability commencing November 12, 1979.

Subsequently claimant requested that the temporary total disability compensation be commenced as of June 12, 1979 instead of November 12, 1979. The SAIF Corporation objected to the June 12, 1979 date but was not opposed to changing the commencement date to July 11, 1979.

The Board finds the medical report of Dr. Brookhart insufficient to commence temporary total disability as of June 12, 1979 but finds when claimant sought treatment from Dr. Cherry on July 11, 1979 to be the proper date for reopening.

Therefore, the Board hereby amends its Own Motion Determination to reflect claimant's entitlement to compensation for temporary total disability commencing July 11, 1979.

IT IS SO ORDERED.

CLAIM NO. A 872730

February 25, 1981

JOHN D. MIZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant's claim was originally remanded to SAIF for acceptance with compensation for temporary total disability commencing August 15, 1977 by the Board's Order on Review dated February 16, 1979. This order indicated that closure would be pursuant to ORS 656.278.

The claim has now been submitted for closure and it is recommended by the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from August 15, 1977 through January 27, 1981 less time worked, and an award of 30% loss of function of an arm for unscheduled disability in addition to previous awards. The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 15, 1977 through January 27, 1981, less time worked, and to an award of 45% total loss of an arm for unscheduled disability. This award is in lieu of all prior awards.

WCB CASE NO. 80-1538

February 25, 1981

DIANNA M. MORTON, CLAIMANT
Foss, Whitty & Roess, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order of Abatement

On February 19, 1981 the Board received a Motion for Reconsideration of its Order on Review dated February 11, 1981.

In order to give fair consideration to this Motion, we are abating our Order as of the date below.

IT IS SO ORDERED.

CLAIM NO. C 275625

February 25, 1981

NELSON L. MUIR, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for a worsened condition arising out of his compensable injury of November 1970. Claimant's aggravation rights have run.

The Board concludes, based on the medical evidence provided from Dr. Weinman and the Orthopaedic Consultants that there has been no worsening of claimant's condition and, therefore, his request to reopen his claim is hereby denied.

IT IS SO ORDERED.

February 25, 1981

RICHARD R. PADDOCK, CLAIMANT
Kirk A. Schmidtman, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

The SAIF Corporation seeks Board review of the Referee's order which remanded claimant's claim for an alleged incident of July 25, 1979 to it for acceptance and payment for compensation to which claimant is entitled.

The question in this case is whether claimant's work activity and conditions caused a worsening of his underlying osteoarthritis resulting in an increase in pain to the extent that it produced disability or required medical services (emphasis supplied). This is a medical question involving complex and not totally understood medical theories (emphasis supplied). The answer, in any given case, must be provided by expert medical opinion. See Uris v. SAIF, 247 Or. 420. In this case, we have the opinion of a chiropractor, Dr. DeShaw, that the work activity worsened the pre-existing osteoarthritis at least temporarily. Dr. DeShaw's theory is that the work activity caused an infiltration of calcium deposits into the posterior joint area. On the other hand, Dr. Spady, a medical doctor specializing in orthopedics, stated the work activity "...caused a worsening of the symptoms of his osteoarthritis but did not cause a worsening of the underlying osteoarthritis" (emphasis added). In Hamlin v. Roseburg Lumber Co., 30 Or. App. 615 (1977), the Court indicates that the treating physician's opinion may be given more weight than a non-treating physician; in some instances, even when the non-treating physician is a specialist. In this case, Dr. Spady is the specialist. He examined the claimant, had the history including Dr. DeShaw's reports and reviewed the x-rays. We think Dr. Spady is better qualified to bring medical expertise to bear on the question of whether work activity worsened an underlying osteoarthritis. We find nothing in Hamlin (supra.) which prohibits such a conclusion. Also see Hammons v. Perini, 43 Or. App. 299, and Austin v. SAIF (citation omitted).

Adopting Dr. Spady's opinion and applying the test in Weller v. Union Carbide, 288 Or. 27 (1979), the claim is not compensable. The Referee's order is reversed and SAIF's denial is restored and affirmed.

ORDER

The order of the Referee dated September 8, 1980 is reversed.

The denial of the SAIF Corporation dated December 4, 1979 is affirmed.

February 25, 1981

JAMES E. POWERS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board issued its Own Motion Order on August 12, 1980 reopening claimant's claim for a worsened condition arising out of his industrial injury of March 18, 1973 as of the date of his recommended hospitalization.

The claim has now been submitted for closure and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from August 12, 1980 through January 14, 1981 and no further award of permanent partial disability.

The Board concurs with the failure to grant further permanent partial disability but denies granting claimant any temporary total disability at this time. The evidence of record is insufficient to determine whether or not claimant was employed prior to his hospitalization and whether he actually lost any time from work. See OAR 436-83-810(1)(b). If and when this information is provided, the Board may reconsider.

IT IS SO ORDERED.

OWN MOTION NO. 81-0009M
CLAIM NO. G01384

February 25, 1981

VONE POWERS, CLAIMANT
Michael B. Dye, Claimant's Atty.
Roger Luedtke, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to the provisions of ORS 656.278, and reopen his claim for a worsened condition arising out of his compensable industrial injury of January 19, 1972.

The one medical report submitted as evidence from Dr. Paluska is insufficient to support a finding of a worsened condition. However, claimant is entitled to medical care and treatment pursuant to the provisions of ORS 656.245.

Therefore, the Board denies claimant's request for it to exercise its own motion jurisdiction.

IT IS SO ORDERED.

WCB CASE NO. 79-7321 and February 25, 1981
OWN MOTION NO. 81-0032M

RONALD E. ROGERS, CLAIMANT
Keith D. Skelton, Claimant's Atty.
Noreen K. Saltveit, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Referring for Consolidated Hearing

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition arising from an industrial injury of September 5, 1968.

Claimant has filed an 801 alleging an injury of March 22, 1979 and a request for hearing was filed in WCB Case No. 79-7321.

The Board finds these two cases should be consolidated and heard before a Hearings Referee.

It is ordered that the Referee hold a hearing on a consolidated basis with this own motion request and WCB Case No. 79-7321 to take evidence on whether claimant's present condition is an aggravation of the 1968 injury or a new injury of March 22, 1979 or neither. The Referee shall have a transcript of the proceeding prepared and, together with his recommendation on the own motion matter, submit them to the Board. The Referee, on WCB Case No. 79-7321, will prepare a separate order with appropriate appeal rights.

IT IS SO ORDERED.

CLAIM NO. PC 473316

February 25, 1981

MICHAEL SOCIA, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board issued its own motion order on December 10, 1980 reopening claimant's claim pursuant to the provisions of ORS 656.278.

The claim has now been submitted for closure and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from August 27, 1980 through October 9, 1980, less time worked but no further award of permanent partial disability above that already awarded of 50% loss of the right leg. The Board concurs.

IT IS SO ORDERED.

OWN MOTION NO. 81-0036M
CLAIM NO. C 305780

February 25, 1981

EDWARD STANGL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant seeks reopening of his claim pursuant to ORS 656.278 for a worsened condition arising out of his industrial injury of May 26, 1971. Claimant's aggravation rights have run.

The carrier, SAIF Corporation, is not opposed to a reopening for the surgery recommended by Dr. McKillop.

The Board declines to reopen this claim at this time. Claimant's medical expenses for the surgery and medical care can and will be provided pursuant to ORS 656.245 without necessity of an own motion reopening. The Board cannot reopen this claim for additional benefits due to lack of information. We do not know if claimant has been employed, if he has missed any time from work if employed, and therefore no compensation for temporary total disability can be granted until the Board is provided with this information.

IT IS SO ORDERED.

OWN MOTION NO. 81-0039M
CLAIM NO. C 435926

February 25, 1981

EDWIN STEVENS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

The claimant seeks to have his claim reopened for a worsened condition related to his compensable industrial injury of April 20, 1973 pursuant to the provisions of ORS 656.278. Claimant's aggravation rights have run.

The Board, after thoroughly reviewing the evidence presented, denies claimant's request to reopen his claim. The record indicates that claimant ceased his employment in April 1980 because of worsening of his low back pain. The medical report from the Orthopaedic Consultants, however, indicates that claimant's back pain is due to the natural progression of his underlying osteoarthritis condition which is not related to his industrial injury. Therefore, the Board declines to exercise its own motion jurisdiction.

IT IS SO ORDERED.

WCB CASE NO. 79-10, 425

February 27, 1981

MICHAEL A. BROOKS, CLAIMANT
Thomas E. Sweeney, Claimant's Atty.
Lang, Klein, et al, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer/carrier seeks review by the Board of the order of the Referee which reversed its denial and remanded claimant's claim to it for acceptance and the payment of benefits as required by law.

The Board, after de novo review, would modify the Referee's conclusion. We find, as he did, that claimant's claim is compensable. We also find, however, that the surgery performed by Dr. Harris is not compensably related to his industrial injury based on the evidence presented. Dr. Harris reported that synovial plica, which he felt was a poorly understood phenomenon, and any relationship to trauma has not been proven, and the doctor found that the injury could have been instrumental in causing the condition to become symptomatic. The Board finds, under the criterion set forth in Weller v. Union Carbide, 288 Or. App. 27 (1979) claimant has not carried his burden of proof.

ORDER

The order of the Referee, dated July 31, 1981, is modified.

Claimant's surgery performed by Dr. Harris is found not be be causally related to his compensable industrial injury.

The attorney fee granted by the Referee at the hearing level is reduced from \$750 granted by the Referee in his order to \$450, payable by the employer/carrier.

CLAIM NO. AK 909 February 27, 1981

IRENE CORNELIUS, CLAIMANT
Dan O'Leary, Pozzi, Wilson, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, through her attorney, has moved for own motion relief.

Claimant was compensably injured December 2, 1974. Her aggravation rights have apparently expired.

Claimant's request for own motion relief is accompanied by two reports from Dr. Francis P. Nash. Dr. Nash finds that claimant's condition is worsened, that her present "complaints are the residuum of injuries sustained December 2, 1974," and recommends surgery.

Three months ago the Board requested, in writing, that North Pacific Insurance Company state its position. Since then by phone the Board has repeated its request several times. North Pacific has not responded. The Board has reported this failure to respond to the Director of the Workers' Compensation Department.

Dr. Nash's reports document a worsened condition, a casual relationship to the 1974 injury and the need for surgery. The Board finds that claimant is entitled to have her claim reopened upon her hospitalization for the recommended surgery.

IT IS SO ORDERED.

February 27, 1981

JAMES CROW, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

The SAIF Corporation has provided the Board with current medical reports and claimant's request for it to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of January 3, 1975.

On January 8, 1981, claimant underwent surgery for excision of a Baker's cyst which Dr. Lisac relates to his industrial injury.

The Board finds that claimant's hospitalization and medical expenses are to be paid under the provisions of ORS 656.245, but claimant's claim will not be reopened, and he will not be paid compensation for temporary total disability. The Board has not been provided with any information regarding claimant's employment status prior to his hospitalization and, therefore, does not know if claimant was employed and lost time from work. When and if this information is provided to it, the Board will then reconsider claimant's entitlement to temporary total disability compensation.

IT IS SO ORDERED.

February 27, 1981

HERMAN FLEISHMAN, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order on Reconsideration

On January 14, 1981, claimant, by and through his attorney, request the Board reconsider its December 16, 1980 Order on Review. After a thorough consideration of claimant's arguments, the Board concludes that its order should remain unchanged. Claimant's request to delete all portions of our order which refer to an alleged new injury is hereby denied.

ORDER

The order of the Board, dated December 16, 1980, is hereby affirmed and republished.

February 27, 1981

GEORGE KRUEGER, CLAIMANT
Nepom & Ross, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The Board issued an Own Motion Order on November 13, 1979 which ordered claimant's claim to be reopened upon his entering the Pain Center or his hospitalization for medical treatment.

Claimant was admitted to the Pain Center on November 3, 1980 and was discharged on November 21, 1980. Upon discharge, his claim was submitted for closure. It is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from November 3, 1980 through November 21, 1980 but not further award of permanent partial disability.

The Board agrees with the recommendation on permanent partial disability but denies claimant compensation for temporary total disability. The evidence of record indicates that claimant has not been gainfully employed since 1977 and, therefore, he has sustained no time loss for which compensation is due.

IT IS SO ORDERED.

February 27, 1981

ROBIN A. PARKER, CLAIMANT
Dwight Ronald Gerber, Claimant's Atty.
Schwabe, Williamson, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which granted claimant compensation equal to 96% for 30% unscheduled shoulder disability. The employer contends that this award is excessive.

After de novo review, the Board comes to a different conclusion that the Referee. Claimant's impairment has been consistently rated by the doctors as mild. Additionally, there is strong evidence that this disability could be decreased with weight loss and exercises. Claimant is relatively young with a high school education plus additional courses. It appears that claimant's symptoms have been exaggerated and, in fact, much of her disability is due to an unrelated back injury. She is still able to do cake decorating on a part time basis along with selling home interior products. It appears that the fact claimant is working part time is by her choice rather than necessitated by her shoulder disability. The Board concludes that claimant would be adequately compensated for her disability as it is presently with an award equal to 64° for 20% unscheduled shoulder disability.

ORDER

The order of the Referee dated May 30, 1980 is modified.

Claimant is hereby granted compensation equal to 64° for 20% unscheduled disability for injury to her right shoulder. This award is in lieu of any previous awards claimant has been granted for this industrial injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-6793

February 27, 1981

ROBERT SAUNDERS, CLAIMANT
Randolph Pickett, Claimant's Atty.
Schwabe, Williamson, et al, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer, Tri-Met (self-insured), seeks Board review of the Referee's order which remanded claimant's claim for a new injury in January 1979 to it for acceptance and payment of all benefits as required by law and affirmed the SAIF's denial of aggravation.

The Board, after de novo review, would affirm and adopt the conclusions reached by the Referee.

In this case, Compliance Division of the Workers' Compensation Division, on June 20, 1979, issued a 307 order which designated SAIF as the paying agent until a hearing could be held to determine which carrier was responsible for claimant's condition. On July 30, 1979 SAIF issued a denial. The Referee in his order found that the 307 proceeding was no longer before him and the issue, at least as it pertained to SAIF, had become compensability.

The Board does not agree. The 307 order stands. SAIF's denial did not deny compensability, it denied aggravation and contended that claimant's January 1979 incident was a new injury. Therefore, the issue of which carrier was responsible for claimant's condition was the issue before the Referee regardless of Mr. Hess's attempt to be equivocal, at best, at the hearing.

ORDER

The order of the Referee dated June 30, 1980 is affirmed.

WCB CASE NO. 79-6171

February 27, 1981

THOMAS TRUESDALE, CLAIMANT

Samuel A. Hall, Jr., Claimant's Atty.

Paul L. Roess, Atty. for SAIF.

Request for Review by SAIF

This is a denied claim and the SAIF has requested review of the Referee's decision which ordered:

"...the denial letter of August 21, 1978 be set aside and the cervico-thoracic strain and attendant symptomatology be accepted as a compensable injury incurred on June 22, 1978 in the course of the claimant's employment with Lektro, Inc."

The SAIF denied the claim by letter dated August 21, 1978, stating:

"...that it appears your need for seeking medical treatment was not a direct result of a work injury June 22, 1978 while employed by Lektro, Inc., or that your injury arose out of the course and scope of your employment."

SAIF contended at hearing (1) that the claim was not compensable in the first instance, (2) that claimant's request for hearing on the denial was not timely, and (3) in any event the condition treated by Dr. Rabin and any attendant disability is not compensably related to the alleged injury of June 22, 1978.

First, we must decide whether the request for hearing was timely. The Referee found it was, and we agree. The simple fact is the claimant did not receive the required written notice of denial; once he had the required written notice, his attorney, in his behalf, timely filed a request for hearing. The fact that claimant may have known or suspected his claim would be denied does not satisfy the statutory requirement. The SAIF did not establish that claimant purposely refused to acknowledge receipt of the denial letter which could have allowed an inference that he knew the claim had been denied and schemed to avoid written notice.

At the time the SAIF was advised of non-delivery of the letter of denial, it reasonably could have taken additional steps to attempt delivery such as simply remailing the letter. This observation seems the more reasonable considering the SAIF's contention that the mailing of the denial letter and the mailing of the compensation checks occurred on the same day.

The next question is whether the claimant has proved a compensable injury on June 22, 1978 arising out of the conditions of his employment. At the time claimant was examined by Dr. Patrick at the emergency room of the hospital, his complaint is listed as "back pain." This was recorded on June 23, 1978. The findings on examination were essentially negative, yet with a notation of subjective complaint of "pain in left shoulder" and the additional observation of "apparently lifting yesterday and had some discomfort. Had something pop this AM." Despite the negative examination, pain medication was prescribed. Dr. Patrick felt the symptoms related by claimant were of "undetermined" cause. When Dr. Foster saw claimant on June 25, 1978, he secured a history consistent with that obtained by Dr. Patrick. He found objective evidence of muscle spasm in the neck with tenderness "at the medial border of the scapula and the muscle is in some degree of spasm." Dr. Foster diagnosed "probable muscle spasm" and noted scoliosis. Taking the recited medical evidence together with the claimant's testimony, we affirm the Referee on the issue of compensability.

The next question is whether the treatment provided by Dr. Rabin commencing on April 10, 1979 is compensably related to the June 22, 1978 injury. The Referee found it was; we disagree and reverse. Dr. Rabin diagnosed "acute cervico-thoracic strain with attendant paraspinal myofascitis" (emphasis supplied). Dr. Rabin's opinion on causation is based on a faulty history and his treatment is of a condition not found by either Dr. Patrick or Dr. Foster. There is nothing in the early medical evidence which supports a finding of a mid-back strain which, in April 1979, is found to be acute with the additional finding of "paraspinal myofascitis." We are not persuaded by Dr. Rabin's opinion.

Although it is not determinative, we feel constrained to comment on the fact that claimant accepted wages, unemployment compensation benefits and workers' compensation benefits for overlapping periods of time. Even if claimant is unschooled in wage replacement programs, there is no reasonable basis to believe that he did not at least understand the simple meanings of the words.

ORDER

The order of the Referee, dated May 19, 1980 and reaffirmed July 21, 1980, is modified.

The denial of SAIF Corporation, dated August 21, 1978, is hereby set aside.

Claimant's claim for an injury sustained on June 22, 1978 is remanded to SAIF Corporation for acceptance and payment of compensation to which he is entitled. SAIF is directed to pay the medical bills of record from June 22, 1978 through June 25, 1978.

The medical services provided by Dr. Rabin are not compensable and are not SAIF Corporation's responsibility.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services on Board review a sum equal to \$400, payable in addition to any compensation claimant will receive as a result of this order.

February 27, 1981

JAMES D. TURNBULL, CLAIMANT
Olson, Hittle, et al, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requested that the Board exercise its own motion jurisdiction, pursuant to the provisions of ORS 656.278 and reopen his claim for a worsened condition arising out of his industrial injury of July 22, 1969.

The Board referred this case to the Hearings Division to be consolidated with WCB Case No. 80-1327 for the Referee to take evidence on all issues before him.

After holding a comprehensive hearing, the Referee made his recommendation that, based on all the evidence presented to him at that hearing, that claimant's condition arising out of his July 22, 1969 injury had worsened and that claimant's claim should be reopened as of the day he last worked prior to his January 2, 1979 surgery. The Board concurs with the well reasoned conclusion of the Referee.

ORDER

Claimant's claim is hereby remanded to the employer, a self-insured, for reopening commencing the date claimant last worked prior to his January 2, 1979 surgery and until closure is authorized pursuant to ORS 656.278.

February 27, 1981

SUSAN WARNACK, CLAIMANT
Stoel, Rives, et al, Claimant's Attys.
Gary D. Hull, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed the January 3, 1980 denial of the claimant's aggravation and medical services claim.

Claimant sustained an injury to her right knee on March 11, 1976 which was accepted as a compensable injury and was closed by a Determination Order issued on June 20, 1978. When claimant's knee began causing her problems with increasing regularity and severity in the fall of 1979, she again sought medical treatment and sought to reopen her claim.

FEBRUARY 3, 1981

CLEVE CLAPP, CLAIMANT
Samuel Hall, Claimant's Attorney
Lang, Klein, et al, Defense Attorney
Order on Review

Reviewed by the Board en banc.

This is an appeal by the claimant on the issue of extent of permanent disability. He contends he is permanently and totally disabled. The Referee affirmed the Determination Order which had awarded him 100% loss of the right arm and 90% unscheduled disability. The employer cross appeals contending the unscheduled disability award is excessive.

We find that the claimant has established by a preponderance of the medical and lay evidence that he is permanently and totally disabled.

The claimant is reminded that our finding of permanent total disability does not end his responsibility to make every reasonable effort to reduce his disability and to cooperate in all efforts to return him to suitable and gainful employment. To this end, we recommend the Field Services Division contact this claimant once again and offer its services.

ORDER

The order of the Referee is modified. The claimant is awarded permanent total disability compensation effective the date of the third Determination Order, dated June 19, 1978. The carrier is authorized to offset any payments made pursuant to the Determination Order against this award.

Claimant has apparently changed attorneys since he first requested a hearing, and his then current attorney submitted a fee agreement for approval. The Board will thus take up the question of attorney fees upon receipt of a fee agreement from claimant's current attorney.

Claimant's attorney is entitled to an attorney fee payable from claimant's compensation. However, the Board does not set attorney fees in the abstract; it only can approve the fee agreement between an attorney and a claimant. OAR 438-47-010(3). There is a fee agreement between claimant and the attorney who represented him at the hearing level. There is no fee agreement between claimant and the different attorney who represented him on Board review in the record. Therefore, the Board defers any consideration of attorney fees until it has a fee agreement between claimant and the attorney who represented him on Board review.

What we have here is an appeal record fraught with contrasting evidence, both in terms of conflicting medical opinions, some of which were based on less than full disclosure of the circumstances, and testimony which appeals to be somewhat less than credible.

Upon review of the record, the Board finds that the Referee properly weighed the evidence before him, including its inconsistencies, and that the Referee accurately concluded that claimant has failed to sustain her burden of proving a valid aggravation claim.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee.

ORDER

The order of the Referee, dated May 9, 1980, is affirmed.

WCB Case No. 79-4634

FEBRUARY 3, 1981

JAY SYROP, CLAIMANT

Robert H. Grant, Claimant's Attorney

SAIF Corporation

Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks review by the Board of the order of the Referee which affirmed the SAIF Corporation's denial of claimant's claim on May 7, 1979.

The Board would reverse the Referee's order and find claimant's claim is compensable. Claimant testified to sustaining an injury at work on March 29, 1979, and a co-worker testified that the next day claimant told him he hurt his back the day before with the lawnmower.

The testimony further revealed that the night of the alleged injury, March 29, 1979, claimant went to his part-time job, and he testified he took frequent breaks and had to lay down in his van. This testimony was corroborated by the manager of the disco where claimant was employed. The manager testified when claimant came to work that night, he said he had hurt his back that day at work with a lawnmower. The manager further testified to observing claimant in pain.

The day after the alleged injury claimant saw Dr. Gilsdorf and gave the same history of injury as he testified to at the hearing.

The evidence reveals, contrary to claimant's testimony, that on one occasion he sought medical care, in December 1976, for low back pain with radiation. Claimant did not recall seeking this treatment. Be that as it may, claimant's failure to mention this "one time" isolated incident of medical care and history thereof to Dr. Gilsdorf is really insignificant to the issue before us.

The Referee based his conclusion to affirm the denial on claimant's failure to prove by a preponderance of the evidence that the source of his current back problems was the "sole" result of the incident at work on March 29, 1979. The Board finds that claimant need not prove that the source of his current problems be the sole result of that work injury. Hutcheson v. Weyerhaeuser, 288 Or. 51 (1979). The test is, does evidence establish that the fact asserted is more probably true than not? Claimant saw a doctor one time in December 1976 with no evidence that he sought any further medical care or had any recurrent problem until this industrial injury, well over two years later. The probability test is met. Further, it is enough that claimant proved, in our opinion, that the injury of March 29, 1979 was a contributing cause for the subsequent need for medical treatment.

ORDER

The order of the Referee dated January 25, 1980 is reversed.

Claimant's claim is hereby remanded to the SAIF Corporation for acceptance and payment of benefits as required by law until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is hereby granted as and for a reasonable attorney fee the sum of \$500 at the hearing level and \$300 for his services at Board review, payable by the SAIF Corporation.

WCB Case No. 80-867

FEBRUARY 3, 1981

GEORGE WOOSLEY, CLAIMANT
Charles Tauman, Claimant's Attorney
Thomas J. Mortland, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the denial of compensability of his hand and wrist condition.

The Board would modify the conclusion reached by the Referee. The evidence supports a finding that claimant's diagnosed condition of wrist sprain or tendonitis arose out of his employment. This support comes from claimant's testimony, and the testimony of two co-workers to whom claimant made complaints of pain before the woodcutting incident.

Claimant testified that the woodcutting incident aggravated his already painful wrist and caused him to seek medical services.

The only medical report of record from Dr. Carter indicates claimant told him he was having considerable symptoms prior to the exacerbation precipitated by his cutting wood. The doctor felt claimant's symptoms were consequently work related and authorized a period of time loss.

Based on the above, the Board concludes claimant's tendonitis condition did arise out of his employment but was non-disabling. Claimant's off-the-job aggravation of woodcutting with a painful symptomatic wrist condition led to his seeking medical attention.

ORDER

The order of the Referee dated July 8, 1980 is modified.

The denial issued by the carrier is modified to the extent that the tendonitis condition did arise out of employment but was non-disabling.

WCB Case No. 78-9709 MARCH 3, 1981

MYRL C. BLUHN, CLAIMANT
Lang, Klein, et al, Claimant's Attorneys
SAIF Corporation
Order on Reconsideration

On February 23, 1981, the SAIF Corporation requested that the Board reconsider its Order on Review dated February 18, 1981. SAIF contends claimant is not entitled to additional compensation for temporary total disability from January 26, 1978 through June 2, 1978.

The Board concludes that the evidence in this case is sufficient to establish a worsening of claimant's condition as of January 26. SAIF indicated that "...it is to be inferred that she did receive unemployment benefits from March 25 until April 9..." The Board finds that an "inference" is the most that can be established here. If claimant did, in fact, receive double payments during this period of time, we find that this should be handled administratively by SAIF and not as a directive from the Board.

The Board's Order on Review is reaffirmed.

IT IS SO ORDERED.

WCB Case No. 80-2274 MARCH 3, 1981

HENRY L. SAN MIGUEL, CLAIMANT
Jim Slothower, Claimant's Attorney
Marcus K. Ward, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) and claimant seek Board review of the Referee's order which affirmed the SAIF's denial of claimant's claim for an alleged injury of March 9, 1979 but granted claimant time loss benefits from December 13, 1979 through February 12, 1980 plus penalties and an attorney's fee. Claimant contends that he showed good cause for his late filing and the claim should be determined to be compensable. SAIF contends they should not be required to pay interim compensation, penalties and an attorney's fee based on ORS 656.265(4)(b).

After de novo review, the Board finds that the Referee's order should be modified. We concur with the Referee's finding that claimant failed to show good cause for filing his claim nine months after the alleged incident. Based on this conclusion, the issue of compensability is moot. However, on the merits of the claim, the Board finds claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on March 9, 1979.

The Board agrees that SAIF is responsible for interim compensation, penalties and attorney fees under the provisions of ORS 656.262(4) and (8). However, the Board does not feel that SAIF was necessarily "unreasonable" in its resistance to the payment of compensation. The evidence indicates that if claimant had not been terminated from his job in November 1979, he may not have had the surgery in December. Because of the work load

at claimant's place of employment, he was having a difficult time finding an appropriate date to have the surgery. Up to the date of his termination, claimant was not disabled and had missed no time from work. Even when claimant was in the hospital he was not missing time from work per se, as he had no job at the time. The Board does realize, however, that if claimant had been working, he would have been temporarily disabled by virtue of the fact that he was in the hospital and later recovering. Under the statute, SAIF is obligated to pay interim compensation, penalties and attorney's fees, but the Board feel that the Referee granted claimant an excessive amount. There is no evidence to grant claimant compensation back to the date he was terminated as he contends. The dates of claimant's interim compensation should remain unchanged. However, we conclude the penalty should be reduced to an award equal to 5% of that amount and the attorney fee should be reduced to \$200.

ORDER

The Referee's order, dated August 26, 1980, is modified.

That portion of the Referee's order which granted a penalty shall be modified. Claimant is hereby granted a penalty in the amount of 5% of the interim compensation granted by the Referee's order. This is in lieu of the penalty granted by the Referee.

The attorney fee granted by the Referee shall be reduced from \$750 to the sum of \$200.

The remainder of the Referee's order is affirmed.

WCB Case No. 78-9001 MARCH 2, 1981

EDWIN A. BOLLIGER, CLAIMANT
David W. Hittle, Claimant's Attorney
SAIF Corporation
Order of Abatement

The Board issued its Order on Review on February 11, 1981. Claimant, by and through his attorney, entered a Motion on Reconsideration received by the Board on February 23, 1981. To date there has been no response from the Fund, therefore, so appeal rights do not run, and to give the Board time to fully consider the merits of claimant's contentions, we hereby abate our Order on Review of February 11, 1981. An order will be issued with new appeal rights.

IT IS SO ORDERED.

MARCH 4, 1981

ARYE NELL COLBERT, CLAIMANT
Bloom, Ruben, et al, Claimant's Attorneys
SAIF Corporation
Order on Reconsideration

Claimant, by and through her attorney, moves the Board to reconsider its decision made in its Order on Review of February 13, 1981. The motion is denied.

The evidence indicates that claimant's job-related injury required extensive treatment. As time went on, the doctors began to report that claimant had a functional overlay problem. Claimant had a pre-existing psychological condition.

Claimant's attorney contends in his motion that there was no direct contrary evidence that claimant's underlying condition was not worsened. The Board finds that there was no direct evidence showing that her underlying psychological condition dis worsen. It is true that claimant was hospitalized for her psychological condition, but it was not due to her physical injury. The evidence indicates that her depression had been an on-going problem for years, even prior to this industrial injury.

Therefore, the Board finds its Order on Review made the proper decision and claimant fails in her contention based on failure of proof.

IT IS SO ORDERED.

Claim No. 75000086

MARCH 4, 1981

DONALD D. FAST, JR., CLAIMANT
Pozzi, Wilson, et al, Claimant's Attorneys
Gates McDonald, Defense Attorney
Amended Own Motion Determination

This Amended Own Motion Determination is to correct the term of temporary total disability from that shown as July 21, 1980 through July 31, 1980 to the correct dates of June 13, 1980 through July 31, 1980.

IT IS SO ORDERED.

MARCH 4, 1981

MICHAEL L. HATHAWAY, CLAIMANT
Jan Baisch, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by the Board en banc.

SAIF seeks Board review of the Referee's order which:
(1) Rated claimant's disability at 15% loss of function in each hand caused by Reynaud's syndrome; and (2) directed SAIF to pay outstanding medical bills plus a penalty and attorney fees for not having previously done so.

The Board affirms the rating of claimant's disability. We do not completely agree with the Referee's analysis and rationale; rather, we agree with and adopt the analysis and rationale contained in claimant's brief before the Board.

The Board reverses the Referee's order to pay medical bills, a penalty and attorney fees. Toward the end of the hearing, the Referee stated:

"And following an off-the-record discussion between the claimant and his attorney, it is agreed that the issue of nonpayment of the medical bills has been withdrawn. So, our sole issue will be the extent of disability."

The claimant's brief before the Board concedes that this issue was withdrawn at the hearings level, and obliquely concedes that this portion of the Referee's order is erroneous. The most charitable thing that can be said is that the Referee forgot what he had said the "sole issue" was between the conclusion of the hearing and the issuance of his Opinion and Order.

ORDER

The Referee's rating of claimant's scheduled disability is affirmed. The remainder of the Referee's order is reversed.

GARY L. MUMBLO, CLAIMANT
Brian L. Pocock, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of the Referee's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation. The Board reverses the order of the Referee.

Claimant originally injured his back in December 1975 when he twisted it while working on a ladder. There is very little medical information in the record about claimant's condition at that time. The diagnoses were muscle spasm or strain. Claimant's treatment was conservative, apparently consisting of muscle relaxant medication, pain medication and physical therapy.

During 1978 and 1979 claimant was treated by Dr. Edward M. Geller, a chiropractor. Dr. Geller's reports are the only medical evidence offered in support of claimant's aggravation claim. Dr. Geller found claimant's condition was worsened based solely on claimant's history. Dr. Geller failed to relate claimant's current problems to his 1975 injury except by history. Indeed, not having examined or treated claimant before 1978 nor, so far as the Board can tell, having reviewed the prior medical reports, there is little or nothing Dr. Geller could say (except to repeat claimant's history) that would be probative that claimant's condition had worsened in a compensable sense. The Board is not persuaded by Dr. Geller's reports.

The Board finds the report of Dr. Darrell T. Weinman more persuasive. Dr. Weinman, an orthopedist, treated claimant at the time of his 1975 injury. He again examined claimant in connection with claimant's aggravation claim. Dr. Weinman found no compensable aggravation. He stated:

"X-rays from this office dated January 9, 1976 have been compared to the lateral x-ray from

Dr. Geller's office which was taken July 13, 1979. Narrowing at L4-5 is noted on both films and they can be superimposed showing no additional narrowing at L4-5 in the interval. L5-S1 can likewise be superimposed and there has been no change on this film. Oblique x-rays have been obtained here today and compared with the oblique x-rays taken in 1976 and no subluxation or narrowing of the facet joints at L4-5 or L5-S1 is noted on these films, i.e., no change between the x-rays of 1976 and 1979.

"X-rays of the cervical spine have been reviewed here and, on re-examination, especially on the forward flexion view and the x-rays taken on January 9, 1976, there seems to be a bit of narrowing between C5-6. This is an equivocal finding. A new flexion lateral taken today shows spurring and narrowing which has been progressive, at C5-6, and there is a definite interval change in that x-ray.

"This patient's evaluation above shows some contradictory physical findings, specifically the straight leg raising test. It seems to be positive for back pain at 30° bilaterally, yet the confirmatory test which is called Brittain's test is negative. The two should be the same if there is a true organic or physical problem with the back. This would probably indicate that he does not have nerve root pressure. He has normal reflexes. The range of motion of his lumbar spine is less than it was back in 1976, especially on forward flexion. Whether or not this can be called an objective physical finding is debatable.

"...it is my opinion that his injury of December 17, 1975 was an aggravation of probable pre-existing degenerative disc disease at L4-5 and that he recovered from it. The latest exacerbation is probably not related to his accident of December 17, 1975 but merely another in a long series of exacerbations of low back pain and stiffness that he will probably go through because of his degenerative disc disease at L4-5 which is stable.

"...I feel the patient has had some progression of a C5-6 problem on x-ray but this hasn't been accompanied by a worsening of his subjective complaints. He has lack of objective physical findings in the neck area. His lumbar problem has stayed stationary on x-ray but has continued to cause exacerbations and remissions of low back pain which I think are not related to his injury of December 17, 1975."

Dr. Weinman was more qualified than Dr. Geller by training. Dr. Weinman was in a superior position, having treated claimant at the time of his original injury. Dr. Weinman presented reasoning and analysis, including comparisons of x-rays, to support his conclusion; relatively speaking, Dr. Geller presented none. The Board finds the report of Dr. Weinman so overwhelmingly more persuasive that, even if the burden of proof were switched, we could affirmatively say that no compensable aggravation was proven.

ORDER

The order of the Referee, dated June 27, 1980, is reversed.

The denial of the SAIF Corporation, dated November 26, 1979, is affirmed.

WCB Case No. 78-7877 MARCH 4, 1981

MICHAEL D. NATIONS, CLAIMANT
Dick Goss, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of the Referee's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation. The Board reverses the order of the Referee.

Claimant sustained an on-the-job injury to his left ankle in September 1975. Claimant sustained an off-the-job injury to his left ankle in July 1978; his left ankle "just gave out" and he fell while running down the highway after his car had broken down.

Claimant's brief succinctly states the issue:

"There is only one issue to be decided here, and it is purely a question of fact: Was there a laxity in the ankle from the initial compensable injury which caused the ankle to give out in 1978?"

There is no direct medical evidence of laxity as a result of the 1975 compensable injury. Instead, claimant's case is circumstantial. In 1975 there was "moderate tenderness to palpation over the area of talofibular ligament;" in 1978 there was "significant ligamentous injury to the anterior talofibular and calcaneofibular ligaments" (emphasis supplied). In addition to this evidence of injury to the same ligament, the claimant testified that his ankle had been "floppy" since his 1975 injury and that there was no other apparent reason for his 1978 fall. The Referee found claimant credible.

This is an impressive circumstantial case but not enough, the Board finds, to tip the scale in claimant's favor. Claimant saw no physicians about his ankle condition between his treatment in 1975 and his fall in 1978. Claimant had won ribbons in track and field events in high school, primarily as a sprinter. In 1978, when he was about 30 years old, he was sufficiently involved in recreational running to select that means of going for help after his car broke down. The Board is not persuaded that such a skillful and experienced runner would not have sought any medical attention for the continuing ankle problem between 1975 and 1978 that claimant testified to experiencing.

ORDER

The order of the Referee, dated May 19, 1980, is reversed.

The denial issued by the SAIF Corporation, dated September 15, 1978, is affirmed.

WCB Case No. 79-9409 MARCH 4, 1981
WCB Case No. 79-1579
WCB Case No. 78-8036

JAMES F. RAIFSNIDER, CLAIMANT
Richard A. Carlson, Claimant's Attorney
Robert H. Fraser, Defense Attorney
Order on Review

Reviewed by the Board en banc.

This case is before us for review. The record is a hopeless and unintelligible mess. This Board has better things to do with its finite resources than to attempt to issue a decision that brings order to this chaos. We will therefore only state our conclusions.

Claimant contends that his low back condition and his right shoulder condition are compensable. The Board finds that his low back condition is not compensable because: (1) We are not persuaded by the medical evidence that it arose out of and in the course of employment; and (2) claimant's various and assorted claims for his low back condition were not timely. The Board finds that claimant's shoulder condition is compensable.

The greatest mystery in this case--unexplained anywhere in the record--is that while, on the one hand, the employer seemed to be denying claimant's shoulder claim, on the other hand a Determination Order issued on the extent of claimant's shoulder disability. The Referee found that claimant was 25% permanently partially disabled because of his shoulder condition. The Board agrees.

The Referee ordered that the insurer pay a penalty and attorney fee because of unreasonable refusal to pay compensation. The Board finds that there was genuine and understandable confusion about what claimant was claiming, when he was claiming it, and what the basis of the claims was. We, therefore, conclude that any refusal to pay compensation, albeit erroneous as to claimant's shoulder condition, was not unreasonable.

ORDER

The several denials issued by the insurer with respect to claimant's low back condition are affirmed; the Referee's contrary finding is reversed. Any denials issued by the insurer with respect to claimant's shoulder condition are reversed.

Claimant is awarded permanent partial disability equal to 80% for 25% unscheduled disability for injury to his right shoulder. In all other respects, the Determination Order dated September 17, 1979 is affirmed.

Claimant's fee agreement with his attorney is approved, and claimant shall pay his attorney, out of the increased compensation awarded, the sum of \$1,000.00. This fee is for representation at both the hearings level and on Board review. This fee is in lieu of fees awarded by the Referee.

BARBARA RUPP, CLAIMANT
Dan DeNorch, Claimant's Attorney
Ridgway K. Roley, Jr., Defense Attorney
Order Vacating Order of Dismissal

On February 23, 1981 the Board granted the motion of the employer and insurer to dismiss claimant's request for Board review. Subsequently we received claimant's argument in opposition to the motion to dismiss. We treat claimant's argument as a motion to reconsider our order of dismissal. And, upon reconsideration, we vacate our prior order.

The issue is whether failure to serve copies of a request for Board review on all adverse parties within 30 days is jurisdictional.

The Referee's decision in this case was entered on January 9, 1981. Claimant's pro se request for Board review is dated February 3, 1981, postmarked February 4, 1981 and was received by the Board on February 5, 1981. The postmark date is 26 days after the Referee's decision.

The motion to dismiss documents that claimant did not mail copies of her request for Board review to the employer and insurer until February 11, 1981. That was 33 days after the Referee's decision.

In short, claimant served her request for Board review on the Board within 30 days, but did not serve copies upon the adverse parties until after 30 days.

There are two relevant statutes. ORS 656.289(3) provides in part:

"The order [of the Referee] 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 656.298."

ORS 656.295(2) provides:

"The request for review shall be mailed to the Board and copies of the request shall be mailed to all parties to the proceeding before the referee."

Although the requirement of service on the Board within 30 days is clear, and although the requirement of service on the other parties at some point is clear, the statutes do not expressly require service on the other parties within 30 days.

This Board's rules take a lenient attitude toward service deadlines. OAR 436-83-700(2) provides: "The 30 days of ORS 656.289(3) is satisfied upon mailing the request [for review] to the Board." In other words, postmark controls. And although not here directly relevant, OAR 436-83-505 provides in part: "Aggravation claims filed through the Board shall be forwarded forthwith to the DRE/SAIF and considered filed under ORS 656.273(4) on the date received by the Board."

Consistent with there being no express statutory requirement that the parties be served within 30 days, and consistent with the lenient attitude of our rules, the Board now concludes that failure to serve the parties within 30 days does not defeat this Board's jurisdiction. A different question might be presented if there were grossly unreasonable delays in serving a party with a request for Board review; but we do not think the three day delay involved in this case was unreasonable. A different question might be presented if a party who did not receive timely service established prejudice; but the employer and insurer involved in this case do not claim prejudice.

ORDER

This Board's order of dismissal, dated February 23, 1981 is vacated.

WCB Case No. 80-4999 MARCH 4, 1981

PHILLIP B. STEVENS, CLAIMANT
Harold W. Adams, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order which dismissed his request for hearing. Claimant apparently contends entitlement to temporary total disability compensation, penalties and attorney fees.

The Board finds that the Referee's Amended Opinion and Order makes an erroneous analysis regarding deferred cases. A claim which is deferred by a carrier does not stop the obligation of the carrier to process the claim according to statute. The claim must be accepted or denied within 60 days. This was not done in this case. However, because claimant was back to work and missing no time, there is nothing on which this Board can base a penalty. Moreover, the Board will not award attorney fees when an attorney's efforts do not result in any payment to his or her client.

The Referee's order should have stated that claimant is not entitled to additional temporary total disability compensation or penalties and attorney fees, rather than dismiss the request for hearing.

Despite our disagreement with some of the Referee's analysis, we agree with the Referee's conclusion. Because of this appeal, it is obvious that claimant is dissatisfied with that conclusion, but we find claimant's contentions about his entitlement to additional benefits to be unintelligible. Therefore, the Board agrees with the Referee that claimant take nothing from these proceedings.

ORDER

The Referee's order of August 21, 1980 as amended September 12, 1980 is affirmed.

WCB Case No. 79-2960 MARCH 4, 1981
WCB Case No. 79-6387

GLENN R. STOSE, CLAIMANT
Bloom, Ruben, et al, Claimant's Attorneys
SAIF Corporation
Order on Reconsideration

Claimant, by and through his attorney, requests, by Motion for Reconsideration dated February 20, 1981, that the Board reconsider its Order on Review of February 12, 1981 and find that claimant's psychological condition is compensably related to his industrial injury of June 27, 1977.

After giving due consideration to this request, the Board concludes that claimant's contentions are without merit, and our decision in this matter is unchanged.

IT IS SO ORDERED.

WCB Case No. 80-2667

MARCH 4, 1981

BLAINE J. VOGT, CLAIMANT
Greg West, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's March 5, 1980 denial of his alleged aggravation claim.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee.

ORS 656.298(5) dictates that the Board review only the evidence before the Referee at the time of the hearing. It is the Board's practice to consider new evidence only when both parties agree that it do so. Claimant had an opportunity to solicit additional reports from Dr. Danner and Dr. Shaw prior to the hearing. He failed to do this and SAIF Corporation objects to the submission of these new reports now. The Board hereby denies claimant's request to consider new evidence.

ORDER

The order of the Referee, dated July 11, 1980, is affirmed.

WCB Case No. 78-04721 MARCH 9, 1981

CLEVE E. CLAPP, CLAIMANT
Samuel Hall, Jr., Claimant's Attorney
Lang, Klein, et al., Defense Attorney
Corrected Order on Review

This Corrected Order on Review is to show the correct date of the original Order on Review in this matter as being March 9, 1981 instead of as shown as February 3, 1981. Appeal rights commence as of the date shown below.

IT IS SO ORDERED.

WCB Case No. 79-9637

MARCH 10, 1981

ROBERT O. BORDERS, CLAIMANT
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corporation
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 Referee is final by operation of law.

Claim No. GA 779323

MARCH 10, 1981

CHARLES BREWSTER, CLAIMANT
SAIF Corporation
Own Motion Determination

The Board issued its own motion order on July 24, 1980 and reopened claimant's claim for a worsened condition related to his industrial injury of February 5, 1960.

The claim was submitted for closure and it was the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from May 12, 1980 (per Own Motion Order) through January 11, 1981, less time worked and to an award of 30% loss of right arm.

The Board concurs with the compensation for temporary total disability as recommended but disagrees with granting claimant any further award of permanent partial disability. The Evaluation Division found the information on claimant's prior awards was either lacking or "sketchy." The Board, after contacting the carrier, has found claimant has been adequately compensated for the loss of function of his right extremity.

IT IS SO ORDERED.

Claim No. 323765

MARCH 10, 1981

BERNARD O. CASPER, CLAIMANT
SAIF Corporation
Own Motion Determination

The Board issued its Own Motion Order dated February 15, 1980 for a worsened condition arising out of claimant's industrial injury of May 14, 1971.

The claim has now been submitted for closure and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from December 17, 1979 through December 9, 1980, less time worked and to an additional award of 30 degrees for 20% loss of the right leg for a total award of 65% loss of the right leg. The Board concurs with this recommendation.

IT IS SO ORDERED.

WCB Case No. 79-4980 MARCH 10, 1981
WCB Case No. 79-10,169
WCB Case No. 79-10,606

GARY W. HUNTER and
MICHAEL LEROY, CLAIMANTS
Pozzi, Wilson, et al, Claimant's Attorneys
SAIF Corporation
Order on Reconsideration

The Board issued its Order on Review dated December 30, 1980. By letter dated January 8, 1981 Multnomah County requested the Board to reconsider its order. By letter dated January 22, 1981 the SAIF opposed the Motion for Reconsideration. The Board issued an Order of Abatement on January 30, 1981 in order to give due consideration to this motion.

The issue was and is whether court reporters working in Multnomah County Circuit Court are county employees or state employees for workers' compensation purposes.

We previously stated: "The county actually pays the salaries of and provides other fringe benefits for the court reporters." The reference to fringe benefits was circular in that who pays for workers' compensation coverage is the question in this case. The Board continues to infer from the record--although it is not expressly stated--that other fringe benefits are paid by Multnomah County. And the Board continues to find that it is Multnomah County that actually sets and pays the reporters' salaries.

We previously stated:

"...we find that technically the court reporters are under the control of the county. The county has delegated, in a very small fashion, its authority or power to control the court reporters to the Circuit Court judges to control the day-to-day work of the reporters."

That statement was incorrect. Multnomah County has not delegated any authority to the Circuit Court because it did not have authority to delegate. Court reporters are employed by and serve at the pleasure of circuit judges. ORS 8.310 to 8.340.

In further developing the idea of county control, we previously stated: "...the court reporter is required...to take orders from the Court Administrator..." We were mistaken to equate control by the Court Administrator with control by Multnomah County. The Court Administrator is appointed by and serves at the pleasure of the Circuit Court. ORS 8.070(1).

As supplemented by this order, the Board's findings come down to this: From a payroll point of view, the court reporters are the employees of Multnomah County; from a control point of view, the reporters are the employees of the State of Oregon.

A similar situation arose in Robinson v. Omark Industries. 46 Or. App. 263 (1980). Mr. Robinson was on the payroll of Employers' Overload who assigned him as a temporary worker to Omark Industries. While Mr. Robinson was on Omark's premises, Omark had the right to control all aspects of his work. The Court of Appeals held that an employee can have more than one employer for workers' compensation purposes, that only one employer has to maintain workers' compensation coverage, and that a worker's recourse for an on-the-job injury is with the employer who maintains workers' compensation coverage.

We find that reasoning applicable here. The court reporters are in a hybrid status--employees of the county in a compensation sense, employees of the state in a control sense. Therefore, under Robinson, we look to the question of who maintains workers' compensation coverage.

The answer is not as clear in this record as it was in the Robinson case. Perhaps out of fear of not wanting to be a non-complying employer, neither the state's nor the county's representative ever point-blank stated who maintained coverage. The parties did stipulate, however:

"That if Multnomah County payroll clerk Joyce Holmes were called to testify, she would testify that claimants both were (and are) paid salaries on Multnomah County payroll, from which salaries she withholds the eight cents per day required by ORS 656.506 and transmits quarterly that amount to the State Workers' Compensation Fund to cover the participation of subject employers in the Second Injury Reserve Account, required by ORS 656.622."

ORS 656.506 provides in part:

"Every employer shall retain from the monies earned by all subject workers eight cents for each day or part of day the worker is employed..."

From the stipulation and the statute, the Board infers that Multnomah County is providing workers' compensation coverage for the court reporters.

ORDER

Except as supplemented and modified by this opinion, the Board's Order on Review of December 30, 1980 is republished and reaffirmed.

WCB Case No. 80-748

MARCH 10, 1981

MARY LOPEZ, CLAIMANT
Sidney Galton, Claimant's Attorney
SAIF Corporation
Order on Reconsideration

Upon claimant's Motion for Reconsideration, duly filed with the Board by letter dated February 27, 1981, claimant asks the Board to review the amount of attorney's fees awarded in its February 25, 1981 Order on Review.

The Board finds, upon reconsideration, that the \$250 awarded for attorney's fees by the previous order is inadequate in view of the extent of legal services required for the proper representation of claimant in the appeal for review filed by the employer's insurer, SAIF Corporation.

The Board concludes that a proper attorney's fee is the sum of \$750, or an increased award of \$500 over and above the previous award for attorney's fees.

ORDER

IT IS HEREBY ORDERED, therefore, that claimant's attorney is awarded an additional sum of \$500 for attorney's fees, for a total of \$750, for his services at this Board review, payable by SAIF Corporation, and the Board's Order on Review, dated February 25, 1981, is amended accordingly.

Own Motion No. 81-0041 MARCH 10, 1981

JIM MELCHER, CLAIMANT
SAIF Corporation
Own Motion Order

The claimant requests the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition arising out of his industrial injury of February 1971. In support of his contention claimant has submitted to the Board a medical report from Dr. Steele who has scheduled surgery for him on March 4, 1981.

The carrier, SAIF Corporation, is unopposed to a reopening.

Therefore, claimant's claim is remanded to the SAIF for reopening March 4, 1981, the date of Dr. Steele's recommended surgery and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB Case No. 79-08496 MARCH 10, 1981

TOM MOORE, CLAIMANT
Peter Hansen, Claimant's Attorney
Mary Danford, Defense Attorney
Amended Order on Review

The Board issued its Order on Review in the above entitled matter on February 17, 1981. In that order the Board inadvertently failed to award claimant's attorney a fee for prevailing at Board review. Therefore, that Order on Review is hereby amended to include:

Claimant's attorney is hereby granted a fee of 25% of the compensation for temporary total disability awarded by our order of February 17, 1981, not to exceed the sum of \$750.

IT IS SO ORDERED.

WCB Case No. 80-325 MARCH 10, 1981

FRED NEGUS, CLAIMANT
Brian Welch, Claimant's Attorney
Donald P. Bourgeois, Defense Attorney
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 Referee is final by operation of law.

WCB Case No. 81-1062 MARCH 10, 1981

FRED PETERS, CLAIMANT
Jan Baisch, Claimant's Attorney
Paul L. Roess, Defense Attorney
Order on Review

Reviewed by the Board en banc.

Claimant seeks Board review of the Referee's order which awarded 60% permanent partial disability as a result of the claimant's low-back injuries, representing a 25% increase over the Determination Order, and which affirmed denial of additional temporary total disability benefits.

The issues are:

- (1) Extent of claimant's disability; and
- (2) Entitlement to temporary disability benefits for the period from March 1, 1979 through April 23, 1979.

Considering the latter issue first, the Determination Order awarded temporary total disability from October 1, 1978 through February 28, 1979, and then again from April 24, 1979 through October 9, 1979. Claimant contends that he was disabled continuously from October 1, 1978 through October 9, 1979. The Referee disagreed and affirmed this portion of the Determination Order. The Board agrees with the claimant.

The explanation for the March 1 to April 23 hiatus in temporary total disability payments is as follows:

Claimant was injured in a fall on October 1, 1978. The most significant consequences were a fracture of the fibula at the ankle and a nondisplaced fracture of the sacrum. (Claimant also suffered three fractured ribs and abrasions and contusions.) Dr. Curtis D. Adams treated claimant's ankle. Dr. Adams expressed the opinion that claimant had recovered from the ankle injury and could return to work on March 1, 1979.

Claimant did not return to work because of a variety of physical problems, some of which (e.g., diabetes) had nothing to do with his industrial injury. Claimant saw Dr. Mario J. Campagna on April 24, 1979 complaining of low back pain that was becoming worse. Dr. Campagna diagnosed lumbar spondylosis, aggravated by claimant's October 1978 fall. The doctor reported claimant was unable to work because of his back condition from the date of the first examination (April 24).

The temporary total disability hiatus is thus the time between when Dr. Adams finished treating claimant's ankle and when Dr. Campagna started treating claimant's back.

The Board finds claimant is entitled to temporary total disability compensation during this period. In context, the more reasonable interpretation of Dr. Adams' release for claimant to return to work on March 1 meant only that claimant's fractured ankle was healed. Dr. Campagna's report that claimant "has been unable to work" since April 24 because of his back condition does not prove that claimant was able to work before that date. Uncontroverted x-ray evidence from right after claimant's fall that he fractured his ankle and back, combined with an uncontroverted finding that claimant's back condition precluded him from working after April 24, supports the inference that claimant's back condition was substantially the same from the time of his fall until Dr. Campagna started treating that condition. The Board so infers.

We turn to the issue of the extent of claimant's permanent disability.

Claimant asserts that at no time since the date of the accident has he been physically able to work and that in view of his age, education, work experience and physical condition, he is permanently unemployable. Respondent seeks a reduction in the award to the original 35% permanent partial disability award of the Determination Order. Respondent asserts that claimant's failure to obtain suitable employment results from a lack of motivation and effort rather than from physical impairment.

Permanent and total disability can be proven in two ways. First, it is possible to establish that extent of disability solely from the medical evidence. See Butcher v. SAIF, 45 Or. App. 313 (1980). Claimant here is not totally incapacitated from a medical standpoint. Claimant has completely recovered from all the consequences of his October 1, 1978 fall except for his back condition. None of the medical evidence establishes that claimant's back condition is permanently and totally disabling. For example, Dr. Campagna reports: "Physical examination reveals, the patient appears comfortable and dresses easily. He bends to the ankles without pain." And Dr. William E. Matthews reports: "There is one set of [low back] x-rays as far back as October

1972, and they are suprisingly similar to present ones...No definite evidence of nerve root impairment at the present time." All the physicians who treated or examined claimant's back generally agreed: (1) He probably would be unable to return to his prior occupation as a log truck driver; but (2) claimant can do lighter work despite his back condition.

The second way to establish permanent and total disability is a combination of medical evidence and evidence regarding the claimant's age, education, training, experience, etc. The non-medical factors can be summarized in a single word: Employability.

Claimant relies upon language from Gettman v. SAIF, 289 Or. 609, 614 (1980), to the effect that an:

"...award of compensation for permanent total disability can be reduced only upon a specific finding that the claimant presently is able to perform a gainful and suitable occupation."

The Board is confused by this passage. Since review at all levels of this system is de novo, we find it difficult to appreciate any rule limiting a higher level from "reducing" what a lower level has done--unless the Supreme Court intends some reduction of de novo review. Moreover and more importantly, the Board finds it impossible to reconcile the above passage, which was an interpretation of ORS 656.206(1)(a), with ORS 656.206(3), which provides:

"The worker has the burden of proving permanent total disability status and must establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment."

It seems to the Board that under ORS 656.206(3) it would be possible and legally proper to deny a claim of permanent total disability status based only on a finding that claimant did not sustain the burden of proving reasonable efforts to obtain employment--without there being sufficient evidence to make the additional "specific finding" contemplated by Gettman that the claimant is presently employable. The Board proceeds on that understanding of the law unless and until there is further clarification from the appellate courts.

The Referee found: "Claimant has sought no alternative employment." Unless the Referee intended this to be a sub silentio finding that claimant was not credible, the Board disagrees. Claimant testified that he made some informal inquiry of one acquaintance in the lumber industry and was told something to the effect that no work was available for him. Claimant

also testified that he had some form of contact with the Field Services Division of the Workers' Compensation Department and was told something to the effect that no retraining program was available to him.

Here, as in Shaw v. Portland Laundry/Dry Cleaning, 49 Or. App. 1041, 1043 (1980), the Board finds "the record too cryptic to be the basis of any finding about the nature, quantity or quality" of claimant's alleged job search. It is not clear whether claimant formally applied for a lumber industry job or just informally asked whether something was available. It is not clear whether claimant's inquiry was limited to log truck driving or included any lumber industry employment; the record more strongly implies the former. It is clear from claimant's testimony that he did not apply for any other jobs.

Claimant's alleged contact with the Field Services Division is even more obscure. We do not know exactly what claimant asked or exactly what he was told. To the extent that claimant received a negative response from Field Services, there is a strong implication in the record that such a response was based upon claimant having overstated what Dr. Campagna had told him. Claimant testified that there was no written record of his contact with Field Services. But see OAR 436-61130(1)(e): "The [Field Services] Division shall notify the worker and insurer in writing when...the Division denies a vocational assistance program requested by the worker."

For these reasons, the Board concludes that claimant has not sustained his burden of proving reasonable efforts to obtain employment within the meaning of ORS 656.206(3) and has not, therefore, sustained his burden of proving permanent and total disability.. Should an appellate court rule that the above-discussed passage from Gettman v. SAIF, supra, prevails over the plain meaning of ORS 656.206(3), the Board further finds that on this record it is impossible to presently identify any specific job that claimant is able to perform.

Turning to the extent of claimant's partial disability, the Board agrees with the Referee's analysis.

ORDER

The Referee's order dated August 20, 1980 is modified to award temporary total disability benefits to claimant for the period from March 1, 1979 to April 23, 1979. In all other respects, the Referee's order is affirmed.

Claimant's attorney will be entitled to an award of fees payable from the increased compensation upon submission of a fee agreement. OAR 438-47-010(3).

WCB Case No. 79-07395 MARCH 10, 1981

DONALD L. RISKE, CLAIMANT
Frank J. Susak, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members Barnes and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's denial of August 21, 1979.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee.

Two references to Dr. Clifton's knowledge of claimant's previous history, found on page three of the Referee's order, should be clarified somewhat. Dr. Clifton was unaware of claimant's dizziness, tinnitus and passing out spells at the time of his examination. However, he was aware of these problems prior to the taking of his deposition and his opinion remained unchanged.

Even with this clarification, the Board finds that claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury on June 21, 1979. The Referee found claimant was not credible. "Where the medical evidence, and indeed the claimant's whole case, rests on the thoroughly impeached credibility of the claimant, we conclude that claimant has not sustained his burden of proof." Miller v. Granite Construction Co., 28 Or. App. 473, 478 (1977).

ORDER:

The order of the Referee dated June 24, 1980 is affirmed.

WCB Case No. 78-7484 MARCH 10, 1981

VIVIAN WISE, CLAIMANT

Bloom, Ruben, et al, Claimant's Attorneys

Schwabe, Williamson, et al, Defense Attorneys

Order on Review

Reviewed by Board members McCallister and Lewis.

Claimant seeks Board review of the Referee's order which affirmed the "June 13, 1977" (sic) Determination Order. He determined that claimant had failed to prove that her claim was prematurely closed, that she had suffered an aggravation of her September 13, 1977 injury, or that she was entitled to any permanent partial disability compensation as a result of this injury.

After de novo review, the Board concurs with the Referee that claimant has failed to prove by a preponderance of the evidence that her claim was prematurely closed. The reports of Dr. Graham and the Orthopaedic Consultants just prior to closure indicate that claimant's condition was medically stationary and no further treatment was necessary. The Board also does not find Dr. Cherry's reports sufficient to warrant a reopening of her claim under the provisions of ORS 656.273.

The Board does find, however, that claimant has sustained a slight degree of permanent impairment due to her September 13, 1977 industrial injury. The Orthopaedic Consultants, on February 14, 1978, indicated claimant's loss of function of the back due to the injury was minimal. They felt claimant could do the same occupation with limitations if she used proper lifting and body mechanics. Dr. Graham, claimant's treating physician, concurred totally with this report. On November 29, 1978, Dr. Graham indicated that claimant had continuing symptoms which, despite her lack of objective findings, he felt were genuine. He felt she could return to her usual occupation with some restrictions of lifting, pulling and pushing. Dr. Kemple, on December 21, 1978, agreed that claimant should restrict her lifting and bending activities to some extent. Based on this medical evidence, the Board concludes that claimant is entitled to compensation equal to 32 degrees for 10% unscheduled disability to her back due to her September 13, 1977 industrial injury.

ORDER

The order of the Referee, dated July 25, 1980, is modified.

Claimant is hereby granted compensation equal to 32 degrees for 10% unscheduled disability to her back as a result of the September 13, 1977 industrial injury.

The conclusions reached by the Referee with respect to the issues of premature closure and aggravation are affirmed.

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 \$2,000.

Claim No. D 113902 MARCH 10, 1981

EARL ANSEL WOFFORD, CLAIMANT
SAIF Corporation
Own Motion Determination

The Board issued its Own Motion Order pursuant to the provisions of ORS 656.278 and reopened claimant's claim for a worsened condition arising out of his March 17, 1965 industrial injury commencing upon claimant's hospitalization recommended by Dr. Weed.

The claim has been submitted for closure and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from December 13, 1979 through January 3, 1980 and no further award of permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

WCB Case No. 79-7251 MARCH 10, 1981

EDWARD ZOZOSKY, CLAIMANT

Merten & Saltveit, Claimant's Attorneys

Schwabe, Williamson, et al, Defense Attorneys

Order on Reconsideration

On February 20, 1981, the employer submitted a Motion for Reconsideration of the Board's Order on Review of February 11, 1981. By letter dated February 23, 1981, claimant's attorney opposed the motion but requested she be granted an attorney fee from the employer's appeal. We will address both requests at this time.

Based on the evidence before us, the medical reports are unequivocal that claimant suffered an occupational disease from exposure at work, diagnosed as dermatitis. This claim was accepted and subsequently closed by a Determination Order of August 29, 1978.

Claimant's condition then changed, and he developed what was diagnosed as psoriasis and on August 6, 1979 the carrier issued a denial; however, it denied the condition of dermatitis.

The Referee, in his order, denied compensability of the diagnosed psoriasis condition, and that finding was affirmed by the Board. The only change which we made was to clarify what was to be accepted as compensable and what was not. That is, the original condition arising out of claimant's exposure at work, dermatitis, is and remains the responsibility of the carrier. The condition diagnosed as psoriasis is not compensable. Because of the wording of the carrier's denial, it was necessary to clarify this point.

The employer's contentions set out in his motion are without merit. The sole issue before the Board and the Referee was compensability of psoriasis. Our Order is not ambiguous and does not raise the issue of compensability of the dermatitis condition as we ruled it was compensable.

On the issue raised by claimant's attorney regarding an attorney fee, the request is denied. The issue was compensability, and it was denied which obviously does not entitle claimant's attorney to a fee.

ORDER

The Board's Order on Review dated February 11, 1981 is hereby affirmed and republished.

WCB Case No. 79-3505 MARCH 13, 1981

The Beneficiaries of
ROBERT ATKINS, Deceased
SANDRA ATKINS, CLAIMANT
Charles Erwin, Claimant's Attorney
SAIF Corporation
Order Denying Motion to Dismiss

SAIF has appealed from the Referee's Opinion and Order. Claimant moves to dismiss SAIF's appeal, pointing out that SAIF has neither filed a brief within the time permitted nor notified the Board that it does not intend to file a brief.

The Board shares the frustration indicated by claimant's motion: "The Board should not be called upon to search the 325 pages of testimony and all 18 exhibits, each consisting of many pages...to guess at what appellant has in mind." Under existing law, however, SAIF is permitted to do just what it has done.

It may be small comfort for claimant, but if SAIF appeals the Board's decision to the Court of Appeals, claimant can hope that SAIF raised no issues before the Board and argues that the Court should decline to review issues that were not raised before the Board.

The motion to dismiss is denied. This case isocketed for Board review on the record and respondent's brief.

IT IS SO ORDERED.

Claim No. C 42295

MARCH 13, 1981

GERALD J. BOCHSLER, CLAIMANT
SAIF Corporation
Own Motion Determination

The Board issued its Own Motion Order on May 28, 1980, reopening claimant's claim effective April 11, 1980 for a worsened condition related to his industrial injury of September 6, 1966.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from April 11, 1980 through June 16, 1980 but no additional award of permanent partial disability compensation. The Board concurs with this recommendation.

IT IS SO ORDERED.

WCB Case No. 80-530

MARCH 13, 1981

WILLIAM C. CRAIG, CLAIMANT
Malagon, Velure & Yates, Claimant's Attorneys
Jaqua & Wheatley, Defense Attorneys
Order of Dismissal and Own Motion Order

Claimant injured his back in 1972 and again in 1977. Different insurance carriers were on the risk in those two years.

In 1979 claimant made an aggravation claim with the carrier that had been on the risk in 1977. The denial of that aggravation claim gave rise to WCB Case No. 80-530.

In 1980 claimant requested the Board to exercise own motion jurisdiction, taking the alternative position that his worsened back condition was the responsibility of the carrier that had been on the risk in 1972. The Board referred that request for own motion relief to the Hearings Division to be heard in conjunction with WCB Case No. 80-530.

On the eve of the scheduled hearing, the parties settled WCB Case No. 80-530. Because of that settlement, claimant has withdrawn his request for own motion relief. The Board has approved the settlement in WCB Case No. 80-530.

Therefore, claimant's request for hearing in WCB Case No. 80-530 is dismissed, and claimant's request for own motion relief is denied.

IT IS SO ORDERED.

Claim No. C-121906

MARCH 13, 1981

LOUIS CROSS, CLAIMANT

Galton, Popick & Scott, Claimant's Attorneys

SAIF Corporation

Own Motion Determination

The Board issued its Own Motion Order dated June 6, 1980 which reopened claimant's claim as of January 30, 1980 for a worsened condition arising out of his industrial injury of April 16, 1968.

The claim was submitted for closure, pursuant to the provisions of ORS 656.278, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from January 30, 1980 through March 30, 1980 and no additional award for permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

Claim No. C604-14077 REG MARCH 13, 1981

JOSEPH DAVIS, CLAIMANT

Welch, Bruun & Green, Claimant's Attorney

Schwabe, Williamson, et al, Defense Attorney

Own Motion Order

Claimant requested that the Board grant own motion relief. By orders dated May 23 and June 20, 1980, we referred claimant's request for a hearing and recommendation. We have received the Referee's recommendation.

We requested a recommendation on three different issues. We now find one of them dispositive: Whether claimant is barred from now seeking additional compensation after having stipulated as part of a 1976 disputed claim settlement that he was then permanently and totally disabled.

Claimant injured his left elbow at work in September 1972. The Referee recommends that we find that claimant's elbow condition has worsened since his last award of compensation. We so find.

In 1975 claimant made a claim for a back injury which was partially denied. In 1976 claimant made a claim for a testicle injury which was denied. These claims were resolved by a bona fide dispute settlement entered pursuant to ORS 656.289(4) and dated October 13, 1976. That settlement was signed by claimant, his attorney, the attorney representing the employer/carrier and approved by a Referee. That agreement provided in part:

"1. The parties agree that the claimant is now permanently and totally disabled.

"3. The parties are in dispute as to whether claimant's current permanent and total disability is due to his back injury or to non-compensable factors.

"4. The parties are in further dispute as to whether the claimant's testicle claim of January 1976 is compensable."

The settlement agreement provided for payment of \$21,500 to claimant and for payment of \$3,350 to claimant's attorney, for a total of \$24,850 "in full and final settlement between the parties."

An ORS 656.289(4) bona fide dispute settlement ordinarily terminates all of a worker's rights under ORS chapter 656. However, in March 1977 claimant requested payment of additional medical expenses relating to his 1975 back injury that had been partly the subject of the 1976 bona fide dispute settlement. Even though it seems to the Board that the 1976 bona fide dispute settlement would have been a successful defense to claimant's 1977 claim, that claim lead to the execution of yet another bona fide dispute settlement. This settlement, dated September 29, 1978 was signed by claimant, his attorney, the carrier's attorney and approved by a Referee. It provided for payment to claimant of \$7,483.15 which included \$1,000 as a fee for claimant's attorney.

The Board notes that even though no hearing had ever been held on claimant's 1975, 1976 or 1977 claims, his attorney had been awarded fees that totaled \$4,350. The Board further notes that the 1978 payment of \$7,483.15 by the carrier (Liberty Mutual) appears indefensible because of the earlier bona fide dispute settlement.

In 1978 the focus shifted away from claimant's back and returned to his elbow which had been injured in 1972. On October 21, 1978 claimant requested payment of medical bills relating to the continuing treatment of his elbow condition. The carrier did not respond and claimant requested a hearing. The outcome was a March 6, 1979 stipulated settlement whereby claimant's elbow claim was reopened "for medical care and treatment, including surgery as recommended by claimant's physician."

In summary, the various agreements of the parties are:

1976 -- bona fide dispute settlement of partially denied back claim and denied testicle claim;

1978 -- bona fide dispute settlement of renewed back claim, apparently limited to cost of medical services;

1979 -- stipulated settlement of claim for cost of medical services for treatment of elbow injured in 1972.

All these agreements were approved by Hearings Division referees.

The Referee's recommendation in this own motion case suggests that once a worker's aggravation rights have expired and the Board has referred a subsequent request for own motion relief to the Hearings Division for hearing and recommendation, the referees of the Hearings Division lack "jurisdiction" to approve a stipulated settlement or bona fide dispute settlement. The Board disagrees.

Our workers' compensation system allows private settlement of an original claim or an aggravation claim -- limited only by a requirement that the settlement be approved by "a referee [or] the board." ORS 656.289(4). It makes no sense to the Board to say that all claims can be settled throughout the five year aggravation period, but no claims, i.e., requests for own motion relief, can be settled beyond that date. The Board concludes that requests for own motion relief can be settled privately just as any other claim can be.

The next issue is who has authority to approve a settlement of a request for own motion relief. The only relevant statute is ORS 656.289(4) which refers to approval by "a referee [or] the board." The Board concludes that, as a matter of authority, it makes no difference whether a settlement of a request for own motion relief is approved by a Referee or by the Board. The Board clearly has authority to approve such a settlement. And the Referees, as the Board's agents, have the same authority.

It does not follow, however, that because the Referees have authority to act, it is desirable that they do so. The Board's unique and open-ended power to grant own motion relief, ORS 656.278, imposes on the Board the serious duty to apply a reasoned own motion policy consistently. Approval of own motion settlements by 29 separate Referees would not promote development of either clear policy or consistency. Therefore, the Board concludes that Referees should not approve own motion settlements, but should instead forward them to the Board for approval. This includes both stipulations and bona fide dispute settlements.

The remaining question is whether claimant's 1976 stipulation that he was then permanently and totally disabled, quoted above, precludes now granting, by own motion order, increased compensation for claimant's worsened elbow condition. The Board concludes that it does. There can be no greater disability than permanent and total disability. Absent some indication that claimant's condition improved after 1976 -- and there is none in this record -- the Board will not now grant own motion relief.

IT IS SO ORDERED.

WCB Case No. 79-03896 MARCH 13, 1981

DIANNA GOBLER, CLAIMANT
Welch, Bruun & Green, Claimant's Attorneys
Schwabe, Williamson, et al, Defense Attorneys
Order on Review

Reviewed by Board members McCallister and Lewis.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of her claim for an occupational disease.

The Board agrees with the Referee's conclusion in this case. The evidence indicates that claimant has been a nervous person most of her life. Dr. Parvaresh indicated that if claimant was under more pressure than her co-workers with respect to her job quota and how she uses her work time, then she has a legitimate aggravation of a pre-existing psychiatric disorder. He ultimately concluded that claimant was actually reacting to being turned down for a promotion which she felt she deserved. Dr. Hayes indicated that if claimant's work environment was as she described it, then her employment significantly and materially

aggravated her condition. Neither doctor came to a definite conclusion that her job stresses aggravated her pre-existing condition. The testimony taken at the hearing, based on a preponderance; indicates that conditions at work were not as claimant described them. The Board concludes that claimant has failed to prove by a preponderance of the evidence that her condition was aggravated by her work situation.

ORDER

The order of the Referee, dated June 27, 1980, is affirmed.

Claim No. D 122753 MARCH 13, 1981

DENNIS JOHNSON, CLAIMANT
SAIF Corporation
Own Motion Order

The claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his compensable industrial injury of October 30, 1975.

Dr. Bert had scheduled surgery for January 8, 1981 for a Bristow repair of the right shoulder. SAIF is unopposed to reopening.

The Board concludes claimant's claim shall be reopened commencing the date of his hospitalization for the surgery of January 8, 1981 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

Claim No. C 269088 MARCH 13, 1981

BETTY MARTIN, CLAIMANT
SAIF Corporation
Own Motion Determination

The Board issued its own motion order of October 13, 1980 which reopened claimant's claim for a worsened condition related to her original industrial injury of September 23, 1970. That Own Motion Order ordered the claim reopened upon claimant's hospitalization.

The claim has now been submitted for closure and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant's claim be closed without any award of compensation for temporary total disability nor any increase in permanent partial disability. This recommendation is based upon the fact that claimant was not employed prior to this hospitalization and therefore has sustained no time loss in the form of temporary total disability compensation. The Board concurs with this recommendation.

IT IS SO ORDERED.

WCB Case No. 79-8496 MARCH 13, 1981

TOM MOORE, CLAIMANT
Peter Hansen, Claimant's Attorney
Mary Danford, Defense Attorney
Order of Abatement

On March 12, 1981, defendant's attorney requested the Board for reconsideration of the Board's Order on Review dated February 17, 1981.

In order that time for appeal does not run, our Order on Review is hereby abated and held for naught.

IT IS SO ORDERED.

Own Motion No. 81-008M MARCH 13, 1981

FRANK NAHORNEY, CLAIMANT
Own Motion Referred for Hearing

Claimant requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of October 13, 1971.

The carrier, Argonaut Insurance Co., by letter dated February 23, 1981 informed the Board that it was opposed to a claim reopening.

The Board is in possession of Dr. Cohen's medical report and finds that the information provided by him is insufficient for the Board to determine whether or not claimant's claim should be reopened.

Therefore, the Board is referring this matter to the Hearings Division for a Referee to hold an evidentiary hearing and to take evidence to determine whether claimant's present condition constitutes a worsening of his condition related to his industrial injury of October 13, 1971. After the hearing the Referee is to order a transcript of the proceedings and, together with his recommendation, submit such to the Board.

IT IS SO ORDERED.

WCB Case No. 78-05969 MARCH 13, 1981

ROY D. NELSON, CLAIMANT
Olson, Hittle, et al, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant appeals the Referee's order which awarded him 10% unscheduled disability for neck and bilateral shoulder injuries. It is claimant's contention he is entitled to additional temporary total disability, a greater permanent partial disability award and penalties and attorney's fees.

We modify the Referee's order. First, we note that the Referee, although he could not understand how the right shoulder problem could be compensably related to the claimed injury which involved only trauma to the left side of the body, nonetheless he found both shoulder problems compensable. We not only do not understand the rationale relating the right shoulder to the claimed injury, we do not accept it. The right shoulder condition is not compensable. The injury of October 26, 1976 involved a fall on the left side of the body, and we see nothing in the record to negate the impact of repeated histories which claimant provided the doctors over a span of several years that the mechanics of the accident produced injury to the claimant's left side. The right shoulder complaints do not appear in the record until 1978, so there is not even a temporal relationship. Having disposed of the right shoulder question by finding it not compensable, we move on to the question of claimant's entitlement to temporary total disability compensation.

The Board finds sufficient evidence in the record to support claimant's claim for additional temporary total disability compensation. First, the chart notes of Dr. Woolpert dated February 18, 1977 indicate a regime of active treatment of the left shoulder and neck complaint and the opinion that claimant should not work. On July 26, 1977 claimant was found capable of "modified lighter" work, in the same chart note, Dr. Woolpert indicates claimant cannot return to his regular occupation, truck driving. Out of all of this, the Board believes the claimant has established entitlement to additional temporary total disability compensation from February 18, 1977 through July 26, 1977.

Having disposed of the temporary total disability issue, we now must decide the extent of claimant's permanent disability. The claimant is 55 years old with a 10th grade education. He has been, for most of his working life, a truck driver or has worked with farm machinery.

The evidence indicates claimant is now precluded from returning to "truck driving"--he is limited to lighter jobs. To the extent the neck and left shoulder conditions contribute to the loss of wage earning capacity, we find claimant is entitled to an award of 30% unscheduled permanent partial disability.

Lastly, the claimant asks the Board to assess penalties and attorney's fees for the carrier's failure to reopen. We find the claimant's request without merit.

ORDER

The order of the Referee, dated June 25, 1980 is modified.

Claimant is hereby granted compensation for temporary total disability from February 18, 1977 through July 26, 1977 and to an award of 96 degrees for 30% unscheduled neck and left shoulder disability.

Claimant's attorney is hereby granted as and for a reasonable attorney fee, 25% of the temporary total disability granted by this order not to exceed \$250, and 25% of the increased compensation for permanent partial disability granted by this order, not to exceed \$750.

SAIF Claim No. 451219 MARCH 13, 1981

GARY NORDLING, CLAIMANT
SAIF Corporation
Own Motion Order

Claimant requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition resulting from his industrial injury of July 18, 1973. Claimant's aggravation rights have expired.

A medical report from Dr. Scott indicates claimant's condition has worsened and he has recommended surgery.

The Board orders the carrier to pay all hospital, surgery and medical care benefits pursuant to ORS 656.245. Claimant is not entitled to have his claim reopened for compensation for temporary total disability because the evidence before the Board is insufficient for us to determine whether or not claimant is employed and whether or not he is losing time from work. If this information is provided to us, we will reconsider our decision.

IT IS SO ORDERED.

WCB Case No. 80-5271 March 13, 1981

BILL E. PAINTER, CLAIMANT
Welch, Bruun & Green, Claimant's Attorneys
Marcus K. Ward, Defense Attorney
SAIF Corporation
Order of Abatement

By letter dated March 5, 1981 claimant's attorney requested the Board to reconsider and stay its order of February 17, 1981.

In order to give due consideration to this request, our order of February 17, 1981 is hereby abated and held for naught.

IT IS SO ORDERED.

WCB Case No. 79-10069 MARCH 13, 1981

RICK RABERN, CLAIMANT
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corporation
Order Denying Reconsideration

The SAIF Corporation moves the Board to reconsider the Opinion and Order dated March 4, 1981.

The only issue SAIF raises that was not previously considered by the Board is its contention that our award of attorney fees to claimant violates the "no-work-no-fee" rule of Bentley v. SAIF, 38 Or. App. 475 (1979). Bentley holds that the Court of Appeals will review the Board's awards of attorney fees for abuse of discretion. The Board's order explained its reason for an award of attorney fees in this case--that there was no reasonable basis for SAIF's appeal from the Referee's decision. If SAIF believes that this Board lacks discretion to so interpret its own administrative rules governing awards of attorney fees, it is invited to address that argument to the Court of Appeals.

The motion for reconsideration is denied.

IT IS SO ORDERED.

WCB Case No. 78-7333 MARCH 13, 1981

MAURICE E. SIMILA, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order and SAIF Corporation cross appeals the order which granted claimant an award of 47.25% for 35% loss of the right foot. The claimant contends he is entitled to compensation for temporary total disability from July 18, 1978 through February 26, 1979. The SAIF contends that the award granted by the Referee is excessive.

The Board, after de novo review, would modify the Referee's order. The Board concurs with the Referee that claimant's condition was medically stationary and he is not entitled to any further award of temporary total disability compensation.

On the issue of extent of permanent partial disability, the Board finds the award granted is not supported by the evidence. The only medical report which rates claimant's loss of function, the sole criteria for determining extent of permanent partial disability, is that of Dr. Davis. He rates claimant's impairment at 20% loss of function, and Dr. Harris, the treating physician, specifically concurs with this rating.

Claimant has, by two Determination Order's, been granted 25% loss of the right foot. The Board concludes that the awards of 25% adequately compensate claimant for his loss of function of the right foot.

ORDER

The order of the Referee dated May 1, 1980 is modified.

The Referee's award of 35% loss of the right foot is reversed and the Determination Order of November 2, 1979 awarding 25% loss of the right foot is affirmed in its entirety.

Own Motion No. 81-0060M MARCH 13, 1981

CARLTON SPOONER, CLAIMANT

Welch, Bruun & Green, Claimant's Attorney

Own Motion Order Referring for Consolidated Hearing

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of July 15, 1968.

The record indicates that on September 23, 1980 claimant, while employed by a different employer, sustained an injury which its carrier denied as being causally related to his 1968 industrial injury.

Based on this record we feel this matter should be referred to the Hearings Division.

The denial of the September 23, 1980 industrial injury has been appealed and is presently scheduled to be heard on April 23, 1981 before Referee Harold M. Daron. The Board hereby refers this own motion case to the Referee to be consolidated with WC Case No. 80-11400 which is presently scheduled to be heard by him on April 23, 1981. The Referee is instructed to take evidence on whether claimant's current condition is related to his original

injury of 1968 or to the new injury of September 23, 1980. The Referee is to issue an Opinion and Order on the 1980 claim and have a transcript of the proceedings, together with his recommendation on the own motion proceeding, submitted to the Board.

IT IS SO ORDERED.

WCB Case No. 79-09628 MARCH 13, 1981

JOHN R. WECKER, CLAIMANT
Galton, Popick & Scott, Claimant's Attorney
Schwabe, Williamson, et al, Defense Attorneys
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 and pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

Own Motion No. 81-0055M MARCH 13, 1981

DAVID A. WILSON, CLAIMANT
SAIF Corporation
Own Motion Order

The claimant requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition arising out of his industrial injury of October 20, 1950. Claimant's aggravation rights have expired.

The SAIF submitted all pertinent medical information to the Board and indicated it was unopposed to a reopening for the recent surgery.

The Board finds that claimant's hospitalization, surgery and medical benefits shall be paid by SAIF pursuant to ORS 656.245. Claimant's claim will not be reopened. The Board does not have sufficient information for it to grant compensation for temporary total disability as we are unaware of claimant's employment status in order to determine whether or not he was employed prior

to the hospitalization and what his time loss was, if any. If this information is provided to the Board, we will reconsider our decision.

IT IS SO ORDERED.

WCB Case No. 79-9192 MARCH 13, 1981

HENRY J. WOODFORD, CLAIMANT
Steven J. Joseph, Claimant's Attorney
Paul R. Bocci, Defense Attorney
Order on Review

This is an occupational disease claim appealed to the Board by the employer. The employer requests the Board reverse that portion of the Referee's order which states:

"...the employer shall accept the claim as a compensable occupational worsening of underlying respiratory conditions with an assigned date of August 14, 1979 and provide compensation as required by law."

The employer contends the claimant has failed to prove by a preponderance of the evidence that his employment caused a worsening of his pre-existing underlying disease.

The "pre-existing underlying disease" is bronchial asthma and allergic rhinitis.

ORS 656.802(1)(a) defines "occupational disease:"

"Any disease or infection which arises out of and in the scope of the employment, and to which an employee is not ordinarily subjected or exposed other than during a period of regular employment therein."

The claimant's disease(s) were not caused by his work activities and conditions. Under the occupational disease law, there is no such requirement; all that must be proved is a worsening of a pre-existing condition caused by the claimant's work activities and conditions. (See Beaudry v. Winchester Plywood Co., 255 Or. 503, 469 P2d 25 (1970).

The Supreme Court in Weller v. Union Carbide (288 Or. 27 (1979)) considering ORS 656.802(1)(a) in expanding on the Beaudry (supra) rationale stated, "that in order to prevail, claimant would have to prove by a preponderance of evidence that (1) his work activity and conditions (2) caused a worsening of his underlying disease (3) resulting in an increase in his pain (4) to the extent that it produces disability or requires medical services (emphasis supplied).

In his Opinion, the Referee states:

"From the overall record, although I consider the question a close one, I conclude that the claim is compensable-- as a worsening of the claimant's underlying bronchial asthma and allergic rhinitis, resulting from his work exposure. I am not so taken with the word "symptoms" in the reports as to conclude that those symptoms were not a manifestation of a temporarily-worsened disease state. Dr. Yurchak, who has treated claimant and whose reports are persuasive, has referred to a reversible disease--which has apparently been reversed to its pre-exposure state." (emphasis supplied)

The Board makes two points regarding the Referee's conclusion. First, referring to Weller (supra) at page 33:

"Amicus argues that '[t]he symptoms of disease are the disease.' Amicus may well believe that. There may well be medical authorities who believe it. No qualified witness so testified in this case, however, and there is accordingly no basis in the evidence for the factfinder to reach that same belief."

In this case, considering all the other evidence, we do not agree with the Referee that Dr. Yurchak's reports supply the quality of proof required to support a finding of a worsening of the pre-existing disease(s).

Secondly, the Referee's reference to Dr. Yurchak categorizing claimant's condition as a "reversible disease" is merely a restatement of the finding of all the medical opinions. We find, based on all the evidence that the more reasonable conclusion is that claimant has a pre-existing disease(s) which, by history, becomes symptomatic on an episodic basis, sometimes from "environmental" exposure(s) and the cause of this phenomenon is the predictable course of the underlying disease(s) process.

The claimant has failed to prove his case, the Order of the Referee finding the claim compensable and awarding claimant's attorney a fee is reversed. In all other respects, the Referee's order is affirmed.

IT IS SO ORDERED.

WCB Case No. 79-9720 MARCH 18, 1981

JOSEPH ALBERT, CLAIMANT
Douglas Hess, Claimant's Attorney
SAIF Corporation
Order On Remand

On March 9, 1981 the Board received from the SAIF a Motion for Remand and inasmuch as no party is opposed to such a remand, this case is remanded to Referee Neal pursuant to ORS 656.295(5).

The Referee is instructed to enter an amended order specifying whether any additional interim compensation is due, whether the SAIF Corporation should pay a penalty on interim compensation due, if any, and the amount of an attorney fee, if any.

IT IS SO ORDERED.

WCB Case No. 79-9454 MARCH 18, 1981

DENNIS E. BERLINER, CLAIMANT
Evohl Malagon, Claimant's Attorney
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of the Referee's order which set aside the Determination Order and found claimant's claim was prematurely closed and that, psychologically, claimant has never been medically stationary. The Board reverses.

Claimant's psychological problems commenced two years after this industrial injury and he sought treatment from Dr. Henderson and now Dr. Martin, both psychiatrists. Although Dr. Martin does not find claimant's psychological condition to be stationary, it appears that claimant will not be declared stationary by this doctor until claimant is vocationally retrained and back to work.

However, vocationally stationary and medically stationary are separate concepts. Dr. Martin gives no explanation for his opinion that claimant is not stationary, and yet he counsels claimant only every other week or on an as needed basis. Based on the record claimant's psychological condition is unchanged since he commenced treatment in 1977, some four years ago.

Dr. Colbach's opinion that claimant is medically stationary but should continue with psychological counseling is more persuasive. This treatment can be provided pursuant to ORS 656.245.

ORDER

The order of the Referee dated June 24, 1980 is reversed.

The Determination Order of October 9, 1979 granting claimant 16 degrees for 5% unscheduled low back disability, 15 degrees for 10% loss of the right leg and 15 degrees for 10% loss of the left leg is hereby reinstated.

WCB Case No. 78-09709 MARCH 18, 1981

MYRL C. BLUHM, CLAIMANT
Lang, Klein, et al, Claimant's Attorneys
SAIF Corporation
Amended Order On Review

On March 16, 1981 claimant requested the Board reconsider the award of attorney fees granted by its February 18, 1981 Order on Review. The Board agrees that claimant's contention has merit and modifies its order accordingly.

ORDER

The order of the Board dated February 18, 1981 is hereby modified.

The award of attorney fee equal to \$350 for claimant's attorney's services before the Board is affirmed.

Claimant's attorney is hereby granted an additional attorney fee for his services at the Hearings level in an amount equal to \$850.

The remainder of the Board's order is affirmed.

MARCH 18, 1981

RHODA MAE COLLIER, CLAIMANT

Galton, Popick & Scott, Claimant's Attorney

SAIF Corporation

Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of the Referee's order which remanded this claim to it for acceptance and payment of benefits. Claimant cross-appeals requesting penalties and attorney fees. The Board finds both SAIF's appeal and claimant's cross-appeal meritorious and reverses the Referee's order in its entirety.

Claimant, who ordinarily works in Oregon, was temporarily assigned by her employer to work in New Jersey during most of October 1979. She flew to New Jersey, stayed in a motel, ate in restaurants and drove a rented car--all at her employer's expense.

On Saturday, October 20, 1979, at about 9:30 p.m., claimant went to a bar for drinks with two new acquaintances. These acquaintances were in no way connected with claimant's employer or employment. What followed was a purely social visit over drinks for the next two hours or more. No business was discussed.

After this gathering broke up, while driving her rented car back to her motel, claimant was injured in a one-car accident.

The Referee cited Simons v. SWF Plywood, 26 Or. App. 137 (1976) for the proposition that "traveling employees" are generally "within the course of their employment continuously during the trip." The Board questions whether an employee on indefinite temporary work assignment in a different location is a "traveling" employee within the meaning of Simons. And even if claimant were a traveling employee, Hackney v. Tillamook Growers, 39 Or. App. 655 (1979) raises considerable doubt about whether any safe generalization can be drawn from Simons. See also O'Connell v. SAIF, 19 Or. App. 735 (1974); Seidl v. Dick Niles, Inc., 18 Or. App. 332 (1974).

More recently, the Supreme Court has ruled that the general test for compensability is work connectedness. Rogers v. SAIF, 289 Or. 633 (1980). The Board concludes that claimant's Saturday evening social visit at a bar with acquaintances not involved with claimant's employer or employment is not work connected. It would belabor the obvious to so conclude if claimant were not temporarily away from her usual place of work. The Board finds nothing in claimant's temporary assignment to New Jersey that changes that result. SAIF's denial of compensability was proper. The Referee's reversal of SAIF's denial was error.

On claimant's cross appeal, the Board finds penalties and attorney fees are warranted. The employer had knowledge of claimant's injury on October 21, 1979. SAIF did not issue its first payment for temporary total disability until December 7, 1979. SAIF did not issue its denial until January 10, 1980. SAIF offers no defense of its tardy payment or tardy denial. The Board feels, however, that the extra difficulty involved in investigating a claim that arises on the other side of the continent is a mitigating factor that justifies a lower penalty that would otherwise be imposed.

ORDER

The order of the Referee dated September 9, 1980 is reversed. The denial by the SAIF Corporation dated January 10, 1980 is affirmed.

The SAIF Corporation is hereby assessed a penalty of 15% of the compensation for temporary total disability paid to claimant. The SAIF Corporation shall, in addition, pay to claimant's attorney the sum of \$500.

Own Motion No. 80-0005M MARCH 18, 1981

NADINE FREEMAN, CLAIMANT
Lang, Klein, et al, Claimant's Attorney
SAIF Corporation
Own Motion Order

Claimant, by and through her attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for a worsened condition related to her industrial injury of September 10, 1971. The SAIF Corporation is opposed to any reopening.

The evidence indicates both Drs. Smith and Misko recommended surgery for thoracic outlet syndrome and both related it to claimant's industrial injury. The opposing medical opinion is from the Intensive Diagnostic Advisory Board.

The Board concludes that the preponderance of evidence is that claimant's thoracic outlet syndrome is causally related to her original industrial injury, and the claim is ordered reopened as of November 20, 1980, the date the surgery was scheduled, or when claimant is hospitalized for that surgery.

IT IS SO ORDERED.

WCB Case No. 79-10,206. MARCH 18, 1981
WCB Case No. 79-8314

JAMES GRIFFIN, CLAIMANT
Jeffrey S. Mutnick, Claimant Attorney
Brian L. Pocock, Defense Attorney
Paul L. Roess, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

Claimant appeals that portion of the Referee's order which affirmed the carriers' denials raising the following issues:

1. The medical evidence and testimony demonstrates that the claimant's condition results from his compensable injury of July 20, 1978.
2. Claimant had good cause for failing to appeal SAIF's denial of June 27, 1979 within 60 days.
3. Argonaut Insurance Company and SAIF are estopped from asserting the defense of non-liability and must be deemed to have assumed liability.

The facts are not in dispute. Claimant filed a claim for a left wrist and right shoulder condition on July 20, 1978 while employed as a greenchain off-bearer at Brookings Plywood. Brookings was insured by Argonaut Insurance Company; the claim was accepted. A Determination Order issued on March 23, 1979, granting temporary total disability compensation from July 20, 1978 through November 9, 1978, temporary partial disability from November 10, 1978 through December 6, 1978 and 10% unscheduled permanent partial disability. South Coast Lumber Company purchased the mill, and claimant continued to be employed by South Coast. On April 16, 1979 while employed by South Coast claimant's right shoulder condition became acutely symptomatic. SAIF insured South Coast, SAIF accepted the claim and paid temporary total disability compensation but issued a denial June 27, 1979. Argonaut reenters the case and pays the claimant temporary total disability compensation for a short period of time, then denies the claim on August 30, 1979. Claimant requested a hearing on the carriers' denials.

The Referee found the claimant's request for hearing on the SAIF claim was not timely filed and that claimant had not shown good cause for his failure to file it within 60 days of the date of denial; that the acute right shoulder symptoms the claimant experienced in April 1979 arose out of a new injury at South Coast which would otherwise be compensable but for the late filing; that the claimant had not proved his aggravation claim as against Brookings and the carrier Argonaut; ordered SAIF to pay temporary total disability compensation, if not paid, from April 16, 1979 through June 27, 1979 plus a penalty of 10% of that amount and a \$500 attorney fee to claimant's attorney for SAIF's unreasonable failure to pay temporary total disability compensation; 25% unscheduled permanent partial disability due to the July 20, 1978 Brookings injury in lieu of the award granted by the Determination Order and a 25% fee to claimant's attorney payable out of the increase permanent partial disability award.

We find the claim compensable as against Brookings and their carrier Argonaut. The problem in claimant's right shoulder which manifested itself in April 1979 was simply a recurrence of the injury of July 20, 1978 and is compensable as an aggravation. Dr. Matthew's has said the claimant's problem which appeared in April 1979 "...are felt by me to be a continuation of the 1978 problem." We find Dr. Matthew's opinion persuasive.

Having found the claim against Brookings/Argonaut compensable, we affirm the SAIF denial but for a different reason than the Referee. We find the claimant had good cause for his failure to file a request for hearing on the SAIF denial within 60 days. We believe the "catch 22" position the claimant found himself in with respect to the dual denials after the short period of payment made by Argonaut arose out of the fact the claimant was lulled into a sense of security and that he had no reason to believe he should take legal action on the SAIF denial. Consistent with our finding on the Argonaut denial, we affirm the SAIF denial.

The Board does not reach the issue of estoppel.

The Referee's award of increased permanent partial disability on the July 20, 1978 claim is premature.

ORDER

The order of the Referee is modified.

The Referee's approval of SAIF's denial is affirmed. The approval of Argonaut's denial is reversed and the July 20, 1978 claim is ordered reopened for payment of benefits until closure under ORS 656.268. The carriers shall make monetary adjustments between themselves consistent with this Order on Review.

The increased award of permanent partial disability on the July 20, 1978 injury is reversed as is the award of an attorney fee out of the increased compensation.

Argonaut is authorized to credit any sums paid to claimant on the Referee's award against any temporary total disability compensation due or payable under this Order; that is, credit permanent partial disability compensation paid against temporary total disability award and/or future permanent partial disability awarded at closure under ORS 656.263.

The claimant's attorney is awarded a fee of \$1,500 for prevailing on a denied claim payable by Argonaut. This fee is for claimant's attorney's efforts at Hearing and Board levels.

WCB Case No. 79-10260 MARCH 18, 1981

VERNON L. HOLDRIDGE, CLAIMANT
Jeffrey R. Russell, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's (SAIF) denial dated November 21, 1979.

Claimant compensably injured his back in February of 1979. Following recovery from surgery, he returned to work on September 13, 1979. Claimant testified that his back began to bother him again as soon as he returned to work. On September 22, 1979 claimant suffered an off-the-job injury when he fell while trying to start a motorcycle. Claimant missed three days of work because of the motorcycle incident. Claimant testified that after he did return to work, his work activities produced more and more back pain until he quit on October 16, 1979 and sought medical attention.

SAIF's position, if we understand it correctly, is that all of claimant's medical problems after the motorcycle incident were caused by that incident, rather than causally linked to claimant's February 1979 industrial injury. SAIF even seems at times to concede that it would have accepted responsibility for claimant's continuing back problems if there had been no intervening motorcycle accident.

The Board concludes that the motorcycle incident did not injure claimant's back or exacerbate his back condition. The hospital emergency room report of that incident finds only abrasions. It indicates no history of back complaints at that time. The three days claimant missed from work were because his ankle was too swollen to get his boot on. Claimant testified he did not injure his back when he fell off the motorcycle.

The reports and deposition of Dr. Matteri might support a contrary conclusion. The problem, the Board finds, is that Dr. Matteri's position is so equivocal and contradictory that it could support almost any conclusion; therefore, it supports none.

Based on claimant's credible testimony and based upon the hospital report indicating no back injury or complaints at the time of the motorcycle accident, the Board finds that claimant has carried his burden of proof. SAIF's denial must be reversed.

ORDER

The order of the Referee dated July 28, 1980 is reversed. The SAIF's denial of November 21, 1979 is reversed and this matter is remanded to the SAIF Corporation for acceptance and the payment of benefits as required by law. The SAIF will not, of course, have to pay time loss for the three days following the motorcycle incident.

Claimant's fee agreement with his attorney is approved, and claimant's attorney is granted as and for a reasonable attorney fee, at both the Hearing and Board levels, the sum of \$1,500.00, payable by the SAIF, not payable out of claimant's compensation.

Own Motion No. 81-0034M March 18, 1981

JOE HOLMES, JR., CLAIMANT
Howard R. Hedrick, Claimant's Attorney
SAIF Corporation
Own Motion Order

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and grant claimant an increased award for permanent partial disability.

After reviewing the record before us the Board denies claimant's request. Claimant has not been employed since 1976 and is drawing total social security disability. The Board finds that the evidence does not support a finding that claimant has suffered any greater permanent partial disability than heretofor awarded, 90% loss of his left leg.

Claimant is entitled to all medical care and benefits stemming from his industrial injury of May 25, 1973 under the provisions of ORS 656.245.

IT IS SO ORDERED.

WCB Case No. 80-3698 MARCH 18, 1981

KAREN KRAFT, CLAIMANT
Bruce A. Bottini, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

SAIF seeks Board review of that portion of the Referee's order which granted claimant compensation equal to 13.5 degrees for 10% loss of the left foot. SAIF contends claimant failed to prove "permanency" of her condition and, therefore, is entitled to no compensation for the foot disability.

The Board, after de novo review, affirms the order of the Referee. The case relied upon by SAIF, Candee v. SAIF, 40 Or. App. 567 (1979), has one important difference from this case. In Candee, the doctors specifically indicated that claimant's headaches would resolve themselves and would not cause a permanent disability. In our case, no such finding was made. Claimant is having undisputed problems with phlebitis flare-ups. There is also no dispute that these are directly related to her industrial injury and are probably somewhat worse because of her diabetic condition. Claimant's credible testimony indicates that this problem is evident after a day at work spent standing on her feet. It is admitted that claimant has had no loss of earning capacity due to her injury but that is not the criteria in scheduled injuries. Claimant has proven by a preponderance of the evidence that she has sustained a permanent impairment of the left foot which has been adequately compensated by the Referee.

ORDER

The order of the Referee, dated August 13, 1980, is affirmed.

Claimant's attorney is granted the sum of \$200 for his services at this board review, payable by SAIF Corporation..

LORENE PARTRIDGE, CLAIMANT
D. Richard Hammersley, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's order which granted claimant compensation for permanent total disability for her left knee disability and psychiatric condition. SAIF contends claimant's psychiatric condition is not compensable and, therefore, she is not permanently and totally disabled.

The Board, after de novo review, finds that claimant has failed to prove by a preponderance of the evidence that her psychiatric condition was worsened by her industrial injury. The Board agrees with the Referee that the weight of the believable evidence indicates she had significant emotional problems prior to her injury. Dr. Larsen, claimant's treating physician, felt that claimant had few psychiatric problems before her knee injury and that since her injury, she has been severely depressed, highly suicidal and has required hospitalization. Dr. Means, Dr. Parvaresh and Dr. Stolzberg generally agree that claimant had significant emotional problems prior to her injury. Dr. Parvaresh opined claimant's injury did not directly or materially contribute to her psychiatric disorder. Dr. Stolzberg felt claimant's injury was simply one more thing in her life that prevented her from enjoying life. Dr. Stolzberg felt claimant was no worse as a result of her industrial injury. Based on the preponderance of the evidence, the Board concludes the SAIF's denial of June 8, 1979 should be affirmed.

The medical evidence also establishes that claimant's osteoarthritis condition is not related to her industrial injury.

Since we have found both the osteoarthritis and claimant's emotional problems are not compensably related to the claimed injury, we must determine extent of disability considering the knee injury alone. Dr. Waldram, on August 1, 1978, indicated claimant's limitations included: Inability to walk more than two blocks, inability to stand on the left leg longer than one hour at a time, and inability to stand more than two to three hours during the course of a day. Claimant can sit for a prolonged period of time. It was indicated that her disability in the knee was significant. The September 1, 1978 Determination Order granted her compensation for 65% loss of the left leg. Since the issuance of this order, there is nothing to indicate a reason to

increase the award. The evidence indicates that claimant is still able to do her housework, drive, do yardwork and do her own shopping. The Board concludes that claimant has been adequately compensated by the award granted by the Determination Order.

ORDER

The Referee's order dated May 9, 1980 is reversed.

The denials, issued June 8, 1979 and January 7, 1980 are affirmed.

The September 1, 1978 Determination Order is affirmed.

WCB Case No. 79-5443

March 18, 1981

MARVIN PETERSON, CLAIMANT

Malagon, Velure & Yates, Claimant's Attorney

Lindsay, Hart, et al, Defense Attorney

Order on Review

Reviewed by the Board en banc.

The employer seeks Board review of the Referee's order which found this denied aggravation claim to be compensable. We reverse.

This is a difficult case for at least two reasons. First, no testimony was presented before the Referee; instead, the matter was submitted on medical reports and deposition. Thus, the Referee was in no better position to assess credibility than is the Board.

Second, credibility is important. The only medical evidence relating claimant's current problems to his prior injury comes from Doctors Gilsdorf and Becker. Dr. Gilsdorf supported claimant's aggravation claim to the hilt. Dr. Becker was more luke warm, albeit generally supportive. Both medical opinions are based to a very large degree on claimant's report of his medical history to the doctors. Thus, the doctor's opinions stand or fall with claimant's credibility.

Weighing the evidence, assessing credibility, or any other function a factfinder is expected to perform, necessarily involves some elements of subjective insight and individual intuition which can be impossible to articulate. Our judicial system accepts that truism daily through the use of general verdicts. Our administrative law system, however, seems to consistently require this Board to return special verdicts, if not more.

Be all that as it may, the question remains of whether this Board is persuaded by the opinions of Doctors Gilsdorf and Becker which were based largely on claimant's report of his medical history to them. We are not persuaded by the doctors' opinions because we have doubts about claimant's credibility. Claimant gave various versions of the facts to various doctors at various times. Our insight and our intuition leaves us sufficiently unsure for the Board to be able to say that claimant carried his burden of proof.

ORDER

The order of the Referee dated August 14, 1980 is reversed.

The denial issued by the employer/carrier dated May 2, 1979 is affirmed.

Own Motion No. 81-0021M MARCH 18, 1981

CARL STRATTON, CLAIMANT
William c. Holmes, Claimant's Attorney
SAIF Corporation
Own Motion Order

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for consideration of permanent total disability as relating to his industrial injury of October 19, 1956.

After a review of all the medical data presented, the Board finds that, although surgery for a total joint replacement is inevitable in the future, at the present time there is no surgery contemplated. Therefore, claimant is not entitled to compensation for temporary total disability and the award of 25% previously granted adequately compensates claimant for his loss of function of his left leg.

Claimant's request for the Board to exercise its own motion jurisdiction is denied.

IT IS SO ORDERED.

MARCH 18, 1981

JACK J. WADE, CLAIMANT
Charles H. Seagraves, Jr., Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

Claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's denial of his claim for a knee condition allegedly related to his March 30, 1979 industrial injury.

After de novo review, the Board affirms the order of the Referee. Lest it be construed that the Board also has ignored the only medical opinion on causation in the record, a short explanation will follow. It is our responsibility to review the entire record before the Referee. Not only the medical reports, but numerous other factors must be taken into consideration. There is some inconsistency in the history given by claimant to Dr. Potter, which definitely contributed to his finding of causation. Claimant's knee pain failed to show up in other medical reports, despite the fact that claimant indicated he complained of this problem to other doctors. There are inconsistencies between claimant's testimony and the 12-page document he prepared for Dr. Potter and record. If claimant was having difficulty with the knee in May 1979, we find it hard to understand why he was willing to take a job as a choker setter at that time. We find, after a thorough consideration of all the evidence, that claimant has failed to sustain his burden of proof.

ORDER.

The order of the Referee, dated May 22, 1980, is affirmed.

MARCH 20, 1981

ROBERT ELLISON, CLAIMANT
Emmons, Kyle, et al, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

Claimant and the SAIF Corporation (SAIF) seek Board review of the Referee's order which affirmed the Determination Order with respect to temporary total disability and granted an award equal to 32 degrees for 10% unscheduled low back disability. Claimant's

attorney was granted an attorney's fee out of this compensation and an additional fee for his efforts when SAIF attempted to terminate temporary total disability compensation. Claimant contends that he is entitled to a penalty for the SAIF's unreasonable resistance to the payment of temporary total disability and an additional award of compensation for permanent disability. SAIF wants the attorney fee reduced, the duration of temporary disability reduced, and the 10% award reduced.

Claimant sustained a compensable low back strain on March 15, 1979. After a period of conservative treatment claimant was released for regular work on July 2, 1979. In August 1979, claimant went to work for a few days at a cannery but quit because of increased back pain. He was hospitalized for traction by Dr. Haevernich. On November 15, 1979, claimant saw Dr. Haevernich with severe back pain. The doctor stated that he "could not find symptoms which coordinated his findings clinically with his subjective findings." He released claimant for light duty on October 16, 1979. He felt that this latest problem was due to his industrial injury, but that no further treatment was necessary at that time.

In December 1979, SAIF set up the first of four appointments for claimant at the Callahan Center. In early January 1980 claimant advised the Callahan Center that he was in too much pain to attend the program and that his wife had been injured in an automobile accident and would be unable to care for herself and their child for the duration of time he was scheduled to be gone. The Callahan Center immediately set up a second appointment. The claimant's attorney and SAIF had a few conversations regarding

claimant's refusal to attend the Callahan Center and whether time loss benefits should be terminated. SAIF agreed to pay the compensation due claimant but, because of the discussions, was one day late. Claimant requests a penalty for this day. When claimant failed to show up for his next appointment, a third appointment was set up for February 12 with an additional clause that attendance was mandatory; claimant's failure to attend for an invalid reason would result in termination of his benefits. Claimant's attorney indicated claimant's situation had not changed and he would not be able to go to the center. SAIF requested that the Department authorize a suspension of claimant's benefits. After thorough discussion with both SAIF and claimant's attorney, this request was denied. A fourth appointment was set for April 9, 1980. Claimant went the first day only; the second day his wife called the center stating that he hurt too much to attend anymore. Claimant's benefits were subsequently terminated as of April 10, 1980 by the Second Determination Order.

The Board finds that claimant has been totally uncooperative in this claim. His frequent phone calls to SAIF became abusive to the point that they had to refuse to talk to him; only if his attorney called them would they discuss his case. Assuming that

claimant's excuses for failure to attend the Callahan Center were legitimate, claimant contends that SAIF was delinquent in not advising him of child care aid from Adult and Family Services. What claimant fails to mention is that the form letter from the Callahan Center which he received four times indicates that if he has any problems with transportation or child care, he should ask them for assistance. Just because it was a form letter does not change the fact that claimant was informed of help. It is interesting to note that Dr. Fitchett, in October 1979, indicated that people have benefited from the program at the Callahan Center, "...although in my experience generally they are a little bit more mature than this pt [patient] appears." We feel claimant has proven Dr. Fitchett to be correct.

On November 15, 1979, Dr. Haevernick examined claimant and found that he needed no further treatment at that time. Since that time, claimant saw doctors only upon SAIF's request with the intent to find him ready for closure. He had no treating physician and underwent no treatment of any kind. His condition neither improved nor worsened. The Board finds that Dr. Haevernick's November 19 report was sufficient to allow a proper claim closure under the provisions of ORS 656.268(1). It is interesting to note claimant's interpretation of this particular statute. Claimant advised us that his claim could not be closed until his condition became stationary and he had completed an authorized program of vocational rehabilitation. The statute actually says: "Claims shall not be closed nor temporary total

disability compensation terminated if the worker's condition has not become medically stationary or if the worker is enrolled and actively engaged in an authorized program of vocational rehabilitation..." At the time claimant was found to be medically stationary, he was not enrolled in a vocational rehabilitation program. When claimant became enrolled, he would then be entitled to additional temporary disability compensation until completion of the program. In this case, claimant is entitled to compensation through November 15, 1979 and for one day only, April 9, 1980. If, in the future, claimant decides to cooperate with the system, he may be entitled to additional compensation for time loss. Because of the confusion surrounding this case, penalties are not warranted for the one day SAIF was late in sending claimant's compensation check to him.

Claimant contends he is entitled to an increased award of compensation for his permanent disability to the low back. Based on his age (19), education (tenth grade), background, limitations and actual disability, the Board concludes that the 10% award granted by the Referee is adequate. Most of the doctors had trouble assessing the extent of claimant's problem due to his functional overlay. Generally, it was found that his objective findings were insufficient to explain his subjective complaints.

It is for this functional overlay that claimant wants compensation. To get additional compensation for this obvious problem, claimant must first show that this is related to his industrial injury, either caused by his injury or worsened by it. Claimant has failed to prove this with the medical evidence in the record. The award granted by the Referee is adequate.

ORDER I

The order of the Referee dated August 26, 1980 is modified.

The award granted by the Referee equal to 32 degrees for 10% unscheduled disability plus the corresponding attorney fee is affirmed.

The remainder of the order is reversed.

Claimant is hereby granted compensation for temporary total disability from August 30, 1979 through November 15, 1979, plus for one day only, April 9, 1980.

The award of permanent disability granted by this order may be offset against any overpayments SAIF has made pursuant to earlier directives.

WCB Case No. 79-09869 MARCH 20, 1981

SANDOR FORGACS, CLAIMANT
Wesley A. Franklin, Claimant's Attorney
Scott M. Kelley, Defense Attorney
Amended Order on Review

The Board issued its Order on Review in the above entitled matter on March 13, 1981. In that order the Board inadvertently failed to grant claimant's attorney a reasonable attorney fee for his prevailing at Board review from an employer's appeal. Our Order on Review is hereby amended to read:

ORDER

Claimant's attorney is hereby granted as and for a reasonable attorney fee for his services at Board review, the sum of \$350, payable by the employer.

JIM HAYTER, CLAIMANT
Olson, Hittle, et al, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which granted claimant additional compensation for temporary total disability from May 5, 1979 to November 20, 1979 and an award of 80 degrees for 25% unscheduled disability. Claimant contends he is entitled to continued compensation for temporary total disability until Dr. Stilson declares him medically stationary, or, in the alternative, he is entitled to a greater award for his loss of wage earning capacity.

The Board, after de novo review, affirms and adopts the Referee's order. Dr. Stilson, a chiropractor, sent claimant to Dr. Rosenbaum, and Dr. Rosenbaum indicated, on November 20, 1979, that claimant was not in need of any further medical care and treatment. Terminating compensation for temporary total disability as of that report was proper.

Claimant is 44 years of age with a high school education and four years in an apprenticeship for becoming a carpenter. Claimant is now precluded from construction carpentry and is working with vocational rehabilitation personnel. Claimant is bright with a good reading ability. His impairment, medically, has been rated as mild. He has had no periods of hospitalization nor any surgery. Therefore, the award granted by the Referee adequately compensates claimant for his preclusion from this segment of the labor market.

ORDER

The order of the Referee dated August 1, 1980 is affirmed.

KENNETH IVIE, CLAIMANT
Michael Strooband, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of the Referee's order which remanded claimant's claim for a right shoulder condition to it for acceptance and payment of compensation to which he is entitled. SAIF contends its denial should be affirmed.

Claimant underwent surgery for excision of the right distal clavical on May 22, 1980. Approximately two years prior to the surgery he began noticing real problems in his shoulder. Because his job as a spreaderman required repetitive use of the shoulder, claimant felt that his condition was probably related to his work.

The parties have agreed that the case of Weller v. Union Carbide Corp., 288 Or. 27 (1979), applies to this case. In order for compensability to exist based upon the facts of this case, the law requires that there be proof by a preponderance of evidence that claimant's work activity and conditions caused a worsening of his underlying disease, resulting in an increase in pain, to the extent that it produced disability requiring medical services. None of the medical evidence supports compensability within the Weller test with the possible exception of reports from Dr. Weinman. Dr. Weinman tried to ride two horses and ended up riding neither successfully. He first said:

"It is my opinion that this patient's job aggravated the disease process, necessitating his Mumford excision of the distal clavicle on May 22, 1980."

He later said:

"If I am to report the attitude and the history as obtained from the patient, I must feel that:

"1) He had pre-existing acromioclavicular joint disease.

"2) It was made symptomatic by his job.

"In my opinion that would logically lead to the conclusion that the operation was done because of aggravation on a job and hence it is your responsibility to pay the medical bills."

In conclusion, we have no medical evidence that supports compensability within the Weller test except one of two reports from Dr. Weinman, and that report is contradicted by the other. The majority of the Board concludes that claimant has not sustained his burden of proof.

ORDER

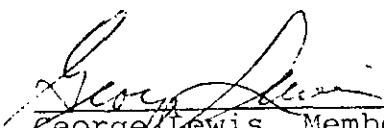
The order of the Referee, dated October 2, 1980, is reversed.

The denial, dated May 1, 1980, is affirmed.

I respectfully dissent from the majority opinion.

Rather than try to add anything, I would rely on the Referee's well thought out Opinion and Order, and I affirm and adopt that order.

WORKERS' COMPENSATION BOARD


George Lewis, Member

WCB Case No. 80-00797 MARCH 20, 1981

KATHY LARSEN, CLAIMANT
Welch, Bruun & Green, Claimant's Attorney
Lang, Klein, et al, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The employer seeks Board review of the Referee's order which awarded claimant compensation for temporary total disability from February 5, 1980 to February 24, 1980 and temporary partial disability from February 25, 1980 to March 5, 1980 and assessed a penalty of 25% of the temporary disability awarded.

The Board, after de novo review, modifies the Referee's order

The medical evidence indicates that claimant was released for regular work by Dr. Setera on October 1, 1979 and claimant commenced working for him as a receptionist. Claimant received treatments from Dr. Setera which were only palliative. She was terminated from that job December 1, 1979.

Dr. Puziss examined claimant on January 2, 1980 and indicated that her low back and neck complaints were not related to her work and the etiology was unknown. However, by report of February 6, 1980, he ordered physical therapy three times a week for all three body areas.

In Dr. Puziss' report of March 25, 1980 he indicated that he had not seen claimant since February 6 and felt that she was probably medically stationary by March 6 but indicated that she had subjective symptoms but no objective findings and no physical impairment.

Claimant testified that she saw no doctor after February 6, 1980 and on February 25 she became employed doing payroll and clerical work. Claimant testified she continued to have pain but could perform the job.

A preponderance of the medical evidence indicates that claimant had only continuing subjective complaints with no objective medical evidence to support those symptoms. Her condition remained unchanged from September 1979 through the time of the hearing. Therefore, we conclude that claimant is not entitled to compensation for temporary total disability, but she was entitled to continued medical care and palliative treatment pursuant to ORS 656.245 in February and March 1980 and into the future.

ORDER

The order of the Referee dated August 7, 1980 is modified.

That portion of the Referee's order granting compensation for temporary total disability and temporary partial disability, penalties and attorney fees is reversed.

The remainder of the Referee's order is affirmed.

LAWRENCE L. McGEHEE, CLAIMANT
Tim J. Helfrich, Claimant's Attorney
Keith D. Skelton, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

Claimant had the employer seek Board review of the Referee's order which granted claimant compensation equal to 192° for 60% unscheduled disability. Claimant contends he is permanently and totally disabled, or, in the alternative, he is entitled to greater awards of unscheduled and scheduled permanent disability and that his cervical, shoulder, arm and hand, leg and feet and headache complaints are causally related to the claimed injury. The employer contends the award is excessive.

First, we agree with the Referee on the non-compensability of the numerous complaints claimant alleges are related to the industrial injury.

The Board concludes that the award of unscheduled disability for claimant's low back granted by the Referee is excessive. The Orthopaedic Consultants rated claimant's loss of function of the low back as moderate. It is possible that claimant is 60% disabled, but this record does not support that award solely on consideration of the disabling affects of the low back condition separate from those conditions found not compensable. Claimant is 50 years, has a GED and has a varied work background. He has a definite functional overlay problem and very little motivation to return to work of any kind. We believe 128° for 40% unscheduled low back disability is more consistent with all the evidence. We so find.

ORDER

The order of the Referee, dated July 3, 1980, is modified.

Claimant is hereby granted compensation equal to 128° for 40% unscheduled back disability. This award is in lieu of that granted by the Referee in his order which is affirmed in all other respects.

DELWIN O. McKAMEY, CLAIMANT
Franklin, Bennett, et al, Claimant's Attorneys
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's order which remanded claimant's claim for hearing loss to it for acceptance and payment of compensation to which he is entitled.

The only issue before us is compensability.

There is no dispute in the record that claimant has a significant hearing loss and that the majority of this disability is due to his occupation as a boilerman. The doctors are agreed that only a small portion of his disability is the result of presbycusis. The question before this Board is whether claimant's hearing loss is the responsibility of PSF Industries, Inc., by whom claimant was employed from August 16, 1976 through October 15, 1976.

SAIF asks that the Board examine the audiograms taken on June 14, 1976 and on April 26, 1977. A comparison of these audiograms indicates that claimant's hearing loss was greater after the period of employment in question than before. The Board is persuaded that the "last injurious exposure" rule is the appropriate test to apply in this instance. We agree with the Referee that Inkley v. Forest Fiber Products Co., 288 Or. 337 (1980), is applicable. It indicates that where uncertainties as to the cause and date of onset of the occupational disease exist, it becomes necessary to use the principles set out in the "last injurious exposure rule." It goes on to state:

"Under the rule an occupational disease claimant must show that his condition arose 'out of and in the scope of employment,' ORS 656.802(1)(a), but he need not meet the often impossible burden of showing that workplace conditions at a specific time and place caused or materially aggravated his condition. The rule requires the claimant to show only that the employment environment during the relevant period could have been a contributory cause of the disease." (emphasis supplied)

Not only do we find claimant's job in question "could" have contributed to his hearing loss, we are persuaded that a thorough consideration of the history, the medical reports, and the audiograms indicate this period of employment did contribute to the progression of claimant's occupational disease. The SAIF Corporation's denial should be reversed.

ORDER

The order of the Referee dated July 23, 1980 is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services before the Board the sum of \$150, payable by the SAIF Corporation.

WCB Case No. 79-00986 MARCH 20, 1981
WCB Case No. 80-05057

TERESA MITCHELL, CLAIMANT
Stoel, Rives, et al, Claimant's Attorneys
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's order dated June 27, 1980 which awarded 20% unscheduled disability to the low back resulting from claimant's August 29, 1977 industrial injury and 5% unscheduled disability to the low back resulting from her March 26, 1979 industrial injury.

Prior Determination Orders, closing claimant's two separate claims, had awarded time loss benefits only with no award for permanent partial disability.

The issue is extent, if any, of claimant's permanent partial disability. Appellant argues that claimant's physical impairment is minimal and is not due to either of her industrial injuries. It asks, if permanent impairment is found, that the Board determine whether that impairment has caused a loss of earning capacity.

Citing Ryf v. Hoffman Construction Co., 254 Or. 624, 459 P2d 991 (1970) and Ford v. SAIF, 7 Or. App. 549, 492 P2d 491 (1972), claimant asserts that her permanent physical impairment will sooner or later have an adverse effect on her earning capacity and that the Referee's award, if anything, is conservative.

The Board, on de novo review, incorporates the Referee's findings with one minor exception: On pages 3 and 4 of the Opinion and Order where the Referee states that claimant "has sustained at least some loss of incapacity as a result of her industrial injuries," it should read that "claimant has sustained at least some loss of earning capacity as a result of her industrial injuries," which the Board finds to be to the extent awarded by the Referee.

While a loss of earning capacity is the basis upon which compensation should be determined, Lindeman v. State Industrial Accident Comm., 183 Or. 245, 192 P2d 732 (1948), the court later noted in Walker v. Compensation Dept., 248 Or. 195, 432 P2d 1018 (1967), that the disabling effect of any injury may be considered. In the present case, as in Walker, there is adequate evidence to support a finding that the injuries to claimant's back caused disabling pain which severely restricted her work activities. It is clear that claimant must restrict her work-related activities and should be retrained into a non-physical form of work.

In Ford, supra, claimant, with a work history limited to heavy physical labor, was employed in a supervisory capacity in a plywood mill. In spite of his disability caused by burns over 50% of his body, he returned to his supervisory job at an even higher pay scale. In that case, SAIF argued that pain and suffering, severity of initial injury and physical incapacity which do not affect earning ability, are extraneous to a determination of the extent of unscheduled disability. Further, SAIF contended that because claimant had returned to employment making even more money than before, he had obviously lost no earning capacity. The court held, however, that earning capacity must be considered in connection with a worker's handicap in obtaining and holding gainful employment in the broad field of general industrial occupations and not just in relationship to his occupation at any given time. The court of appeals pointed out that the worker could now work only in supervisory capacities and could not return to any of the heavy physical jobs that he had previously held.

Although claimant in this case was again gainfully employed at the time of her hearing, there is uncontroverted medical evidence that her work activities are limited by her physical impairment which the Board attributes to her work-related injuries.

The Board concludes, therefore, that the Referee correctly found the claimant sustained a 25% unscheduled disability to her low back as a result of her two industrial injuries and that the Referee apportioned them appropriately between the two.

ORDER

The order of the Referee dated June 27, 1980 is affirmed.

IT IS FURTHER ORDERED that claimant's attorney be paid the sum of \$350.00 as a reasonable attorney's fee in connection with this board review.

WYANE BATDORF, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attorneys
SAIF Corporation
Order on Review

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's (SAIF) denial of compensability for a myocardial infarction. The Board agrees with the conclusion reached by the Referee.

Dr. Howard, an internist, treated claimant upon his hospitalization May 22, 1978. His opinion was that claimant's myocardial infarction arose from coronary artery disease affected by diabetes, smoking and obesity. He indicated that work stress was not a significant factor.

Dr. Matthews, a cardiologist, opined that claimant's work did not cause the development of coronary artery disease. He did not give an opinion on the cause of the myocardial infarction.

Dr. Kloster, a cardiologist, was deposed and testified that he had read the medical reports but did not examine or interview the claimant. In response to a hypothetical question, Dr. Kloster testified that it was his opinion that claimant's work activity of hauling a 100-150 pound hose up and down a steep embankment was a significant contributing factor to the development of his myocardial infarction.

The Board concurs with the Referee that the opinions of Dr. Howard and Dr. Matthews carry greater weight. Dr. Kloster's information on the weight of the hose and the energy claimant expended to fill the water truck was grossly in error. Further, although Dr. Kloster had read the hospital reports, it appears that he overlooked the history claimant gave throughout his hospitalization that his chest pain commenced the night before his hospital admission.

Claimant, in his brief, contends that the Referee erroneously used his personal experience as a finding of fact in this case. The Board agrees that it was inappropriate for the Referee to discuss his "personal experience." That error is rendered moot by this Board's de novo review.

ORDER

The order of the Referee dated August 21, 1980 is affirmed.

Claim No. C 465282

MARCH 24, 1981

JOYCE BATSON, CLAIMANT
SAIF Corporation
Own Motion Determination

The Board issued its Own Motion Order in the above entitled matter on September 15, 1980 which ordered claimant's claim to be reopened effective upon her hospitalization for surgery.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from July 27, 1980 through September 21, 1980 and no additional award for permanent partial disability above the 50% already granted. The Board concurs with this recommendation.

IT IS SO ORDERED.

Own Motion No. 81-0017M MARCH 24, 1981

DALE BROSIG, CLAIMANT
Emmons, Kyle, et al, Claimant's Attorney
SAIF Corporation
Own Motion Order

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of January 14, 1975. Claimant's aggravation rights have expired.

Attached to claimant's request were medical reports from Dr. Boyer, a chiropractor, and Dr. Martens. The Board finds that the evidence presented is insufficient to find that claimant's condition has materially worsened. Dr. Martens found claimant's condition unchanged and indicated that the treatment by Dr. Boyer was only palliative, not curative.

Therefore, the Board will not exercise its own motion jurisdiction in this case, and claimant's request to do so is denied.

IT IS SO ORDERED.

Own Motion No. 81-0053M MARCH 24, 1981

HAROLD BROWNING, CLAIMANT
George Waldum, Claimant's Attorney
Own Motion Referring for Hearing

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his July 16, 1973 industrial injury. Claimant's aggravation rights have expired.

The medical information provided to the Board is insufficient for us to make a determination on claimant's request. The record does not provide, except by inference, a statement of a causal link between the current disc herniation condition and the original injury. The recurrence of severe pain occurred while claimant was working for a different employer. Therefore, this matter is being referred to the Hearings Division.

The Referee is to hold a hearing and take evidence to determine whether or not claimant's current condition is causally related to his industrial injury of July 1973. After the hearing the Referee is to have a transcript prepared of the proceedings and submit it, together with his recommendation, to the Board for it to enter its Own Motion Order.

IT IS SO ORDERED.

Own Motion No. 81:0051M MARCH 24, 1981

JAMES CROW, CLAIMANT
SAIF Corporation
Own Motion Order

The Board issued its Own Motion Order in the above entitled matter on February 27, 1981 in which it did not grant claimant compensation for temporary total disability because of not having any information in the file concerning claimant's employment status.

On March 9, 1981 the Board was provided, by the claimant, with the necessary information, and our Order will be amended accordingly.

The Board concludes that claimant is entitled to compensation for temporary total disability from January 8, 1981 until his claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

Claim No. 133 CB E03 6584 MARCH 24, 1981

RAYMOND P. DUNLAP, CLAIMANT
Corey, Byler & Rew, Claimant's Attorneys
Own Motion Determination

The Board issued its Own Motion Order on August 12, 1980 reopening claimant's claim for a worsened condition related to his May 2, 1974 industrial injury with compensation for temporary total disability commencing April 8, 1980.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from April 8, 1980 through February 2, 1981 and to no further award of permanent partial disability above the 30% unscheduled disability previously awarded. The Board concurs with this recommendation.

IT IS SO ORDERED.

WCB Case No. 80-00313 MARCH 24, 1981

THOMAS A. JACOBS, CLAIMANT
Bischoff, Murray, and Strooband, Claimant's Attorneys
Rankin, McMurry, et al, Defense Attorneys
Order on Review

Reviewed by Board members McCallister and Lewis.

The employer seeks Board review of the Referee's order which granted claimant an increased award of compensation for a total equal to 64 degrees for 20% unscheduled disability for his low back injury. The employer asks that the Determination Order granting 10% be affirmed.

Claimant is a 42-year-old saw mill barker operator who sustained a compensable injury to his low back on January 5, 1979. Surgery was performed in June 1979 with good recovery. Claimant was able to return to work in September 1979.

The most persuasive evidence in this case is that claimant is able to perform his previous job with few modifications. He indicated that he occasionally has help when the barker jams, but that also happened prior to the injury. For several months after claimant returned to work, he was actually doing more strenuous work than his present job. His only problem was some back ache and physical exhaustion at the end of the work day. Claimant has

missed no time from work and has apparently made no complaints of Jack pain while working. He, in essence, has no loss of wage earning capacity whatsoever. The fact that he had to turn down three higher paying jobs is not evidence of a loss of wage earning capacity.

Dr. Streitz, in December 1979, indicated claimant might have some trouble with extremes of lifting or repetitive lifting. He did feel claimant was functioning well. A later report indicated there had been no change in his condition. Claimant testified that he was being careful in his activity, but didn't seem to indicate that he was under a great deal of restriction. "Being careful" is not sufficient criteria on which to base an increased award. We find claimant has been adequately compensated for his loss of wage earning capacity resulting from his January 1979 injury.

ORDER

The order of the Referee dated August 18, 1980 is reversed.

The Determination Order dated December 27, 1979 is affirmed.

Own Motion No. 81-0071M MARCH 24, 1981

PAUL JOHANSEN, CLAIMANT
SAIF Corporation
Own Motion Order

Claimant requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of May 20, 1972. Claimant's aggravation rights have expired.

Accompanying medical reports indicate Dr. Mayhall recommended claim reopening by his report of November 10, 1980. Claimant indicated that he was forced to cease working in January 1981 and surgery for debridement of the subtalar joint was performed by Dr. Mayhall on February 20, 1981. The SAIF is unopposed to a claim reopening.

The Board concludes that claimant's claim should be reopened by SAIF with compensation for temporary total disability commencing when ascertained by the carrier that compensation was due as reasonably required as a consequence of the recommended surgery.

IT IS SO ORDERED.

Own Motion No. 81-0064M MARCH 24, 1981

STANLEY LINDSLEY, CLAIMANT
Hayes Patrick Lavis, Claimant's Attorney
SAIF Corporation
Own Motion Order

The claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his July 14, 1955 industrial injury. Claimant's aggravation rights have expired.

The medical evidence indicates that Dr. McLaughlin hospitalized claimant and performed surgery on his right leg on February 9, 1981. The SAIF is unopposed to claimant's request to reopen.

The Board concludes claimant's claim shall be reopened with compensation for temporary total disability commencing February 2, 1981 or upon claimant's hospitalization, and until his claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

Own Motion No. 81-0029M

TOMMY QUARLES, CLAIMANT
Jeff Gerner, Claimant's Atty.
James D. Huegli, Employer's Atty.
SAIF Corporation, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his April 1970 industrial injury.

Attached to his request claimant submitted a medical report from Dr. Buza which indicates that the surgery claimant underwent in 1980 was for ongoing degenerative osteoarthritis which Dr. Buza indicated had caused a thickening of the ligamentum flavum which was a naturally occurring phenomenon. Dr. Buza believed that the condition was secondary to claimant's 1970 injury. The Board concludes that Dr. Buza's medical report is insufficient to establish that the need for surgery was due to a worsening of claimant's original condition from injury. It appears from the medical evidence submitted that Dr. Buza never saw claimant until 1980 being unfamiliar with claimant's condition over the past ten years. Therefore, claimant's request for own motion relief is denied.

The employer's memorandum in opposition to the Board's exercising its own motion jurisdiction seems to be inconsistent. On the one hand, it states claimant's 1980 surgery was not causally related to claimant's 1970 injury. On the other hand, it states the employer's responsibility "can be satisfied by payment of his medical expenses pursuant to ORS 656.245." The contradiction is that the employer has no ORS 656.245 duty unless claimant's surgery is causally linked to his prior injury. In any event, any dispute about the causal link can be raised in the Hearings Division by a request for hearing.

IT IS SO ORDERED.

Claim No. C 339129

MARCH 24, 1981

BRINGFRIED RATTAY, CLAIMANT
SAIF Corporation
Own Motion Determination

The Board issued an Own Motion Order on November 14, 1980 which reopened claimant's claim for a worsened condition related to his compensable industrial injury of November 22, 1971.

Claimant was hospitalized on October 23, 1980 for surgery as recommended by Dr. Misko.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from October 23, 1980 through November 30, 1980 and no further award for permanent partial disability. The Board disagrees with this recommendation.

The Board will not grant compensation for temporary total disability; however, the hospitalization and surgery will be paid for pursuant to the provisions of ORS 656.245. The information before the Board is insufficient for it to determine whether or not claimant's hospitalization required any lost time from work. The Board needs documentation that he has missed time from work due to his condition and hospitalization. See OAR 436-83-810(1)(b). When, and if, this information is provided, the Board will reconsider the issue of compensation for temporary total disability.

IT IS SO ORDERED.

WCB Case No. 80-04999 MARCH 24, 1981

PHILLIP B. STEVENS, CLAIMANT
Harold W. Adams, Claimant's Attorney
SAIF Corporation
Order on Reconsideration

Claimant, by and through his attorney, submitted on March 9, 1981 a request for reconsideration of the Board's Order on Review dated March 4, 1981. The request for reconsideration raises no issues not previously considered by the Board. Claimant's request for reconsideration is denied.

IT IS SO ORDERED.

WCB Case no. 80-05218 MARCH 26, 1981

ROBERT V. CONDON, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attorney
Bruce Bottini, Defense Attorney
Order on Review

Reviewed by the Board en banc.

The employer seeks Board review of the Referee's Opinion and Order. The issue is whether the 1979 amendment to ORS 656.313 is retroactive. The Board concludes that the 1979 amendment generally is not retroactive.

The issue before the Board arises as follows. In an earlier proceeding, WCB Case No. 79-08395, a Referee found that claimant's claim, which had previously been denied by his employer, was compensable. The employer refused to pay for claimant's medical expenses, relying on the 1979 amendment to ORS 656.313. The claimant then initiated this proceeding contending his employer was responsible for payment of medical service bills. The Referee ruled in claimant's favor. The employer requests Board review.

Since the issue is retroactivity, the dates are important. Claimant was injured on July 4, 1979. Oregon Laws 1979, Chapter 673, Section 1, amending ORS 656.313, became effective on October 3, 1979. On April 29, 1980, a referee issued an order in WCB Case No. 79-08395 finding that claimant's claim should have been accepted as a compensable claim.

In short, the claimant was injured at the time the pre-1979 version of ORS 656.313 was in effect, and his claim was adjudicated at the time the post-1979 version of ORS 656.313 was in effect.

Under both the older and new versions of the statute, the general rule was and is: "Filing by an employer or the State Accident Insurance Fund Corporation of a request for review or court appeal shall not stay payment of compensation to a claimant." ORS 656.313(1). Under the older version of the statute, compensation included "all benefits, including medical services." ORS 656.005(9). The 1979 amendment basically removed the duty to pay for medical services pending review or appeal by adding sections 3 and 4 to the pre-existing statute.

"(3) If an insurer or self-insured employer denies the compensability of all or any portion of a claim submitted for medical services, the insurer or self-insured employer shall send notice of the denial to each provider of such medical services. After receiving notice of the denial, a medical service provider may submit bills for the disputed promedical services to the provider of health insurance for the injured worker. The health insurance provider shall pay all such bills in accordance with the limits, terms and conditions of the policy. If the injured worker has no health insurance, such bills may be submitted to the injured worker. A provider of disputed medical services shall make no further effort to collect disputed medical service bills from the injured worker until the issue of compensability of the medical services has been finally determined. When the compensability issue has been finally determined, the insurer or self-insured employer shall notify each affected medical service provider and each affected health insurance provider of the results of the determination. If the services are determined to be compensable, each health insurance provider that has paid claims pursuant to this subsection has a right of action to recover the costs thereof from the insurer or self-insured employer. As used in this subsection, 'health insurance' has the meaning for that term provided in ORS 731.162.

"(4) Notwithstanding ORS 656.005, for the purpose of this section, 'compensation' means benefits payable pursuant to the provisions of ORS 656.204 to 656.208, 656.210 and 656.214 and does not include the payment of medical services."

Under the older version of the statute, if a Referee found that a denied claim was compensable, the defense was obligated to pay for the claimant's medical services pending Board review and appeal to the Court of Appeals. For claims arising after the effective date of the 1979 amendment, the defense no longer has such an obligation; rather, medical services are paid for by the claimant's health insurance carrier with that carrier having a claim for reimbursement against the workers' compensation carrier if the claim is ultimately determined to be compensable. The problem is which of these two approaches are applicable in a case like this, where the claimant was injured before the effective date of the 1979 amendment but his claim was adjudicated after the effective date of the 1979 amendment.

The general rule is that a statute will not be applied retroactively to affect legal rights and duties arising out of past actions. Joseph v. Lowery, 261 Or. 545 (1972). The employer strenuously argues that the 1979 amendment to ORS 656.313 does not affect legal rights and duties arising out of past actions because it merely governs the question of which of two insurance carriers pay for medical services during the appellate process. That is not necessarily correct. If, for example, a claimant injured before October 3, 1979 had no health insurance, application of the 1979 amendment would divest the claimant of an absolute right for payment of medical services by the workers' compensation carrier which he had under prior law and substitute a right based on contingency.

For claimants who do have health insurance, whether retroactive application of the 1979 amendment would affect legal rights and duties arising out of past actions is more complicated. The 1979 amendment requires: "The health insurance provider shall pay all such bills in accordance with the limits, terms and conditions of the policy." This language could or could not affect legal rights and duties arising out of past actions depending upon the terms of the claimant's health insurance policy. Under our workers' compensation system, medical services for work-related injuries and diseases are paid for on a first-dollar basis. There is no deductible. There is no limitation. Health insurance, by contrast, may or may not contain deductibles, percentage limitations, maximum limitations, etc.

The employer's argument that the 1979 amendments do not affect legal rights and duties arising out of past actions is thus correct only in the situation of a worker who has an unlimited first-dollar health insurance coverage. For such a hypothetical worker, all his medical services would be paid for by the workers' compensation carrier under the older version of the statute and all his medical services would be paid for by the health insurance carrier under the newer version statute. From the worker's standpoint, the right in question is the same under both statutes, i.e., the right to have all bills for medical services paid; it is of no meaningful consequence to the worker whether they are paid by one insurance company or another.

However, the Board takes official notice of the fact that most workers do not have unlimited first-dollar health insurance coverage. For this vast majority of Oregon workers, whether the older or newer version of ORS 656.313 is applicable does affect legal rights and duties arising out of past actions. To illustrate: (1) If ORS 656.313 had never been amended, a claimant whose claim was ruled compensable by a Referee would have all his medical bills paid, regardless of whether the Referee's decision were ultimately reversed; but (2) if the amended version of ORS 656.313 were applied, and if the claimant's health insurance only paid, say, 80% of his medical bills, and if the Referee's finding of compensability were ultimately reversed, then the claimant would be responsible for one-fifth of his medical bills.

For these reasons, the Board concludes that the 1979 amendment to ORS 656.313 should not be applied retroactively to a claim that arose before its effective date absent evidence that the claimant had unlimited first-dollar health insurance coverage. There is no such evidence in this case. Therefore, claimant's employer remains responsible, as it was before the 1979 amendment to ORS 656.313, for payment of claimant's bills for medical services.

The Referee found that the employer's refusal to pay for the medical services was not so unreasonable as to merit imposition of a penalty: "Because of the difficulty which arises from construction of such legislation, I do not find the employer's refusal was unreasonable so as to warrant payment of a penalty." The Board agrees up to a point. The employer's responsibility to pay for claimant's medical services dates from April 29, 1980 when a Referee found claimant's claim compensable in the earlier proceeding, WCB Case No. 79-08395. That responsibility has now been reaffirmed by a Referee and this Board in this proceeding. Continued refusal to pay would be unreasonable.

ORDER

The Referee's order dated November 4, 1980 is affirmed. The City of Portland shall pay for all medical services claimant received in connection with his claim that was the basis of WCB Case No. 79-08395 and that accrued between the date of injury and the date of the Board's Order on Review in WCB Case No. 79-08395.

If such medical services are paid for within 14 days of the date of this order, no penalty is imposed. If such medical services are not paid for within 14 days of this order, the City of Portland shall pay to claimant a penalty for unreasonable refusal to pay compensation equal to 25% of the accrued medical bills as defined in the prior paragraph of this order.

Claimant is entitled to attorney fees for successfully defending the Referee's order. However, claimant's brief before the Board consisted only of a copy of his brief filed with the Referee. No significant additional legal services was rendered at the Board level. The City of Portland shall pay claimant's attorney the sum of \$200 as a reasonable attorney fee, payable in addition to and not out of the compensation awarded to claimant by this Order.

WCB Case No. 79-08807 MARCH 26, 1981

CAROL L. HELMICK, CLAIMANT
Leeroy O. Ehlers, Claimant's Attorney
Lang, Klein, et al, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of her "aggravation" claim.

After de novo review, the Board affirms the Referee's order. There was extensive discussion in both the opening statement at the hearing and in the parties' briefs with respect to what this case actually involves. Claimant sustained a compensable non-disabling injury in September 1978. In July 1979 she suffered a "reaggravation of her pain" and requested action on her claim. Because this occurred within a year of her injury, all claimant had to show was that her condition was now disabling. ORS 656.262(10). It was up to the carrier to consider changing the status of her claim from non-disabling to disabling. Before we can ever get to the issue of extent, the claimant must show that

she is temporarily disabled and in need of compensation other than medical services which were provided to her while her claim was in a "non-disabled" status. We find that claimant failed to show this. The carrier, in effect, instigated the hearing by issuing the denial of an aggravation of claimant's condition. We find, as did the Referee, that claimant has failed to prove she is entitled to additional compensation for worsened conditions resulting from the original injury. Although the claim was improperly handled by the carrier, we find that claimant failed in her burden of proof with respect to showing either that she has a disabling condition or a worsened condition as a result of her September 1978 industrial injury.

ORDER

The order of the Referee dated September 4, 1980 is affirmed.

Own Motion No. 81-0065M MARCH 26, 1981

CARL JOHNSON, CLAIMANT
SAIF Corporation
Own Motion Order

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his September 10, 1974 industrial injury. Claimant's aggravation rights have expired.

The medical evidence indicates claimant was scheduled for an arthroscopy on March 10, 1981 with probable surgery for arthrotomy by Dr. Spady. The SAIF is unopposed to a reopening.

The Board finds that claimant's claim should be reopened upon his hospitalization and surgery as recommended by Dr. Spady until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

JAMES P. LAVIN, CLAIMANT
Jerome F. Bischoff, Claimant's Attorney
R. Roy Heysehl, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The employer seeks review by the Board of the Referee's order which set aside its denial and referred the case to it for acceptance and payment of benefits as required by law.

The evidence indicates that claimant, in the fourth or fifth grade, stepped on a nail with his right foot and subsequently developed osteomyelitis. In 1970 degenerative arthritis was diagnosed. The Veterans hospital in 1972 issued a report which stated "consider fusion later." Dr. Donohoo reported on August 21, 1972 that eventually claimant's right foot would come to a fusion if he becomes incapacitated.

Claimant was employed as a machinist at Roseburg Lumber Company and filed his claim on July 19, 1979 claiming work aggravated his arthritis. The carrier denied on August 15, 1979.

On November 9, 1979 Dr. Johnson of the Veterans hospital performed fusion of claimant's right talonavicular joint.

It was Dr. Johnson's opinion, reported on March 6, 1980, that it was medically probable that claimant's work as a machinist, which required him to stand for prolonged periods of time, had worsened his talonavicular arthritis. This is the only medical opinion in the record.

The Board, after de novo review, finds this case not unlike Henry v. SAIF, 39 Or. App. 795, 593 P2d 1251 (1979). In that case the Referee had held claimant's condition was not work-related simply because claimant's work required him to stand most of the time on the job. The Court upheld the Referee's decision and added that claimant failed in his burden of showing that his condition was presently more severe than it would have been had claimant never worked at all.

The principal in Henry, supra, is applicable in this case: (1) Claimant had a pre-existing right foot condition; (2) his job required standing; and (3) it does not follow that claimant's occupation aggravated the condition. There is no medical evidence that the level of claimant's disability would not have occurred at all or so quickly but for his employment. All the record reveals is that standing aggravates claimant's pre-existing condition to what extent standing at work contributed to the "exacerbation" is not proved by this record.

The employer's contention in its brief is that Dr. Johnson's report should not be admitted because it had no chance to cross-examine. The Board finds based on the circumstances herein, the contention is without merit.

ORDER

The order of the Referee dated August 28, 1980 is reversed.

The denial dated August 15, 1979 is affirmed.

WCB Case no. 79-10,152-E MARCH 26, 1981

ALBERY LOGAN, CLAIMANT

Don Swink, Claimant's Attorney

Schwabe, Williamson, et al, Defense Attorney

Order on Review

Reviewed by the Board en banc.

The employer seeks Board review of the Referee's order which, although it found the employer's claim of overpayment of temporary total disability to be "meritorious," denied the employer any relief on the basis of res judicata. Without attempting to ascertain the current scope of res judicata in workers' compensation, the Board reverses the Referee because claimant is estopped to rely on that doctrine.

On April 15, 1977 claimant suffered a compensable injury. The claim was accepted and subsequently closed by a Determination Order dated January 24, 1979. Claimant requested a hearing on the extent of his permanent disability. By stipulation dated July 27, 1979 the parties settled that request for hearing.

The Determination Order awarded claimant temporary total disability as follows:

April 18, 1977...through May 14, 1978 less time worked, and from June 3, 1978 through June 9, 1978, and further from July 15, 1978 through December 15, 1978."

The employer subsequently learned, after entering into the July 1979 stipulation that during most of 1978 claimant had been working for Western Railroad Builders for \$10 per hour. Claimant was, at the same time, receiving time-loss payments from the employer. Claimant did not report any of his earnings to his employer despite a specific request from his employer that he do so.

Upon learning of the extent of claimant's work for Western Railroad Builders, the employer requested a hearing contending that the temporary total disability award granted by the January 1979 Determination Order should be reduced. The referee denied any relief, relying on the doctrine of res judicata, and reasoning that the employer could have contested claimant's entitlement to temporary total disability at the time of the July 1979 stipulation, but did not do so, and is now barred from doing so.

The Referee was correct in saying that the employer could have contested time-loss payments in connection with the pending request for hearing that was resolved by the July 1979 stipulation. The Referee's analysis was also generally correct: Res judicata usually forecloses the parties from relitigating something that could have been litigated in an earlier proceeding between the same parties.

It is far from clear, however, whether and to what extent that generalization applies to the workers' compensation area. In Pumpelly v. SAIF, 50 Or. App. 303 (1981), the Court of Appeals appears to have held that res judicata did not apply to an issue that could have previously been litigated between the parties. There the court referred to "a lack of medical information" at the time of the prior proceeding. 50 Or. App. at 308. Here there was a similar lack of information about claimant's employment at the time of the stipulation.

The Board need not and does not attempt to define the current scope of res judicata because there is a more comfortable and obvious basis for decision: Estoppel. A party can be estopped to rely on the defense of res judicata. Such an estoppel requires: (1) A false representation; (2) made with knowledge of the true facts; (3) made to a party ignorant of the truth; (4) that the false representation was made with the intention that it should be relied upon by the other party; and (5) that the party to whom it was made was induced to act upon it. Frasuer v. Agripac, 290 Or. 99, 104 (1980); Burnett v. SAIF, 29 Or. App. 415 (1977).

The Board finds all elements of estoppel present in this case.

Claimant made false representations both actively and passively. He had been informed by his employer that he had a duty to report any employment while he was receiving time loss benefits. He failed to do so. Moreover, the employer specifically asked claimant in July 1978 if he was working for wages. Claimant's response was negative.

As for claimant's knowledge of the true facts, he testified at the hearing that he failed to advise his employer of his return to work because he thought "work" meant only "manual labor." The Referee found this hard to accept. The Board finds it inherently incredible.

All of the evidence indicates that claimant's employer was ignorant, and justifiably so, of the nature and extent of claimant's work for Western Railroad Builders until about November 1979, long after having entered into the July 1979 stipulation.

Claimant now says he had no intention to defraud his employer. The Referee did not believe him. The Board does not believe him. It is impossible to infer any other intention when a worker accepts employment at \$10 per hour for almost a year and conceals that fact while simultaneously receiving time-loss benefits.

Claimant's employer was obviously induced to act by claimant's false representation, both in the sense that it overpaid temporary total disability and in the sense that it was unable to raise the issue of overpayment before entering into the July 1979 stipulation.

Indeed, the Board feels so strongly that the evidence establishes intentionally false statements that if the offense of unsworn falsification were not limited to false statements "to a public servant in connection with an application for any benefit," ORS 162.085(1) (emphasis supplied), we would refer this matter to the appropriate District Attorney for possible criminal action.

ORDER

The Referee's order dated July 1, 1980 is reversed in its entirety.

The employer, Boise Cascade, is allowed to offset its overpayment of compensation for temporary total disability against any further awards granted to claimant.

WCB Case No. 80-00077 MARCH 26, 1981
WCB Case No. 80-00853

ROBERT M. MORRIS, CLAIMANT
Pozzi, Wilsom, et al, Claimant's Attorneys
SAIF Corporation
Order of Remand for Consolidated Hearing

Claimant moves to remand WCB Case No. 80-00077 to the Hearings Division on the ground that the Referee failed to rule on a central issue. The Board agrees with the claimant.

It appears that there was genuine and reasonable confusion about what was involved in WCB Case No. 80-00077. That case involved both an appeal from an April 4, 1979 Determination Order (Ex. 9) and a contention that claimant's condition had subsequently worsened, which the employer denied. The Referee's Opinion and Order affirms that denial, but does not reach the question of the extent of disability that was also raised in WCB Case No. 80-00077.

Claimant's attorney advises us that he currently has a request for hearing pending in WCB Case No. 80-11614 which involves a question of extent of disability. The extent of disability issue in WCB Case No. 80-00077 involves the same portion of claimant's anatomy. Obviously, as claimant's attorney suggest, the two cases should be consolidated in the Hearings Division. WCB Case No. 80-00077 is remanded for that purpose.

IT IS SO ORDERED.

WCB Case No. 79-10,402 MARCH 26, 1981

STEVE PATTERSON, CLAIMANT

Michael J. Hansen, Claimant's Attorney

SAIF Corporation

Order Granting Motion to Strike

The SAIF Corporation requested Board review of the Referee's order. By letter dated January 23, 1981 the Board informed the parties: "All briefs shall be filed within 50 days from the date of this letter, to-wit, March 16, 1981."

Even though SAIF had not yet filed any appellant's brief, respondent filed a brief on March 16, 1981 in compliance with the Board's instructions.

Subsequently, SAIF submitted a brief dated March 19, 1981 and received by the Board March 20, 1981. SAIF offered no explanation for this late filing. SAIF did not move for an extension of time.

Respondent has moved to strike SAIF's brief on the ground that it was not timely filed. The motion is well taken and will be granted.

ORDER

SAIF's brief is stricken from the record and will be returned to SAIF with a copy of this order. This case is placed on the docket for Board review based on the record and respondent's brief.

Claim No. GC 446817

MARCH 26, 1981

DARREL P. TARTER, CLAIMANT
Charles Tauman, Claimant's Attorney
SAIF Corporation
Own Motion Order

Claimant suffered a compensable industrial injury on May 16, 1973 and his claim was subsequently closed by a Determination Order of May 24, 1974. Claimant's aggravation rights expired in May 1977. By a stipulation of August 5, 1980 the carrier stipulated to provide claimant with the medical care and treatment as recommended by Dr. Parsons.

Claimant underwent a lumbar laminectomy with disc excision surgery on July 11, 1980. The claim has now been submitted for closure.

It is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from July 11, 1980 through September 30, 1980 and temporary partial disability from October 1, 1980 through January 12, 1981 and no additional award of permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

WCB Case No. 80-00517

MARCH 26, 1981

WILLIAM TEAL, CLAIMANT
William J Blitz, Claimant's Attorney
SAIF Corporation
Order on Review

The SAIF Corporation seeks Board review of the Referee's order which modified the Determination Order of July 16, 1980 and granted claimant compensation for temporary total disability from August 11, 1978 through June 26, 1980 and a penalty of 25% on said compensation.

The Board, after de novo review, modifies the Referee's order. The Board affirms the Referee's modification of the Determination Order on compensation for temporary total disability. The SAIF made no reasonable effort to secure a medical report from Dr. Woolpert for almost two years. They made no attempt to have Dr. Woolpert clarify his October 2, 1978 report wherein he found claimant's condition medically stationary; no attempt was made to have claimant examined by an independent examiner. In short, the SAIF's processing of this claim is singularly characterized by their failure to process, the result is the only report finding claimant medically stationary from the August 1978 injury is that of Dr. Woolpert in June 1980.

We reverse the Referee on the penalty. We do not find SAIF's actions unreasonable. We find sufficient ambiguity in the record to permit SAIF's interpretation, although that interpretation may later have been proved incorrect. Dr. Woolpert's report of October 2, 1978 found claimant's "condition" at that time stationary, the report does not clearly define which "injury" he was talking about. We think Evaluation Division, upon closure in July 1980, felt this report included the 1978 injury. Therefore, the SAIF's termination of time loss benefits as of that date was not unreasonable. We so find.

We do find the SAIF's refusal to comply with the Referee's Opinion and Order of November 19, 1979 constitutes unreasonable refusal to pay compensation. Referee Wolff found the August 1978 injury was a new injury and remanded the claim to the SAIF for acceptance and payment of compensation commencing August 11, 1978. SAIF did absolutely nothing until it paid compensation for temporary total disability from August 11, 1978 through October 2, 1978 and made such payment on May 5, 1980.

Therefore, the SAIF will be assessed a penalty of 10% for its failure to timely comply with the Referee's order.

ORDER

The order of the Referee dated August 28, 1980 is modified.

The Determination Order of July 16, 1980 is affirmed as modified by the Referee in his order.

The Referee's award of penalty on compensation from August 11, 1978 through June 26, 1980 is modified.

The SAIF is assessed a penalty in a sum equal to 10% of the compensation for temporary total disability granted by the Referee's order of November 19, 1980 from August 11, 1978 through May 5, 1980 inclusive.

Claimant's attorney is not granted a fee at this level as the fee granted by the Referee was quite adequate.

CLEVE E. CLAPP, CLAIMANT
Samuel Hall, Jr., Claimant's Attorney
Lang, Klein, et al, Defense Attorney
Supplemental Order

The Board's Order on Review of March 9, 1981 deferred any award of attorney fees pending receipt of a fee agreement between claimant and his attorney. We have now received that fee agreement and an explanation of the relationship between claimant's attorneys.

Claimant was represented in part by David Vinson of Starr and Vinson and in part by Samuel A. Hall, Jr., of Coons and Hall. Both Mr. Vinson and Mr. Hall have stated to the Board that they will work out their own allocation of attorney fees.

Claimant's attorneys are entitled to an attorney fee payable from the increased compensation awarded claimant by the Board pursuant to OAR 438-47-040(1). That rule contains a guideline of 25% of the increased compensation awarded subject to a limit of \$3,000. Both of claimant's attorneys suggest their possible entitlement to an additional fee for extraordinary services pursuant to OAR 438-47-010(2), but neither has submitted the documentation required by that rule, i.e., "a sworn statement of the services performed by the attorney." In any event, the Board regards the maximum fee permitted by OAR 438-47-040(1) to be a reasonable attorney fee in this case.

ORDER

Claimant's attorneys, David Vinson and Samuel A. Hall, Jr., are awarded as a reasonable and proper attorney fee 25% of the increased compensation awarded to claimant by the Board's Order of March 9, 1981, not to exceed the sum of \$3,000, payable from claimant's compensation; and to be allocated as agreed by Mr. Vinson and Mr. Hall.

LARRY WRIGHT, CLAIMANT
Allen T. Murphy, Jr., Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which granted claimant compensation for permanent total disability. SAIF contends, first, that the Referee did not have jurisdiction to hear the matter or, in the alternative, that claimant failed to prove he is permanently and totally disabled.

Claimant sustained a compensable injury on June 29, 1970 the initial closure of his claim was on June 21, 1971. Claimant's aggravation rights expired on June 21, 1976. On November 19, 1976, claimant's claim was again properly closed under the provisions of ORS 656.268. Claimant had one year to appeal the award granted by that 1978 Determination Order.

What followed is a bit obscure. Apparently claimant did request a hearing on the 1976 Determination Order. We say "apparently" because, although there is no such document in this record, a subsequent stipulation refers to settlement of "all issues raised in claimant's request for hearing."

According to the Board's own motion files of which it takes official notice, claimant's attorney requested the Board to grant own motion relief on March 31, 1977.

There was thus both a request for hearing apparently pending and a request for own motion relief pending at the same time involving the same issues--with the parties taking different positions on which of the two procedural avenues was the appropriate one.

This procedural riddle was solved by a Stipulation and Order executed by all parties, submitted to the Board for approval and approved by the Board on November 16, 1977. That stipulation referred to settlement of "all issues raised in claimant's request for hearing herein including his request for reopening under own motion jurisdiction." The stipulation provided that "the claim shall be reopened for medical care and temporary total disability payments pursuant to claimant's own motion petition under the provisions of ORS 656.278." (Emphasis supplied.)

What followed is even more obscure. When the Board re-opens a claim under its ORS 656.278 own motion authority, as it did in the 1977 Stipulation and Order, only the Board can then close that claim. Yet for no reason apparent in this record, the Evaluation Division issued a Determination Order on August 17, 1979 closing the claim that had been reopened by the Board on its own motion. This case came before the Referee on a request for hearing on that 1979 Determination Order.

The Board concludes that the Evaluation Division lacked authority to issue that 1979 Determination Order. The Evaluation Division only has authority to close claims under ORS 656.268. By contrast, once ORS 656.278 comes into play, a claim can only be reopened and subsequently closed by the Board under its own motion authority.

Since the 1979 Determination Order was null and void, claimant had no right to request a hearing thereon. Since claimant had no right to request a hearing, the Referee lacked jurisdiction to issue his August 29, 1980 order.

As an own motion matter, this claim is obviously overdue for closure. The Board will submit the record to the Evaluation Division for an advisory rating and then issue an Own Motion Determination closing the claim.

ORDER

The order of the Referee, dated August 29, 1980, is vacated, and claimant's request for hearing on the August 17, 1979 Determination Order is dismissed.

The August 17, 1979 Determination Order is hereby declared to be null and void. Claimant's claim is hereby referred to the Evaluation Division for its advisory rating under the provisions of ORS 656.278.

WCB Case No. 78-03668 MARCH 30, 1981
WCB Case No. 78-05218

GUS BARLAS, CLAIMANT

Evohl F. Malagon, Claimant's Attorney
Schwabe, Williamson, et al, Defense Attorneys
Order on Review

The employer, Weyerhaeuser, seeks review by the Board of the Referee's order which found claimant's psychological condition was causally related to his industrial right hand injury of February 1, 1977 and remanded said claim to it for acceptance and the payment of benefits as required by law.

We reverse. The psychological condition is not compensable.

The psychological evidence in the record indicates claimant was evaluated by Dr. Colbach in April 1979. At that time, Dr. Colbach opined (1) the injury was a material contributing factor to claimant's psychological condition and (2) claimant was totally disabled.

Subsequently, Dr. Colbach saw a film of claimant, and, by a report of May 16, 1979, he changed his earlier opinion. After viewing the film, he reported claimant's basic problem was attitudinal, and that claimant was capable of being helped but had already made up his mind on what he was going to do.

Dr. Rimel, a psychiatrist, examined claimant on May 17, 1979. The diagnosis was depressive neurosis and schizoid personality. The doctor felt that the depressive condition antedated the industrial injury. He found claimant not self-conscious about his hand.

The employer denied compensability of the psychological condition on June 4, 1979.

Dr. Colbach was provided with Dr. Rimel's report and indicated on June 5, 1979 that he agreed with Dr. Rimel's diagnosis and that (1) claimant was not particularly psychologically disabled as a result of his hand injury and (2) claimant had no motivation for work or rehabilitation.

Dr. Luther, a psychiatrist, evaluated claimant on July 18, 1979 and also read the medical evidence. He found claimant talked a great deal about "not feeling good," specifically with regard to his stomach and extremities. He believed claimant was not interested in psychotherapy. Dr. Luther's opinion was that claimant's significant injury precipitated a significant depression which "at this time in addition to physical infirmities renders him essentially totally disabled."

Dr. Colbach reviewed Dr. Luther's report and provided as his "final opinion" the injury did not materially contribute to claimant's "pathetic" state.

Dr. Colbach on deposition testified in depth about his change of opinion. He testified claimant had a pre-existing psychological disorder. He was a loner and somewhat unhappy with no social relationships. Claimant was not psychologically, permanently and totally disabled. Dr. Colbach felt that claimant consciously finished "sponsoring" his body for the "crummy capitalists" who didn't take care of him. Claimant was definitely angry at this employer and wouldn't do anything for them ever

again. Not that he couldn't but that he wouldn't. The doctor felt that until the litigation was ended, one couldn't say what claimant plans to do with his life. Getting better was "giving in" to the employer, and claimant was not about, in the doctor's opinion, to "give in."

Dr. Colbach found claimant's condition was medically stationary; that is, he could get better but he wouldn't accept it. The doctor felt that claimant's lifestyle had not changed at all after the injury from what it was before except he no longer worked.

We find the believable medical evidence does not support a conclusion that claimant's work injury precipitated the psychological condition. The lack of causal connection becomes obvious when one compares claimant's present lifestyle with that preceeding the industrial injury. The only change that is seen is claimant's total lack of motivation for any rehabilitation or a return to work. We are persuaded that claimant made up his mind he was not going to work ever again and refuses to make any effort to try. We are further persuaded this behavior on the part of claimant is attitudinal and not pathological.

The Board further finds our conclusions in this case consistent with the language used by the Court of Appeals in Wilson v. Weyerhaeuser, 30 Or. App. 403, 567 P2d 567 (1977), to wit:

"Emotional states at the less severe end of the spectrum may reflect and be subject to claimant's exercise of will. As such, the injury is not causal--it merely gives opportunity for expression of common work avoidance desires. These mental states are not pathological, but attitudinal."

This is the situation described by Dr. Colbach who felt claimant's behavior with refusal to try indicates a man who has made up his mind to behave as he is behaving and that this behavior is strictly attitudinal. This behavioral pattern is a long-standing psychiatric disorder. This behavior merely reflects his "normal" reaction to the situation he finds himself in. Prior to this industrial injury, claimant had been involved in an automobile accident, and claimant reacted to that situation by selling his car and never driving again, which was also "normal" behavior for him.

Based on the above record, the Board concludes that claimant's psychological condition is not compensably related to his industrial injury, and the denial by the employer is affirmed.

ORDER

The order of the Referee dated August 8, 1980 is reversed in its entirety.

WCB Case No, 80-689

MARCH 30, 1981

CLARENCE H. BLAIR, CLAIMANT
Brink, Moore, et al, Claimant's Attorney
David O. Horne, Defense Attorney
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 Referee is final by operation of law.

Claim No. WD 51562

MARCH 30, 1981

NOBLE J. CHASTEEN, CLAIMANT
SAIF Corporation
Own Motion Determination

The Board issued its Own Motion Order in the above entitled matter on November 14, 1980 and reopened claimant's claim for a worsened condition related to his industrial injury of October 7, 1974.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from October 29, 1980 through December 3, 1980 and temporary partial disability from December 9, 1980 through December 28, 1980 and no further award for permanent partial disability.

The Board concurs with the recommendation for temporary total disability compensation but disagrees with that recommended for temporary partial disability. Dr. Filarski, on December 3, 1980, found claimant fit for light duty activity with overhead work limitation and felt that in two or three weeks claimant would be medically stationary. Dr. Filarski doesn't submit another report until February 24, 1981 which declares claimant medically stationary. The Board has received information that claimant returned to fulltime work at a gas station on January 18, 1981. Because of the speculation in Dr. Filarski's December report and the lateness of his February report, the Board feels that the compensation for temporary partial disability should run from December 9, 1980 to January 17, 1981, inclusive.

IT IS SO ORDERED.

STANLEY FOUNTAIN, CLAIMANT
Dan O'Leary, Claimant's Attorney
Lawrance L. Paulson, Defense Attorney
Amended Order on Review

This amended order is to correct the Order of Dismissal dated December 30, 1980 which, due to an internal error, omitted claimant's attorney from the mailing list, allowing the appeal rights to expire.

This Amended Order of Dismissal amends our Order of Dismissal to the date shown below, reinstates the appeal rights, and shows service on the claimant's attorney.

IT IS SO ORDERED.

On October 13, 1980, the claimant and his attorney entered into a stipulation which granted him an additional award of permanent partial disability equal to 96° for 30% unscheduled disability, provided the award be paid in a lump sum and granted the claimant's attorney a fee out of this increased award and dismissed the claimant's request for a hearing. This stipulation was approved by Referee Gemmell.

Subsequent to the approval of the stipulation, the claimant retained a different attorney, and on November 12, 1980 requested the Board set aside the stipulation and set this case for a hearing on its merits. The claimant contended that at the time the stipulation was entered into, he was unable to work. Further, the claimant forwarded a report to the Board from Dr. Hoff in which the doctor stated he felt that claimant had moderately severe disability and was unable to work.

On November 17, 1980, the employer/carrier advised the Board that it objected to the claimant's request. The employer/carrier contends that any rights the claimant may have are under ORS 656.278. Further, they contend that the stipulation is a final order and does not have any appeal rights to it. They request the Board dismiss the claimant's request for review.

The claimant, by and through his attorney, on December 9, 1980, advised the Board that he was relying on the case of Schultz v. SAIF, 252 Or 211, 448 P2d 551 (1968).

We have reviewed the contentions of the parties in this case and dismiss the claimant's request for review. We find the claimant's request is without merit. The Schultz case relied upon by the claimant held that if, on the face of the record, the probability of an inaccurate award was found, the Board could remand the claim to the Hearings Officer for further determination of claimed liability although the original award was based on an agreement of the parties. In this case, we do not find that on the face of the record that the award of compensation granted to the claimant in the stipulation was inadequate. Therefore, the Board denies the claimant's request that the stipulation entered into and approved on October 13, 1980 be set aside and that this case and claim be set for hearing before a Referee.

ORDER

The claimant's request for review dated November 12, 1980 is dismissed.

Claim No. B 96609

MARCH 30, 1981

ELMER HICKEY, CLAIMANT
Welch, Bruun & Green
SAIF Corporation
Own Motion Order

Claimant, by and through his attorney, requested on April 17, 1980 that the Board exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of Dec. 4, 1964.

The Board found the evidence presented insufficient to reach a determination and, in the interest of all parties, referred this matter to the Hearings Division to be heard by a Referee per an Own Motion Order Referring for Hearing dated May 9, 1980.

The hearing was subsequently held on January 8, 1981 and the Referee transmitted his recommendation to the Board on January 30, 1981.

The Board, having read the transcript of the proceedings, the medical evidence of record and the Referee's recommendation concludes that the claimant is entitled to an award of 70% loss of an arm for unscheduled disability.

Further, the Board urges that the Field Services Division of the Workers' Compensation Department contact claimant and make every effort possible for some type of retraining or job placement assistance for this claimant.

Claimant's attorney is granted as a reasonable attorney fee the sum of \$600 ppt of the increased award granted by this order.

IT IS SO ORDERED:

WCB Case No. 80-4990 MARCH 30, 1981
WCB Case No. 80-3037

JAMES HYDE, CLAIMANT
Richard Kropp, Claimant's Attorney
Lang, Klein, et al, Defense Attorneys
Order on Review

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation to which claimant is entitled and assessed a penalty against it for unreasonably refusing to pay compensation.

SAIF contended that claimant's condition was actually a continuing problem related to his 1962 or 1971 industrial injuries. For this reason, Scott Wetzel Services was joined as a party to the proceedings before the Referee. However, no claim had been filed against them by claimant.

The Board concurs with the Referee's finding that claimant sustained a compensable new injury on November 26, 1979. The lay testimony and the medical evidence overwhelmingly supports this conclusion.

We have no statutory grounds for assessing a penalty against the SAIF for their "unreasonable denial," as claimant contends. We could assess a penalty for the SAIF's late denial, but claimant failed to raise this as an issue. We feel the record infers that SAIF did not make the required payments of temporary total disability compensation, but there is no evidence in the file to indicate one way or the other. We find that claimant has the burden of proof in this matter. He raised the issue and failed to pursue it. Therefore, no penalties are indicated in this matter.

ORDER

The order of the Referee dated September 8, 1980 is modified.

That portion of the order which granted a penalty is reversed.

The remainder of the order is affirmed.

Claimant's attorney is hereby granted the sum of \$350 for his services at this Board review, payable by the SAIF Corporation.

CURTIS A. LOWDEN, CLAIMANT
Robert L. Chapman, Claimant's Attorney
William Replogle, Defense Attorney
Order on Review

Reviewed by the Board en banc.

The Insurance Company of North America (INA) seeks Board review of that portion of the Referee's order which found the claimant established good cause for his failure to file a request for hearing within 60 days after the denial of his claim by INA and its insured, Husky Industries.

Claimant injured his back in November 1978 while working for Your Handyman Mobile Home Service, which was insured by SAIF. The claimant subsequently changed jobs. The claimant injured his back in June 1979 while working for Husky Industries, which was insured by INA. The Board agrees with the Referee that claimant's 1979 injury is a new injury that is the responsibility of INA and its insured, rather than an aggravation of claimant's 1978 injury which would be the responsibility of SAIF and its insured.

The dispositive issue is whether claimant has established good cause for filing his request for hearing more than 60 days after INA denied responsibility.

There is no significant dispute about the facts relevant to the timeliness issue. INA's denial letter stated in the usual form that claimant had to request a hearing within 60 days if he was dissatisfied. The claimant admitted receiving, reading and understanding that denial letter. If this is all there were to the case, it would be hard to imagine good cause for requesting hearing beyond 60 days.

There is more, however. INA's denial was based on the sole ground that claimant's 1979 problems were an aggravation of his 1978 injury, for which SAIF was responsible. See OAR 436-83-120 ("...the notice of denial shall specify the factual and legal reasons for denial..."). The claimant then telephoned INA. A claims representative elaborated on the denial by telling claimant to call SAIF and gave him a telephone number. The claimant called SAIF as suggested. He was told that SAIF would "check it out" and respond to him by letter.

SAIF subsequently issued a formal denial, taking the position that claimant's 1979 problems were not an aggravation of his 1978 injury, but instead a new injury, and thus the responsibility of INA. See OAR 536-83-120, supra. This denial was sent to an incorrect address. The claimant received it about the end of October 1979 after it was forwarded to him. The claimant's request for hearing on both INA's denial and SAIF's denial was received by this Board on November 29, 1979. That was some 92 days after the date of INA's denial.

In short, we have here a situation involving a dispute between two insurance companies, neither of which has ever contended that claimant's 1979 problems are not compensable, and both of which, originally contended the responsibility for compensation lay with the other company. Caught in this cross-fire, claimant followed INA's suggestion and proceeded to process his claim with SAIF after INA's denial. Due to SAIF's use of an incorrect address and through no fault of claimant, he received no notice of SAIF's denial until more than 60 days after INA's initial denial.

ORS 656.319(1)(a) requires that a request for hearing be filed not later than the 60th day after the claimant was notified of the denial of his claim. ORS 656.319(1)(b), stated in the disjunctive, permits a request for hearing to be filed up to 180 days after notification of denial if "the claimant establishes at the hearing that there was good cause for failure to file the request by the 60th day after notification of denial."

There are a large number of appellate decisions, mostly at the Court of Appeals level, interpreting this statute. The parties in this case rely on various of those decisions. The parties fail to note, however, that a more recent Supreme Court decision has reduced the precedential value of the earlier decisions.

In Brown v. EBI Companies, 289 Or. 455 (1980), the Supreme Court held

"'good cause' under ORS 656.319(1)(b) is not a matter of 'discretion' but of agency judgment in the sense stated in McPherson v. Employment Division, 285 Or. 541, 591 P2d 1381 (1979)." 289 Or. at 460 n 3.

McPherson held that the term "good cause" appearing in the unemployment compensation statutes was to be defined, as a policy matter, by the agency entrusted with administration of those statutes, rather than by the judiciary. Brown extends that rule to the workers' compensation area. The definition of "good cause" under ORS 656.319(1)(b) is thus for the Workers' Compensation Board, and we are not bound by pre-Brown appellate decisions.

In exercising that responsibility, this agency is not foreclosed from following persuasive judicial analysis. In both Hanna v. McGrew Bros. Saw Mill, 44 Or. App. 189 (1980), and Calder v. Hughes and Ladd, 23 Or. App. 66 (1975), the Court of Appeals indicated that a claimant should not be penalized when he is caught in a cross-fire between two insurance carriers, each claiming that responsibility for the claim rests with the other. The Board finds that reasoning to be here applicable and cogent. Factually, we find that the reason for claimant's having requested a hearing more than 60 days after INA's denial was due to his pursuing his claim with SAIF as suggested by INA. Legally, and as a policy matter, we conclude that is good cause for the amount of delay here in question (32 days).

Contrary to the assertion in the employer's brief before the Board, Saltmarsh v. SAIF, 35 Or. App. 763 (1978) is not relevant. In that case, the request for hearing was filed more than 180 days after the denial. That request came too late under ORS 656.319(1)(b), regardless of the cause for the delay. The request for hearing involved in this case, by contrast, was made less than 180 days after the denial; the same statute tells us the request was timely if there was good cause for failure to file within 60 days. As previously indicated, we conclude that there was good cause for the delay.

We conclude with an observation about the Referee's handling of the good cause issue. During the course of the hearing, the Referee stated:

"I am ruling that the claimant did have good cause for the delay beyond the 60 day period before he filed his request for hearing. I will more specifically dwell on that issue at the time I issue my written Opinion and Order."

Perplexingly, the Referee's Opinion and Order states:

The Referee made his decision on the defense issue of failure to file a timely request for hearing at the time of the hearing and stated his reasons and ruling on the record. I feel it is unnecessary to repeat those statements..."

In short, at the time of the hearing, the Referee stated that he intended to explain his reasons in a written Opinion and Order, but in that document the Referee claimed to have already stated his reasons on the record.

The Board believes it is entirely proper for a Referee to orally explain his or her reasoning and analysis on the record. The written order required by ORS 656.289(1) could then incorporate those oral comments by reference. See State v. Johnson/Imel, 16 Or. App. 560, 571 (1974). But it remains desirable to have the Referee's analysis stated either on the record or in a written order; it is unseemly for the Referee to decline to do so in the former context on the grounds that it is going to be done in the latter, and then to fail to do it in the latter context on the erroneous grounds that it has been done in the former.

ORDER

The Referee's order dated April 11, 1980 is affirmed.

Claimant's attorney is awarded as and for a reasonable attorney fee the sum of \$500, payable by INA, not payable from claimant's compensation.

WCB Case No. 78-10097 MARCH 30, 1981

JOE MEEKER, CLAIMANT
Emmons, Kyle, et al, Claimant's Attorneys
Lang, Klein, et al, Defense Attorneys
Order on Review

Reviewed by the Board en banc.

Claimant seeks Board review of the Referee's order. The issue is claimant's entitlement, under an authorized program of vocational rehabilitation, to reimbursement for travel expenses between his home in Newport and Linn-Benton Community College where he was enrolled in a small engine repair course, or in the alternative, entitlement to a rental allowance to live near the college.

The Referee denied the requested relief. The Board reverses.

This case documents the excessive "judicialization" of proceedings before the Hearings Division and the Board. The Referee was only concerned about "applicable rules, statutory provisions and cases" and "the burden of proof." The Referee forgot that he had a telephone.

The Board's approach was not so myopic. We called the Administrator of the Field Services Division of the Workers' Compensation Department. He informed the Board that it is the policy of the Field Services Division in situations like this claimant's to pay either for mileage, public transportation or a second residence, whichever is least expensive. The Board assumes that, had claimant's attorney made the same phone call rather than automatically requesting a quasi-judicial hearing, claimant's problem would have been solved long ago.

ORDER

The Referee's order dated August 18, 1980 is reversed. This case is remanded to the Field Services Division of the Workers' Compensation Department to provide assistance to claimant in accordance with its standard policy.

WCB Case No. 79-08369 MARCH 30, 1981

ROSE E. PEDERSON, CLAIMANT
Welch, Bruun & Green, Claimant's Attorneys
Schwabe, Williamson, et al, Defense Attorneys
Order on Remand

The Board issued its Order on Review on July 9, 1980 wherein the Referee's order granting permanent partial disability was reversed and the Referee's affirming the employer's denial of compensability of the neck condition was affirmed.

The case was appealed to the Court of Appeals whose opinion filed February 3, 1981 affirmed in part and reversed in part the Board's Order on Review.

The Court of Appeals issued its Judgment and Mandate on March 20, 1981 and remanded the neck claim to the Board with instructions to remand it to the Evaluation Division of the Workers' Compensation Department for determination of the compensation to be paid.

Therefore, pursuant to the Judgment and Mandate of the Court of Appeals the claimant's neck claim is hereby remanded to the Evaluation Division of the Workers' Compensation Department for a determination of the compensation to be paid.

IT IS SO ORDERED.

MARY S. TRACY, CLAIMANT
Doug Green, Claimant's Attorney
Marcus K. Ward, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of benefits as required by law. We reverse.

Claimant testified that she was put on cleanup under the barker at the mill for two weeks shoveling bark which weighed 25 to 40 pounds. The shovel weighed an additional four pounds. The evidence, on the other hand, indicates that she did this job for a few days, and the weight of a shovelful of bark was about four pounds and occasionally a really "loaded" shovelful weighed about eight pounds.

Dr. MacCloskey reported the fact claimant developed carpal tunnel syndrome so quickly was unusual but not unknown. Dr. MacCloskey concluded that he could not say that claimant's work did not cause her problem. This opinion fails to meet the test of reasonable medical probability. Dr. Kovachevich offered an explanation "for the relationship between Mrs. Tracys (sic) problem and her employment." He then explains the anatomy of the wrist involving the passage of the median nerve through the wrist. He goes on to review generally the development of carpal tunnel syndrome or median nerve neuropathy phenomenon by stating: "If someone with a snugly fitting median nerve is exposed to high degrees of severe exercise, or wrist strain, there is a mild degree of swelling in this region of the tendons will produce a pressure upon this median nerve resulting in the pain and accompanying symptoms" (emphasis supplied).

Dr. Kovachevich does not provide, except as an explanation, any opinion that the claimant's condition is work-related--even to the extent that he has raised the possibility of an inferred relationship, his hypothesis is based on an erroneous premise. The claimant admitted she did not explain her job duties to the doctor, and the weight of the evidence is that the work she points to as the cause of her condition (or aggravating cause) was of short duration and not necessarily "a high degree of severe exercise." Dr. Kovachevich's "explanation" is given little weight.

We conclude the claimant has failed to prove her case by a preponderance of the evidence. In Raines v. Edward Hines Lumber Co., 36 Or. App. 715 (1978), the Court reemphasized that the rule of liberal construction of the act does not apply to the factfinding process to adjust the burden of proof.

The Referee concluded the claim was compensable because "there has been no other reason advanced as to the cause of the carpal tunnel condition." This post hoc reasoning is not sufficient to justify a shift in the burden of proof. (See Raines, supra.)

ORDER

The order of the Referee dated July 1, 1980 is reversed

The SAIF Corporation's denial of March 14, 1980 is affirmed.

WCB Case No. 79-01032 MARCH 31, 1981

DOREEN D. DAVIS, CLAIMANT
Pozzi, Wilson, et al, Claimant's-Attorneys
Schwabe, Williamson, et al, Defense Attorneys
Order on Review

Reviewed by Board members McCallister and Lewis.

Crown Zellerbach seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation to which she was entitled. Crown Zellerbach (Crown) contends claimant's claim is not compensable.

SAIF Corporation (SAIF) is also involved in this case. It was the workers' compensation carrier for the employer until June 30, 1976 at which time Crown became self-insured. We agree with the Referee that claimant became disabled "enough to be taken off work" sometime in December 1976 and, if the claim is compensable, it should be the responsibility of Crown.

Claimant has a history of back episodes beginning in 1966 which apparently came on without incident. In June 1976 she saw Dr. Harder for her low back pain; he recommended medication and exercise.

Claimant went to the hospital on December 5, 1976 with complaints of pain in the right hip which had increased over the weekend. On January 24, 1977 a laminectomy was performed by Dr. Nag. As a result of reading a booklet about back problems, claimant determined that the cause of her condition at that time was the way she sat at work. Claimant was then working as a key punch operator for Crown. Because of the placement of her machine and the type of chair claimant had, she was unable to touch the floor with her feet. The best solution to this problem, in

claimant's opinion, was to tuck one foot under her hip and rest the other foot on a rung of her chair. She apparently sat this way eight hours each work day over a period of several months. When claimant determined this was the cause of her back pain, she requested Dr. Nag advise Crown of that fact. In January 1977, Dr. Nag indicated that claimant's condition was not the result of her employment at Crown. In March 1977, he indicated claimant wanted it documented that her back problems were "due to the 'type' of chair she used at work," but he did not indicate he shared this opinion. In January 1979, he wrote a report which is the only report on causation in this record and the one relied upon by the Referee. Dr. Nag indicated: "Obviously she has a degenerative condition which is unrelated to work, but it is quite probable that the way she sat might have aggravated her condition." The Board agrees with the Referee that this statement is weak. In fact, we find it so weak that claimant has failed in her burden of proof. Claimant's credibility is suspect, a finding shared by the Referee, and this problem flows over into the history she gave her doctors. Several times claimant was asked why a doctor made a particular statement and she replied that she didn't know because she didn't remember telling them that. A medical report based on suspect history becomes less persuasive.

We find it was in claimant's power to change her situation at work, and she failed to do so. She stated that she asked for a footstool but was informed they didn't have any for the employee's use. However, the evidence indicates that some employees brought footstools for themselves, and claimant was offered the use of a box on which to rest her feet. Claimant chose to sit in that certain position; it was not necessary to do so to perform her job.

Claimant contends that, at the very least, she has sustained a worsened condition under the rationale of Weller v. Union Carbide Corp., 288 Or. 27. There is no dispute that she has an underlying condition, and there is no dispute that it worsened to the point that it required surgery. However, we find no evidence that claimant's unorthodox sitting position at work caused or worsened a pre-existing condition. Even the statement of Dr. Nag, relied upon by the Referee, indicated that the way claimant sat "might have aggravated her condition." We are well aware of the provisions of Clayton v. SCD, 353 Or. 397, but we don't feel claimant has other "credible evidence of a non-medical character" sufficient to prove her case. We find the claim is not compensable.

Having found against claimant on the issue of compensability, we turn to the issue of penalties and attorney fees. Crown was notified of claimant's claim on April 13, 1977 when she filled out and signed a Form 801. Although Crown did not sign the form until October 31, 1978, they had the necessary "knowledge" of the claim in April 1977. ORS 656.262(4) and (5). They did not deny the claim until November 5, 1979 and did not pay claimant interim

compensation. SAIF may have had knowledge of the claim at approximately the same time as Crown. However, claimant did not file a claim with SAIF, and there is no proof in the record as to when they were informed of her claim. Although SAIF did not deny the claim until January 24, 1979, we have no way of knowing when they were advised of claimant's claim. We find no basis upon which to assess penalties against the SAIF Corporation. Claimant is entitled to temporary total disability compensation from December 11, 1976 through April 1, 1977, plus a penalty in the amount of 25% of this award, and an attorney fee. All these amounts are to be paid by Crown.

ORDER

The order of the Referee dated July 23, 1980 is modified:

The denials of Crown Zellerbach and SAIF Corporation are affirmed.

Claimant is entitled to interim compensation from December 11, 1976 to April 1, 1977. Claimant is also entitled to a penalty equal to 25% of this award and claimant's attorney is granted a fee in the amount of \$300. These amounts are to be paid by Crown Zellerbach.

WCB Case No. 79-03896 MARCH 31, 1981

DIANNA GOBLER, CLAIMANT
Welch, Bruun & Green, Claimant's Attorneys
Schwabe, Williamson, et al, Defense Attorneys
Order of Abatement

On March 18, 1981, claimant, by and through her attorney, requested that the Board remand her claim to the Hearings Division for receipt of additional evidence to be considered under the rationale of James v. SAIF, 290 Or. 343 (1981). The Board has under advisement several of these type cases. We invite further response from the parties concerning how they view claimant's case in light of the James decision. We hereby abate our March 13, 1981 Order on Review.

IT IS SO ORDERED.

OLE LARSON, CLAIMANT

Panner, Johnson, et al, Claimant's Attorneys

Lang, Klein, et al. Defense Attorneys

Order on Review

Reviewed by Board members McCallister and Lewis.

The employer seeks Board review of the Referee's order which remanded claimant's aggravation claim to it for acceptance and the payment of benefits. We reverse.

Claimant must prove by a preponderance of evidence that his industrial injury related condition has worsened since the last award or arrangement of compensation.

In this case there are two medical opinions: One from the treating physician throughout the years, Dr. Miller, and the other from Dr. Kendrick who saw claimant only once in the absence of Dr. Miller.

Dr. Miller states in a report dated July 23, 1979 that, "There is no question in my mind that this patient's symptoms are related to the original problem of degenerative disc disease at the L4-5 level."

Dr. Kendrick on August 24, 1979 reported that claimant's condition was related to the original industrial injury.

In August 1977 Dr. Miller reported that claimant's condition, arising out of the 1975 injury, had become stationary without residual permanent disability. X-rays taken in 1975 indicated claimant had degenerative disc disease.

It is clear from Dr. Miller's 1979 report that he feels claimant's problems are now directly related to the degenerative disc disease and no longer related to the industrial injury. There is no medical evidence that claimant's 1975 injury aggravated this underlying condition. Dr. Miller has treated claimant since the initial injury, and we find his opinion more persuasive than that of Dr. Kendrick.

ORDER

The order of the Referee dated June 16, 1980 is reversed.

The employer's denial of aggravation dated August 22, 1979 is affirmed.

BETTY LOVE, CLAIMANT
Galton, Popick & Scott, Claimant's Attorneys
Lang, Klein, et al, Defense Attorneys
Order on Review

Reviewed by Board members McCallister and Lewis.

The employer seeks Board review of the Referee's order which found claimant's right breast condition to be compensable and which remanded the claim to the employer for acceptance and payment of benefits.

The issue is compensability.

The employer denies compensability on the grounds that: The initial claim failed to include a statement of injuries other than to claimant's knee as a result of her January 3, 1979 fall at work; that the treating physician initially believed the breast condition to be unrelated to claimant's work; and further asserts that claimant has failed by a preponderance of the evidence to establish a legal or medical causal relationship between the fall and claimant's breast condition.

Claimant asserts that the treating physician's uncontroverted medical opinion, corroborated by testimony of the witnesses, clearly established that the mastitis which eventually developed resulted from the traumatic injury claimant sustained in the fall.

The Referee, in considering all the evidence as a whole, was convinced by a preponderance of that evidence that claimant's breast condition was, in fact, a direct result of claimant's January 1980 fall. A preponderance need not be to the degree of certainty suggested by respondent's briefs. The uncontroverted medical evidence and testimony which supported the Referee's findings are sufficient to carry claimant's burden of proof.

The Board, on de novo review, adopts the Referee's findings and conclusions.

ORDER

The order of the Referee, dated August 15, 1980, is affirmed.

It is further ordered that claimant's attorney be paid the sum of \$300 as a reasonable attorney's fee in connection with this Board review.

GEORGE WOOSLEY, CLAIMANT
Charles Tauman, Claimant's Attorney
Thomas J. Mortland, Defense Attorney
Amended Order on Review

By a letter dated March 5, 1981, claimant's attorney requested the Board to amend its Order on Review dated March 3, 1981 and grant him an attorney fee payable by the employer/carrier for his participation at Hearing and Board levels.

After considering this request, the Board agrees that claimant's attorney is entitled to a nominal fee. The denial by the employer/carrier was not reversed, only modified on a very limited basis, but the claim was ordered accepted as non-disabling. Claimant's subsequent time loss and need for medical services was found not compensably related and not the responsibility of the employer/carrier because the need for such was due to off-the-job activities. Claimant would have aggravation rights if his work-related condition worsens and becomes disabling.

Claimant's attorney is hereby granted an attorney fee in the sum of \$250 payable by the employer/carrier for his representation at both levels of litigation.

IT IS SO ORDERED.

Claim No. A 865419
Claim No. C 199674

APRIL 6, 1981

HANNUM BOUTIN, CLAIMANT
John Bogardus, Claimant's Attorney
Dennis VavRosky, Defense Attorney
Own Motion Order

On July 11, 1979 the Board ordered claimant's request for own motion relief referred for a hearing. That order required in part: "...the Referee shall make recommendations with respect to claimant's request for own motion relief."

The Board has since received a document from a Referee which concludes:

"As to the decision whether to reopen claimant's prior claims which are the subject of this proceeding in order to provide claimant additional compensation under the Board's own motion authority, that is the ultimate decision for the Board, not this Referee. Therefore, in that respect, I decline to present a recommendation."

There are many responsibilities that are ultimately this Board's. That is no excuse for a Referee not doing something which an Order of this Board directs to be done.

In the Referee's partial defense, however, it was undoubtedly difficult to frame a recommendation, just as it is difficult for the Board to make a decision. Claimant has a variety of health problems extending back to at least 1961. Some are industrially related; others are not. There is cogent evidence that claimant's overall condition has recently worsened. The problem is whether his current condition can be traced back to a genesis in any of his prior workers' compensation claims (as distinguished from non-industrial problems) and, if so, to which of several prior claims.

Three different doctors have come to three different conclusions as to the most likely genesis of claimant's current problems. This is sufficient reason, at least for purposes of the Board's discretionary own motion jurisdiction, to deny reopening.

IT IS SO ORDERED.

WCB 79-09391

APRIL 6, 1981

PHILLIP BARRETT, CLAIMANT

Olson, Hittle, et al, Claimant's Attorney

Cheney & Kelley, Defense Attorney

Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks review of that portion of the Referee's order which failed to assess penalties and attorney fees for the conduct of the employer/carrier in requesting the Order of Suspension that was issued by the Compliance Division of the Workers' Compensation Department.

The Board, after de novo review, would affirm and adopt that portion of the Referee's order which is appealed. As did the Referee, the Board finds that although the employer/carrier did not follow OAR 436-54-281 and -283 to the letter, that claimant's

attorney was informed of the possibility of the suspension of compensation benefits if claimant did not keep his appointment with Dr. Colbach. The claimant's attorney and the claimant were advised that if the appointment could not be kept that a valid reason was required. Neither claimant nor his attorney provided the carrier with such valid reason. The carrier did not inform the claimant of the purpose of the examination by Dr. Colbach nor use the boldface type as required under OAR 436-54-283(c).

The Board concludes, as did the Referee, "...that the delay and the hardship, if any, caused in this case because of issuance of the Order of Suspension was contributed to by claimant or his agent."

ORDER

The order of the Referee, dated September 11, 1980, is affirmed.

WCB Case No. 79-05989 APRIL 6, 1981

JERE BURNS, CLAIMANT
Olson, Hittle, et al, Claimant's Attorneys
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant and the SAIF Corporation (SAIF) seek Board review of the Referee's order which remanded claimant's claim to the SAIF for acceptance and which granted claimant an award of 64 degrees for 20% unscheduled disability. The claimant contends the award of permanent partial disability is inadequate. The SAIF appeals compensability of the claim.

The Board affirms the Referee's conclusions. We note the Referee cites Frasure v. Agripac, Inc., 41 Or. App. 997 (1979) on the issue of estoppel. The Court of Appeals decision in Frasure (supra) was reversed by the Supreme Court. SAIF is not estopped from denying the claim. However, the Board, as did the Referee, finds that the claim is compensable.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee.

ORDER

The order of the Referee dated August 8, 1980 is affirmed.

Own Motion No. 81-0080M APRIL 6, 1981

ROBERT CLOSE, CLAIMANT
Evohl Malagon, Claimant's Attorney
SAIF Corporation
Own Motion Order

Claimant requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of August 29, 1972. Claimant's aggravation rights have expired.

Claimant's industrial injury consisted of an asphalt burn to his left foot. Over the years he has had multiple surgical procedures and awards granted for low back and left leg as well as the left foot.

The medical evidence submitted indicates that claimant underwent a medial meniscectomy on January 5, 1981 to the right leg. The Board finds this condition is in no way related to the 1972 asphalt burn of the left foot. We base this opinion on the medical report of the Orthopaedic Consultants.

Claimant's motion for the Board to exercise its own motion jurisdiction is denied.

IT IS SO ORDERED.

WCB Case No. 80-04245 APRIL 6, 1981

JOHN COFFIELD, CLAIMANT
Doblie & Francesconi, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's order which found claimant's December 27, 1979 injuries compensable and which remanded the claim to SAIF for acceptance, and which awarded penalties for the unreasonable delay in accepting or denying the claim under ORS 656.262(8) together with attorney's fees.

The issues are compensability, penalties and fees.

SAIF contends that claimant was not an employee at the time of the injury but was an independent contractor; that claimant lied about his drinking immediately preceding the accident and is, therefore, not to be believed in any particular despite the Referee's evaluation that the claimant was a credible witness. Even if found to be an employee and a subject worker, SAIF contends that claimant was, by reason of his alleged activities prior to the accident, removed from the scope of any employment that may have existed.

Claimant asserts that he was an employee of James Manke, dba Quality Interiors, the sub-contractor responsible for sheetrocking on the construction project; that claimant's trip to pick up supplies and materials was work-related; and that the criteria established by the courts for determining the employment status of a claimant has been more than met in this case. Claimant further contends that even if his activities were found to be a deviation from his direct work-related responsibilities by reason of the alleged drinking--an allegation which is denied by claimant--the primary purpose and cause of the trip was work-related. Claimant argues that the proper test to be applied is whether the "injury has sufficient work relationship" as directed by the Supreme Court in Rogers v. SAIF, 289 Or. 633 (1980).

This is a denied claim. The matter was heard in Portland August 14, 1980. Mr. Coffield was present and was represented by counsel, James L. Francesconi. The State Accident Insurance Fund was represented by counsel, Gene L. Platt.

In addition to the issue of compensability claimant requested penalties and attorney fees for unreasonable delay.

Claimant is 53 years old and has been a sheetrocker for about 30 years. He has worked out of the Union Hall for over 20 years. He is not a licensed contractor.

James Manke was doing business as Quality Interiors. He was a sub-contractor on a condominium project in Cannon Beach. The general contractor was W. C. Baughman. Mr. Manke had the sheetrock contract and his part of the project was in trouble. He hired claimant away from another job to bring a crew of men in and clean up this project. Claimant, as well as the other sheetrockers, received \$15 per hour. Mr. Manke furnished the necessary tools and materials. The materials were not stored on the job because of possible loss by vandals or thieves.

On the day in question, December 27, 1979, claimant and two or three other men were working on and about the condominium during the morning. About noon the men left for lunch and claimant left to secure additional supplies. While gone from the project claimant was involved in a motor vehicle accident which resulted in various fractures, including skull fractures. He was in a coma for a number of days. He does not remember the accident at all, but was struck by another truck.

Upon de novo review, the Board concludes that greater weight should be given to the Referee's decision as to credibility than to the testimony of one witness which is contrary to the testimony of two other witnesses.

The Board affirms and adopts the Opinion and Order of the Referee which is incorporated herein as if set forth in full.

ORDER.

The order of the Referee dated August 22, 1980 is affirmed.

As defenses SAIF claims claimant was an independent contractor; if an employee, he was not acting within the course and scope of his employment; and that SAIF was prejudiced by claimant's failure to file a claim within 30 days. SAIF does not know where Mr. Manke is.

Claimant had the power to hire and fire--as a working foreman. On one or two occasions Mr. Manke paid all of the employees through one check payable to claimant. His reason for doing this, according to the testimony, was because of his bookkeeping system. The men were told that normal payroll checks and deductions would be made as soon as the bookkeeper was squared away.

Mr. Manke also had the power to hire or fire and directed control of the project by indicating which work was to be done first. He had the right to discharge any of the sheetrockers without incurring any liability to them under a contract. In the COLLINS case (which was also a sheetrocker case) the claimant had actually signed a contract stating he was an independent contractor. Because of the controls retained by employer in that case the Court of Appeals ignored that contract and held claimant was an employee (Collins v. Anderson, 40 Or App 765).

As I view the evidence, this was Mr. Manke's first big job. The job was in trouble and needed a lot of cleaning up and Mr. Manke hired claimant to bring in a crew and do that. There wasn't any piece work as the choice piece work portion of the job had already been done. Only odds and ends or small scattered areas were left and Mr. Manke had to pay hourly wages in order to finish the job.

After giving consideration to all the evidence, I conclude claimant was not an independent contractor--but was a subject employee.

SAIF's next argument is that claimant was not acting within the scope and course of his employment. The supplies were stored at the private residence of Mr. Gene Ettro. There is some testimony claimant owned the materials stored there. However, there is also other testimony claimant was borrowing material from Mr. Ettro--and that Mr. Manke owned the material and claimant was there to pick it up. Claimant testified he did not own the material. After hearing and observing claimant, I have no reason to question his credibility and believe his testimony.

SAIF also attempted to prove claimant was not within the course and scope of his employment because of drinking. Claimant and all the other workers testified there had been no drinking on the job that morning. The estranged wife of Mr. Ettro testified claimant had one drink when he was there about noon picking up the supplies. There isn't any evidence alcohol played any part in the cause of this accident. Claimant was taken by ambulance to the hospital in Astoria. The accident happened near Astoria as Mr. Ettro lived in that town. The hospital records make no reference to there being any smell of alcohol about claimant's person.

After giving consideration to all the evidence, I conclude claimant was acting within the course and scope of his employment.

The last issue raised by SAIF was lack of timeliness in filing the claim. However, the employer knew of the accident either the day it occurred or the day following. As the employer's agent, SAIF is also charged with that notice.

Claimant requests penalties and attorney fees "for unreasonable refusal, resistance, or delay". The injury occurred December 27, 1979. Formal demand was made May 7, 1980. Denial was by letter of June 26, 1980 (Exhibits 5 and 6).

After giving consideration to all the evidence, I conclude claimant is entitled to the penalties and attorney fees requested. Having prevailed in a denied claim situation, he is also entitled to a fee for his attorney in that connection at SAIF's expense.

ORDER:

That this matter be, and the same hereby is, remanded to SAIF Corporation with instructions to accept this worker's claim and provide to him the benefits of the Workers' Compensation Law.

IT IS FURTHER HEREBY ORDERED that SAIF pay an amount equal to 15% of the compensation for temporary total disability from the date of injury to the date of denial, in addition to said compensation, directly to claimant as and for a penalty under the provisions of ORS 656.262(8). SAIF is further ordered to pay the sum of \$200 to claimant's attorney in connection with this penalty.

IT IS FINALLY HEREBY ORDERED that SAIF Corporation pay claimant's attorney the sum of \$750 as and for a reasonable attorney fee, no part of which is to be deducted from compensation due claimant by virtue of this Order or from the attorney fee in the paragraph above.

Own Motion No. 81-0075M APRIL 6, 1981

RAYMOND N. CROOKS, CLAIMANT

SAIF Corporation

Own Motion Determination

The Board issued its Own Motion Order pursuant to ORS 656.278 and reopened claimant's claim for a worsened condition related to his July 24, 1973 injury upon his hospitalization recommended by Dr. Maxwell.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from October 8, 1980 through December 18, 1980 and to no further award for permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

HAROLD CROW, CLAIMANT
Gary Allen, Claimant's Attorney
Keith Skelton, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's Opinion and Order which rescinded SAIF's March 26, 1980 denial of an aggravation claim and which affirmed the July 1, 1980 claim denial of Liberty Mutual Insurance Co.

The sole issue raised on appeal is whether claimant's February 1980 injury was a new injury or an aggravation of an earlier industrial injury to his low back which occurred in July of 1979.

While employed by Cedar Lumber Company, insured by the SAIF Corporation, claimant sustained a compensable low back injury in July of 1979. Claimant was terminated by Cedar Lumber Company some time in August or September of 1979; in October of 1979 he started work for Phillips Industries.

Both the injury of July 1979 and of February 1980 related to claimant's low back, diagnosed by his treating physician as "acute sacroiliac strain" and by a consulting physician as "lumbosacral strain." In both instances, the onset of symptoms was gradual and neither could be traced to a distinct traumatic incident.

SAIF contends, and the Board agrees, that the Referee erred in his finding that Dr. Boughn's 1979 diagnosis of the claimant's condition was, at that time, a "chronic lumbosacral strain." Dr. Boughn's medical findings in July of 1979 were that claimant suffered only a "lumbosacral strain." In February of 1980, when claimant was employed by Phillips Industries, Dr. Boughn again diagnosed claimant's back condition as a "lumbosacral strain." At the time of that second diagnosis, however, the history of claimant's complaints, as contained in the doctor's notes, clearly indicate that the condition predated claimant's employment with Phillips Industries, dating back six to eight months. Not until February 22, 1980 did Dr. Boughn diagnose the claimant's back condition as a "chronic lumbosacral strain," but he concluded that it was an "aggravation of his previous injury."

On January 18, 1980, Dr. Dawson, claimant's treating chiropractor, noted that claimant's complaints "had been gradually increasing over the past four months in the areas of his previous injury" of July 25, 1979; he concluded that his findings indicated a "worsening of Mr. Crow's original injury."

The Board believes that the erroneous finding of fact does not materially affect a conclusion that claimant's injury was an aggravation of his July 1979 injury, in view of the uncontroverted medical opinion of a worsening of the original injury by both of claimant's physicians.

Appellant further argues that claimant's employment with Phillips Industries contributed independently to his disability. The Board must agree with respondent's assessment "that there is not a tot or tittle of evidence to that effect."

Upon de novo review, the Board adopts, with the exceptions noted above, the Opinion and Order of the Referee dated October 6, 1980.

ORDER

The order of the Referee, dated October 6, 1980, is affirmed.

WCB Case No. 79-10704 APRIL 6, 1981

PATRICIA J. DARIS, CLAIMANT
Alan H. Tuhy, Claimant's Attorney
SAIF Corporation
Order on Reconsideration

On March 16, 1981, claimant's attorney requested the Board grant him a reasonable attorney's fee for his efforts before the Board on behalf of claimant. In a "cross-appeal" situation when considering whether an attorney fee is due, our rules dictate that we determine who the initiating party is and whether that party prevailed on their request for review. In this case, claimant appealed and lost. Under the provisions of OAR 436-47-075, claimant's request for attorney's fees must be denied.

IT IS SO ORDERED.

Reviewed by Board members McCallister and Lewis.

The claimant and the SAIF Corporation seek Board review of the Referee's order which directed SAIF pay medical bills connected with claimant's surgery in September 1979 and time loss benefits from the date of claimant's hospitalization to February 28, 1980. It affirmed the denial for ongoing responsibility for claimant's meningioma.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee.

ORDER

The order of the Referee dated July 28, 1980 is affirmed.

WCB Case No. 79-10662 APRIL 6, 1981

HAROLD EASTLING, CLAIMANT
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

Claimant seeks Board review of the Referee's order which affirmed the September 10, 1979 Determination Order and the partial denial issued by the SAIF Corporation (SAIF) on November 16, 1979. The issues raised at the hearing were extent of disability and compensability of claimant's psychological condition. Claimant contends before the Board that he only wants additional temporary total disability from November 1979 and reinstatement of his biofeedback treatment. He is not asking for an increased award of permanent disability.

After a thorough consideration of the evidence before it, the Board affirms the order of the Referee. We are persuaded by the reports of Dr. Parvaresh, a psychiatrist, with respect to the compensability of claimant's psychological condition. Dr. Fleming, a clinical psychologist, based his finding of a compensable psychological condition on a faulty history which left out some very pertinent information. Claimant has failed to prove a compensable condition related to his 1975 industrial injury. Based on this conclusion, the Board does not reach the issue raised by the claimant in his brief concerning temporary total disability compensation and biofeedback treatment. Both of these issues are directly related to claimant's alleged psychological condition. Because we deny the compensability of that condition, he cannot receive treatment and time loss benefits related to it under his workers' compensation claim. Based on the evidence as a whole, but more particularly on Dr. Fry's reports, claimant has failed to prove that he is entitled to any further compensation for permanent partial disability.

ORDER

The order of the Referee, dated July 29, 1980, is affirmed.

Claim No. C 286853

APRIL 6, 1981

EMROY G. FLETCHER, CLAIMANT
SAIF Corporation
Own Motion Determination

The Board issued its Own Motion Order in the above entitled matter on October 2, 1980 which reopened claimant's claim for a worsened condition related to his industrial injury of January 19, 1971.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from August 25, 1980 through November 30, 1980 and to no further award of permanent partial disability above the 50% loss of the right leg previously granted. The Board concurs with this recommendation.

IT IS SO ORDERED.

Own Motion No. 80-0005M

APRIL 6, 1981

NADINE FREEMAN, CLAIMANT
Lang, Klein, et al, Claimant's Attorneys
SAIF Corporation
Amended Own Motion Order

Claimant, by and through her attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for a worsened condition related to her industrial injury of September 10, 1971. The SAIF Corporation is opposed to any reopening.

The evidence indicates both Drs. Smith and Misko recommended surgery for thoracic outlet syndrome and both related it to claimant's industrial injury. The opposing medical opinion is from the Intensive Diagnostic Advisory Board.

The Board concludes that the preponderance of evidence is that claimant's thoracic outlet syndrome is causally related to her original industrial injury, and the claim is ordered reopened as of November 20, 1980, the date the surgery was scheduled, or when claimant is hospitalized for that surgery.

IT IS SO ORDERED.

The Board issued its Own Motion Order on March 18, 1981 and reopened claimant's claim for a worsened condition related to her September 10, 1971 industrial injury.

By letter dated March 24, 1981, claimant's attorney requested that the order be amended as the Board had failed to grant him an attorney fee.

The Board finds that claimant's attorney's request is justified and that we inadvertantly failed to grant him a fee for this claim reopening.

ORDER

Claimant's attorney is granted as and for a reasonable attorney fee the sum of 25% of the temporary total disability compensation granted by our Own Motion Order of March 18, 1981, not to exceed the sum of \$500.

WCB Case No. 80-02548 APRIL 6, 1981

BERNECE ICE, CLAIMANT
Rick, McCormick, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's denial of compensability. The Referee affirmed the denial on the ground that claimant's claim was untimely filed, and the employer was prejudiced by the late filing. The Referee did not reach the question of compensability on the merits.

We modify the Referee's order. We conclude the employer has failed to prove the late written notice constitutes late filing or that the employer was prejudiced in any event. Claimant testified she filed her claim and left it on the employer's desk; there is evidence that even before this the employer had "knowledge." The claim form was never found, but the employer did not say that claimant had not filed one. Substantially the same witnesses testified at the hearing as would have testified had all of the procedures surrounding the written notice of the claim been routinely and timely followed. Therefore, no prejudice has been proven.

On the merits, the Board finds that the claim is not compensable. Claimant alleges she injured her low back at work while employed as a waitress. Dr. Tsai admitted he didn't know when claimant's ruptured disc occurred and that it could have occurred eight hours prior to her alleged injury. He based his opinion primarily on the history claimant provided.

Claimant testified at the hearing that the injury occurred on October 5, 1979. The medical reports indicate October 12. As late as February 28, 1980, claimant told a SAIF investigator that the injury occurred on October 12.

Further testimony elicited from the claimant did not clear up the reason why she indicated the off-the-job insurance carrier as the responsible paying agent on the forms completed in two trips to the emergency room at the hospital. This becomes a factor when the evidence further indicated that she had filed other non-disabling claims before and had indicated on-the-job injuries. Claimant cannot plead ignorance, and she could not explain why she filled out the report at the hospital as she did.

Claimant has the burden of proof. The Board concludes that the evidence produced is just not sufficient for her to carry that burden.

ORDER

The order of the Referee dated August 3, 1980 is modified.

The denial of compensability issued by SAIF on March 18, 1980 is affirmed.

WCB Case No. 79-04405 APRIL 6, 1981

LORENA ILES, CLAIMANT
Michael Mowrey, Claimant's Attorney
SAIF Corporation

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which remanded claimant's claim to it for the treatment of degenerative disc disease which was changed pathologically by her work injury. SAIF contends that under the rationale of Weller v. Union Carbide, 288 Or. 27 (1979), claimant's underlying condition has not been worsened and, therefore, is not compensable.

Claimant sustained a compensable injury on February 4, 1979 while unloading a pallet of chemicals. She sustained a hip condition which was accepted by the carrier. However, her back condition was denied on April 6, 1979 for the reason that it did not seem to be related to her industrial injury. Claimant has a degenerative disc disease condition which apparently flared up significantly some twelve years ago. Since that time, she occasionally had a backache if she slept on a "bad bed" or engaged in heavy lifting activities. Basically, she has had very few symptoms during the twelve years preceeding her injury and apparently none of a significant nature.

The SAIF asks us to examine this case in light of Weller (supra). We find this case is not consistent with the fact situation in Weller to the extent that we feel we cannot apply it here. Weller poses the question of whether a claim is compensable where "...he [the worker] has an underlying disease which is symptomatic; (2) his work results in a worsening of his symptoms not produced by a concomitant worsening of the underlying disease process; and (3) the worsening requires either medical services or results in disability or both." We do not find that claimant's underlying condition was symptomatic enough to connect it to her condition resulting from the February 1979 injury. We find that claimant's back condition after the injury was an independent condition which should be considered as a new injury. Based on this premise, there is no doubt that claimant has sustained a compensable injury to her back. The testimony and the medical evidence totally support this conclusion. Claimant has proven by a preponderance of the evidence that she sustained a compensable back injury on February 4, 1979.

ORDER

The order of the Referee dated May 28, 1980 is affirmed.

Claimant's attorney is granted the sum of \$50 for his services at this Board review, payable by the SAIF Corporation.

Own Motion No. 81-0081M APRIL 6, 1981

ELSIE ALDINE KEITH, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attorneys
Black, Kendall, et al, Defense Attorneys
Own Motion Determination

The Board issued an Own Motion Order on August 26, 1980 which ordered claim reopening upon claimant's admission to the Pain Clinic. On September 22, 1980 the order was modified, and the claim was ordered reopened if and when claimant entered the treatment program at the Pain Clinic. Reconsideration was requested by the carrier, and the order was then abated, but on November 7, 1980 the September 22, 1980 order was reinstated.

Claimant was admitted to the Pain Center on January 12, 1981.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from January 12, 1981 through January 30, 1981 and no further award of permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

WCB Case No. 79-03854 APRIL 6, 1981

ROBERT KLUM, CLAIMANT
Rolf Olson, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

Claimant requests Board review of the referee's order which remanded the claim to the SAIF Corporation for payment of compensation from September 4, 1979 to January 24, 1980, together with 25% of the compensation pursuant to ORS 656.262(8), and which awarded attorney's fees to the extent of 25% of the additional temporary total disability compensation awarded, not to exceed \$750.

Claimant's low back injuries were sustained in an August 2, 1976 logging accident. Compensability is not at issue. The claim was initially closed by Determination Order dated April 20, 1979 after claimant had undergone two laminectomies and one spinal fusion. The claim was later reopened on January 25, 1980, the day claimant underwent his third corrective surgery since the date of the accident.

The issues raised on appeal are premature claim closure, entitlement to penalties and fees.

Claimant contends that his condition was not medically stationary at the time the claim was closed and that, even if claim closure as of March 21, 1979 were found to be appropriate, SAIF wrongfully resisted reopening the claim in September of 1979 upon notice from claimant's physician that he required further corrective surgery. Claimant requests that penalties and attorney's fees be imposed in accordance with ORS 656.262(8) and ORS 656.382(1).

Respondent alleges that the claim was properly closed based upon medical opinion of a medically stationary condition; that no curative treatment was given to the claimant between the date of the Determination Order and August 29, 1979 when further surgery was deemed advisable by claimant's physician; and that the psychiatric treatment, if any actually existed, was palliative or diagnostic in nature. As to the alleged failure on the part of SAIF to reopen the claim in a timely manner, respondent maintains that the proper time to raise that issue is in an appeal from the Determination Order which will eventually close the claim once more.

Respondent's motion to dismiss claimant's request for hearing on the basis that there was no grievable issue present at the time of the March 20, 1980 hearing was properly denied by the Referee on the basis of ORS 656.283 which provides that any party may at any time request a hearing on any question concerning a claim.

The Orthopaedic Consultants, by report dated March 23, 1979, diagnosed claimant's condition as a lumbosacral strain superimposed upon a grade 1 spondylolisthesis with a history that included two laminectomies and one spinal fusion. Their March 21, 1979 examination revealed mechanical low back instability with non-union of the fusion mass as well as a severe psychopathological and musculoskeletal disorder with hysterical feature. Their report included these recommendations:

"It is our opinion that at the present time the patient is orthopaedically stable and that there are no indications for other treatments that will be of help to this patient. He needs long term psychiatric followup and treatment. His condition is stationary and his claim is ready for closure.

"At the present time he is incapable of carrying out any occupation.

"The total loss of function of the back as it exists today is moderately severe, and the total loss of function due to this injury is moderately severe." (Ex. A104) (emphasis added)

Dr. Wilson, claimant's treating physician, concurred by letter of April 12, 1979 to SAIF with the report of the Orthopaedic Consultants.

Assuming that the recommended psychiatric treatment was expected to be curative rather than palliative, there would be no doubt that claimant was not, as of March 21, 1979, medically stationary. On the other hand, if the report of the Orthopaedic Consultants is interpreted to mean that the recommended treatment would be palliative only with no improvement in claimant's overall condition to be expected, then it would be reasonable to assume that claimant was, as of March 21, 1979, totally and permanently disabled.

By relying upon only a portion of the medical opinion of the Orthopaedic Consultants--the part which found claimant's orthopedic condition to be stable--while ignoring the included opinion that claimant lacked the capacity to carry out any type of work, the Determination Order granted 65% unscheduled disability to claimant's low back and declared claimant's condition to be medically stationary as of March 21, 1979, the date of the examination by Orthopaedic Consultants.

If the Orthopaedic Consultants found claimant's condition to be only "orthopedically stationary" but found claimant to be "incapable of carrying out any occupation" due to his overall condition, including psychiatric problems which were caused by his injuries, and the claim was closed on that basis, would not an award of permanent total disability have been appropriate?

If, on the other hand, it was believed that the psychiatric treatment recommended by both the Orthopaedic Consultants and the claimant's treating physician would in some way improve his overall condition thereby enabling claimant to again become gainfully employed, how could claimant's condition be deemed to be medically stationary?

Before a claimant may be found "medically stationary," his overall condition must be found stationary, with no expected worsening and no expected improvement. The claimant is one person, not two. It should go without saying that if a worker cannot work as a result of his combined orthopedic and psychiatric problems which directly result from his injuries, even though his back condition is stationary, his overall condition is not.

It should be noted that there is no dispute about the compensability of the claimant's psychiatric condition. It was well recognized that claimant required psychiatric treatment and that Dr. Wilson was making the appropriate arrangements for that treatment. It should have been equally recognized that, as of March 21, 1979, claimant was totally incapacitated.

Nevertheless, the Determination Order of April 20, 1979 declared claimant's condition to be medically stationary as of March 21, 1979, the date of claimant's examination by the Orthopaedic Consultants. Meanwhile, claimant's need for medical treatment and his total incapacity to do any type of work continued.

On May 1st, Dr. Frederick Fried, the consulting psychiatrist who examined claimant at Dr. Wilson's request, forwarded a copy of his report to SAIF. Dr. Fried diagnosed claimant as "suffering from a chronic benign pain syndrome with hypochondriacal concern." He requested copies of claimant's medical records; after review he planned to recommend eclectic approach utilizing behavioral, pharmacologic and possibly biofeedback as adjunctive

therapy. He opined that it would not be wise to offer a pain-management program on an outpatient basis because the trip to Medford would leave the patient incapacitated by severe pain for two days following the trip. He indicated that review of the complete records would better enable him to assess the advisability of a pain program on a local basis or the need for referral to a pain treatment center. In the meantime, he recommended use of an anti-depressant to raise the pain threshold and to reduce tension.

At the time of the May 1, 1979 psychiatric exam, claimant's care concerning his head pain was being coordinated by Dr. Kevin Sullivan of the Medford Neurological Clinic. On July 24, 1979, Dr. Sullivan noted that claimant was receiving Synalgos-DC and Sinequan from Dr. Wilson who was following claimant's problems with back pain and shooting pains into his legs. Upon being notified by a pharmacy that claimant was asking for refills of his Meprobamate and Equagesic, Dr. Sullivan prescribed Equagesic #100 for claimant's tension headaches, noting that claimant would continue to see Dr. Wilson regarding his back.

On August 29, 1979, Dr. N. J. Wilson of the Orthopedic and Fracture Clinic in Medford reported to SAIF that he had hospitalized claimant for pelvic traction and a lumbar myelogram. On September 4, 1979, Dr. Wilson observed that claimant had a "known pseudoarthrosis" at the L4-5 level, that he had psychiatric problems with chronic pain syndrome with hypochondriacal overtones, and that claimant had gotten to the point where he spent most of his time in bed at home due to constant and severe back pain. Dr. Wilson's medical impression was that claimant suffered a moderately acute recurrent lumbar nerve root irritation.

On September 5, 1979, Dr. Campagna's examination of the claimant at the hospital led him to a clinical impression of "possible pseudoarthrosis with moderate functional overlay." Dr. Campagna did not believe further therapy was indicated, but he conceded that, if claimant did have a pseudoarthrosis, consideration should be given to a re-fusion.

The September 5, 1979 radiologist's report, prepared for Doctors Wilson and Campagna, revealed "probable pseudoarthrosis" at L4-5; the September 6, 1979 myelogram left the radiologist with an impression of slight blunting of the nerve root sleeves on the right side at L4-5 and L5-S1 and grade 1 spondylolisthesis at L5-S1.

On September 5, 1979, re-examination of the claimant at the hospital by Dr. Fried, the consulting psychiatrist, found the claimant suffering from a "reactive depression that was mild psychomotor retardation and depressive affect;" his psychiatric evaluation remained unchanged: Chronic benign pain syndrome with reactive depression.

On September 8, 1979, Dr. Wilson concluded that:

"Since the patient has been unable to get along by conservative means, consideration of refusion should be given. There are some psychological factors in his situation; however, it is apparent that he is not going to be rehabilitated by conservative means.

"...The state will be notified and permission requested for repair of pseudoarthrosis of his spinal fusion. He will be readmitted for this surgery." (Ex. A120)

On September 11, 1979 Dr. Wilson notified SAIF that claimant had again been hospitalized, that he had been under psychiatric treatment, that there was evidence of mechanical instability of the low back at the lumbosacral level and that the neurological consultation indicated a possible pseudoarthrosis of spinal fusion with functional overlay. His recommendation, at that time, was surgical repair of pseudoarthrosis; he requested permission to proceed with corrective surgery.

The record reveals that on October 13, 1979 an appointment was scheduled for the claimant for evaluation at the Northwest Pain Center, but the claimant could not keep that appointment because he was in the hospital. By receipt of a copy of the letter, SAIF was well aware of the fact that claimant had again been hospitalized.

On January 10, 1980, Dr. Wilson again followed up on his September 1979 request for permission to proceed with surgery, further explaining his diagnosis of lumbar nerve root irritation secondary to pseudoarthrosis. He noted the medical controversy concerning further surgery but re-stated his own medical opinion that, in view of the presence of pseudoarthrosis, an attempt at stabilization should be made. Dr. Wilson clearly notified SAIF, by his report of January 10, that claimant had been "admitted for surgical treatment."

Not until claimant was actually on the operating table on January 25, 1980 for his third surgery in as many years did SAIF actually re-open the claim, more than four months after it was first notified by Dr. Wilson of the need for corrective surgery.

Eventually, in February 1980, Dr. Wilson concluded that even claimant's back condition had been stable in March of 1979. The Board agrees with the claimant's contention that the mere fact that claimant's medical status of instability was finally determined in retrospect is not grounds to deny him benefits if, in fact, his condition was not stable on March 21, 1979.

Medical opinion in the record clearly indicates that claimant's back condition was not, in fact, stationary in March of 1979. One year later, in retrospect, Dr. Wilson stated:

"It became apparent that the patient was having increasing difficulty, had not been able to return to activity and was requiring or asking for pain medication, etc. Following his workup in September of 1979, the decision to suggest refusion of the known pseudoarthrosis, of his spinal fusion, was made following his workup at the Rogue Valley Memorial Hospital by Dr. Campagna and myself.

"Considering the findings of a double-level pseudoarthrosis at surgery in January of 1980, I would feel that his symptoms were secondary to this and probably do date back to March of 1979." (Ex. Hr. E)

Respondent's attorney concedes that it was medically concluded, by August 29, 1979, that claimant had a pseudoarthrosis. Pseudoarthrosis, also known as pseudarthrosis, is a pathologic entity characterized by deossification of a weight-bearing long bone, followed by bending and pathologic fracture, with inability to form callus, leading to the existence of a "false joint" that gives the condition its name. Dorland's Illustrated Medical Dictionary, 25th Ed., p. 1275.

As to respondent's contention that the psychiatric treatment recommended for claimant was merely palliative in nature, it would be appropriate to reiterate Dr. Fried's medical opinion, as stated in his deposition, that psychotherapy will not cure a pseudoarthrosis.

The Board disagrees with respondent's further contention that no curative treatment was given to claimant between April 20, 1979 (the date of the Determination Order) and at least August 29, 1979. In his deposition, Dr. Wilson clearly qualified pelvic traction, physical therapy and the use of a back support as all falling within the realm of "curative" treatment. The Board concludes that the conservative treatment afforded the claimant during this period of time, however minimal, required the passage of time to determine just what treatment would improve the patient's condition. In claimant's case, only five months lapsed, during which conservative treatment continued, before the need for further surgery was indicated.

The Board, upon de novo review, concludes that claimant was not medically stationary on March 21, 1979 and that the claim was prematurely closed by Determination Order dated April 24, 1979. The Board further concludes that the Determination Order should be vacated and the claim should be remanded to SAIF for processing and payment of temporary total disability benefits from March 21, 1979 until closed pursuant to ORS 656.268.

The issue of penalties and attorney's fees for failure to reopen the claim in September 1979 becomes, therefore, moot.

ORDER

The Referee's order dated June 30, 1980 is reversed.

IT IS HEREBY ORDERED that the claim be and it hereby is reopened and remanded to SAIF for processing according to ORS 656.268.

IT IS FURTHER ORDERED that the Determination Order of April 20, 1979 be and the same hereby is vacated.

IT IS FURTHER ORDERED that temporary total disability benefits from March 21, 1979 until the claim is closed be paid to claimant with credit for benefits already paid.

IT IS FURTHER ORDERED that claimant's attorney be paid the sum of \$1,000 as a reasonable attorney's fee for representation of claimant up through the time of the hearing and for services rendered in connection with this appeal, to be paid by the SAIF Corporation.

WCB Case No. 80-11229 APRIL 6, 1981

THOMAS R. KNOWLES, CLAIMANT
Martin J. McKeown, Claimant's Attorney
R. Ray Heysell, Defense Attorney
Order of Dismissal

By letter dated February 16, 1981, claimant, through counsel, requested Board review of the Referee's order dated September 5, 1980. The request is untimely and therefore is dismissed.

IT IS SO ORDERED.

Own Motion No. 81-0028M APRIL 6, 1981

LAVELLE G. MARTIN, CLAIMANT
Rosenthal & Greene, Claimant's Attorneys
SAIF Corporation
Own Motion Referring for Hearing

Claimant, through her attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for a worsened condition related to her July 15, 1960 industrial injury. Claimant's aggravation rights have expired.

By letter dated March 19, 1981 the SAIF Corporation indicated that it was opposed to any own motion order granting additional benefits as claimant's complaints are subjective.

The medical documentation provided to the Board is insufficient to make a determination on whether or not claimant's condition has worsened or whether or not claimant has been adequately compensated for any permanent partial disability she suffered as a result of her industrial injury. The medical evidence indicates claimant suffers from other medical conditions which make it impossible for this Board to unravel the medical relationships involved. Therefore, this case is referred to the Hearings Division.

The Referee shall hold a hearing and take evidence on whether or not claimant's current condition, as related to her industrial injury of July 1960, has worsened or, in the alternative, if claimant has been adequately compensated for residuals of her 1960 industrial injury.

IT IS SO ORDERED.

WCB Case No. 80-02143 APRIL 6, 1981

ELLA McCLELLAN, CLAIMANT
Richardson, Murphy, et al, Claimant's Attorney
Thomas Mortland, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

Claimant requests Board review of the Referee's Opinion and Order which awarded 70% unscheduled permanent partial disability to claimant's low back in lieu of the award of prior Determination Orders.

The employer cross-appeals, contending that the Referee's award is excessive. Appellant further contends that claimant is capable of gainful and suitable employment and is thereby precluded from a finding of permanent total disability.

The sole issue is extent of disability.

Claimant alleges that she continues to suffer disabling pain which makes it impossible to carry on normal day-to-day activities; that as a result of her compensable injury in 1971, claimant has undergone four back operations and still must live with constant pain; and that, as a practical matter, employers will not hire someone with such an extensive history of back problems. Claimant contends that, even if employment could be obtained, she cannot work more than four hours in a day and that in no event can she perform jobs which require lifting, bending, standing or sitting in any significant amounts. Claimant contends that the combination of these factors, plus the allegation that vocational rehabilitation options have been effectively closed to her, support a conclusion that the claimant is totally and permanently disabled.

Respondent attributes claimant's unemployability, if any exists, to her unwillingness to promote her own employability, her failure to respond to offers of help from Field Services and further contends that claimant has failed to carry the burden of proving permanent total disability. Citing Audas v. SAIF, 43 Or. App. 813, 816 (1979), respondent maintains that claimant's unwillingness to apply skills and training to a job reasonably within claimant's abilities does not render the claimant permanently and totally disabled.

Upon de novo review, the Board affirms and adopts the findings and conclusions of the Referee as stated in the Opinion and Order dated August 29, 1980.

ORDER

The order of the Referee dated August 29, 1980 is affirmed.

NOTICE TO ALL PARTIES: This order is final unless, within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

WCB Case No. 80-03321 APRIL 6, 1981

ORVAL McKENZIE, CLAIMANT
SAIF Corporation
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 Referee is final by operation of law.

WCB Case No. 78-05969 APRIL 6, 1981

ROY D. NELSON, CLAIMANT
Olson, Hittle, et al, Claimant's Attorney
SAIF Corporation
Order Denying Reconsideration of Attorney Fees

The Board's Order on Review, dated March 13, 1981, awarded claimant's attorney a fee, payable from claimant's compensation, "not to exceed \$750." By letter dated March 18, 1981, claimant's attorney claims an additional \$370 of claimant's compensation.

The attorney's claim is based on OAR 438-47-040(1) which states in part:

"If a claimant appeals the extent of temporary or permanent disability to the Board, an additional attorney fee of 25% of the amount of any increase awarded by the Board shall be approved."

This rule must be read in conjunction with OAR 438-47-010(2) which states in part:

"The amount of a reasonable attorney fee when ascertained under [the Board's rules]...shall be based on the efforts of the attorney and the results obtained, subject to any applicable maximum fee provided by [the Board's rules]."

When OAR 438-47-040(1) is interpreted together with OAR 438-47-010(2), the relevant rule that emerges is: Attorney fees are based on efforts and results obtained subject to an applicable maximum of 25% of the increased compensation obtained. Applying that rule here, the result obtained, i.e., claimant's compensation having been increased by the Board, was due more to the Board's efforts than the efforts of claimant's attorney. The Board regards the attorney fee previously awarded adequate and proper. The motion for reconsideration is denied.

IT IS SO ORDERED.

Own Motion No. 81-0084M APRIL 6, 1981

CHARLES L. PLUMMER, CLAIMANT
SAIF Corporation
Own Motion Order

Claimant requests the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of March 9, 1971. Claimant's aggravation rights have expired.

The SAIF indicated by letter of March 24, 1981 that it was unopposed to a reopening for the surgery performed.

The medical documentation provided indicates that claimant was hospitalized on November 14, 1980 for surgery recommended by Dr. Newby who opined the need for such was related to claimant's 1971 industrial injury.

The claimant's claim is to be reopened commencing November 14, 1980, the date of his hospitalization, for the surgery recommended, and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB Case No. 79-10411 APRIL 6, 1981

DAVID ALLEN SONNENFELD, CLAIMANT
John C. DeWenter, Claimant's Attorney
Larry Brown, Defense Attorney
Order on Review

Reviewed by the Board en banc.

The employer seeks Board review of the Referee's order. The issue is whether claimant's insomnia condition is compensable. The Referee found that it was and reversed the employer's denial. The Board majority agrees with and adopts the Referee's Opinion and Order except as supplemented or modified below.

Claimant experienced no unusual sleeping difficulties before he began working with this employer. Claimant's working schedule with this employer is on a 28-day rotation: Seven days graveyard shift (11 p.m. to 7 a.m.); two days off; seven days swing shift (3 p.m. to 11 p.m.); one day off; seven days day shift (7 a.m. to 3

p.m.); four days off. The 28-day sequence is then begun anew. Claimant began to experience sleeping difficulties shortly after he began working on this schedule. All of the medical evidence is that claimant's insomnia is caused by his working schedule.

The Referee stated it mattered not whether claimant's condition was regarded as an accidental injury or an occupational disease. Under James v. SAIF, 290 Or. 343 (1980), decided subsequently to the Referee's decision, it does matter. The Board majority finds claimant's condition is an occupational disease.

The Referee stated "this case turns upon its own facts, and argument by analogy has little value." The Board majority does not completely agree. We now have available, although the Referee did not, the analogy of James v. SAIF, supra. James holds that an occupational disease can be compensable under the Workers' Compensation Act as it arises from circumstances unique to the claimant's employment. In this case, the claimant's illness (insomnia) arises from his rotational work schedule which is obviously a circumstance unique to his employment.

The employer argues that only work activities can be the basis of a compensable claim and that work schedule cannot. The Board majority finds the distinction specious. Rogers v. SAIF, 289 Or. 633 (1980), requires only work connection, and found the claimant's "extended working hours," that is, his work schedule, as one factor supporting work connection in that case. 289 Or. at 644.

Our holding that this claim is compensable does not, contrary to the employer's apparent fears, mean that a floodgate has been opened in the workers' compensation system. Our holding is limited to the specific facts in this record: The claimant was young and healthy with no prior history of sleeping problems; after starting a shift rotation that is more severe than many, claimant began to have sleeping problems; all uncontroverted medical evidence is that claimant's insomnia is caused by his work schedule; claimant has lost no time from work and does not claim to be permanently disabled, he only seeks payment for medical services and one prescription.

Claimant cross appeals claiming entitlement to penalties and attorney fees because of the employer's unreasonable refusal to pay compensation. An erroneous refusal is not an unreasonable refusal. Considering the unique nature of this claim, the Board does not find the employer's refusal to be unreasonable.

ORDER

The Referee's order dated June 10, 1980 is affirmed and, except as modified or supplemented above, adopted by the Board majority.

Claimant's fee agreement with this attorney is approved, and claimant's attorney is awarded as and for a reasonable attorney fee the sum of \$500, payable by the employer, not payable from claimant's compensation.

NOTICE TO ALL PARTIES: This order is final unless, within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

I agree with the majority in part and disagree in part.

I agree with the majority that the applicable law is ORS 656.802(1)(a) and that James v. SAIF, 290 Or. 343 (1980) controls. I further agree that claimant is not entitled to penalties and attorney fees for the employer's alleged unreasonable refusal to pay compensation.

I disagree with the majority on the issue of compensability.

The majority, in finding this claim compensable, too narrowly construes ORS 656.802(1)(a), particularly the phrase:

"...and to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein."

The application of the above phrase to the question of whether a condition is work related "...ordinarily will depend on the characteristics of the particular disease and the wide or narrow range of conditions that cause it." (James, supra.)

WCB Case No. 80-01327 APRIL 6, 1981
and Own Motion

JAMES D. TURNBULL, CLAIMANT
Olson, Hittle, et al, Claimant's Attorneys
Order Denying Motion to Dismiss Request for Review
and Denying Reconsideration of Own Motion Order

The Board previously referred claimant's request for own motion relief to the Hearings Division "to be consolidated with WCB Case No. 80-01327." In a single document, the Referee issued an appealable order in WCB Case No. 80-01327 and made a recommendation to the Board regarding claimant's request for own motion relief. Based on the Referee's recommendation, the Board issued an own motion order on February 27, 1981 ordering "reopening commencing the date claimant last worked prior to his January 2, 1979 surgery."

Claimant has moved to dismiss the employer's request for review in WCB Case No. 80-01327 contending the sole issue involved in that proceeding--claimant's entitlement to ORS 656.245 medical benefits--was resolved by the Board's own motion order. The employer disagrees with the thesis of the motion to dismiss and, alternatively, moves for reconsideration of our February 27, 1981 own motion order.

The respective contentions of the parties reveal a significant ambiguity in the law. In some respects and instances, a claim of continuing entitlement to ORS 656.245 medical benefits is treated like any new claim even beyond the five year aggravation period. That is what happened here in WCB Case No. 80-01327. In other respects and instances, a claim of continuing entitlement to ORS 656.245 benefits is treated as an own motion matter if it arises beyond the five year aggravation period. That is what happened here in part under the terms of our own motion order.

The Board has suggested a legislative solution to that ambiguity in SB 651, currently pending in the Legislative Assembly. Unless and until that suggestion is adopted, there is no alternative that the Board is aware of except to endure the current ambiguity.

The Board finds that WCB Case No. 80-01327 may involve distinct issues that are not involved in the separate, albeit consolidated in the Hearings Division, own motion proceeding. Therefore, claimant's motion to dismiss the employer's request for review in WCB Case No. 80-1327 is denied. Moreover, the employer's motion for reconsideration of our own motion order of February 27, 1981 is denied.

If there is a problem in these proceedings that could be resolved by expedited briefing and expedited Board review in WCB Case No. 80-01327, the Board would be receptive to such a motion.

IT IS SO ORDERED.

Claim No. TD 90516

APRIL 6, 1981

THOMAS G. YATES, CLAIMANT
Evohl Malagon, Claimant's Attorney
SAIF Corporation
Own Motion Determination

A stipulation reopened claimant's claim for a worsened condition related to his May 15, 1975 industrial injury to be effective October 27, 1980. Subsequently surgery was recommended but claimant declined.

The claim has now been submitted for closure pursuant to ORS 656.273, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from October 27, 1980 through January 27, 1981 and no further award for permanent partial disability. The Board concurs with this recommendation.

WCB Case No. 78-9424 APRIL 10, 1981

CHARLES BIGSBY, CLAIMANT
George Waldum Claimant's Attorney
Lang, Klein, et al, Defense Attorney
Order on Review

Claimant requests that the Board reopen his 1967 back injury claim on its own motion pursuant to ORS 656.278. This request is in the alternative to claimant's efforts to have the Referee's order reversed in WCB Case No. 78-9424 which the Board, by Order on Review, has this date declined to do.

We also decline to reopen on our own motion at this time. As for temporary total disability benefits or increased permanent disability payments, we find too many references in the medical reports to claimant's principal problems being low motivation, obesity, etc., to conclude that this is an appropriate instance in which to exercise our discretionary own motion jurisdiction.

Claimant's supposed need for surgery presents a closer question. Looking to the evidence in WCB Case No. 78-9424 in addition to the medical reports submitted in connection with this request for own motion relief, we find a considerable difference of medical opinion about whether surgery is necessary or desirable or whether claimant is a good candidate for surgery without first losing weight, exercising, etc.

The Board leaves resolution of that close question to claimant and his doctors. If and when they make the decision to proceed with surgical repair of claimant's possible pseudoarthrosis of the spinal fusion performed after his 1967 injury, the Board will order the 1967 claim reopened on its own motion for payment of medical services and associated time loss. But unless and until that decision is made, claimant's request for own motion relief is premature and is, therefore, denied.

IT IS SO ORDERED.

GARY T. CHRISTENSEN, CLAIMANT
Peter Hansen, Claimant's Attorney
SAIF Corporation
Own Motion Order

Claimant, in August 1980, requested the Board exercise its own motion authority and reopen his claim for worsened conditions in January 1980 and August 1980. His original injury occurred on August 16, 1972 and claimant's aggravation rights have expired.

Dr. Duff, on January 29, 1980, advised that claimant's back condition necessitated that he stay off work for a period of time. Claimant's job at that time was heavy enough that he was repeatedly injuring himself and he probably would need a job change. On February 8, 1980, Dr. Duff released claimant for work with the strong recommendation that claimant be provided vocational assistance so that he could get into a more sedentary line of work. In August 1980 Dr. Duff indicated he felt the treatment offered by the Pain Center would be appropriate for claimant.

After a thorough consideration of the record before it which includes the evidence before the Referee from an earlier hearing, we find claimant's August 16, 1972 injury claim should be reopened for temporary total disability from January 23, 1980 through February 8, 1980, less time worked. If and when claimant enters the Pain Center, he will be entitled to compensation for that period of time also.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 23, 1980 through February 8, 1980, less time worked.

If and when claimant enters the Pain Center, he is entitled to temporary total disability compensation for the period of time he is actually involved in an authorized program.

Claimant's attorney is hereby entitled to a reasonable attorney's fee equal to 25% of the increased award of compensation granted by this order, payable out of said compensation as paid, not to exceed \$750.

CHARLES BIGSBY, CLAIMANT
George Waldum, Claimant's Attorney
Lang, Klein, et al, Defense Attorneys
Own Motion Order

Reviewed by the Board en banc.

Claimant seeks Board review of the Referee's order which affirmed a Determination Order on the accepted portion of a claim and affirmed a partial denial on the balance of the claim.

Claimant injured his back in 1967 while SAIF was responsible for his workers' compensation coverage. That claim was accepted and closed by Determination Order in 1970. Claimant subsequently changed jobs. He claims that he reinjured his back in 1977 while EBI Companies (EBI) was responsible for his workers' compensation coverage on his new job.

EBI initially accepted the claim and processed it to closure by Determination Order dated November 15, 1978. Claimant requested a hearing on that Determination Order. About the same time, claimant asked EBI to reopen his 1977 claim for surgery. EBI denied any further responsibility, contending for the first time that claimant's 1977 problems were an aggravation of his 1967 injury.

Claimant's request for hearing on EBI's partial denial was consolidated with his request for hearing on the 1978 Determination Order. The Referee affirmed the Determination Order and affirmed EBI's partial denial. The Referee noted and the Board agrees: The medical evidence is unanimous that claimant's need, if any, for further surgery relates back to his earlier 1967 injury, specifically because of a possible pseudoarthrosis of the spinal fusion that was performed at that time.

After receiving the Referee's Opinion and Order documenting that claimant's current problems relate back to his 1967 injury, claimant filed a request for own motion reopening of his 1967 injury. The Board resolves that request by separate own motion order issued this date.

ORDER

The Referee's order, dated September 10, 1980, is affirmed and, as supplemented above, adopted by the Board.

NOTICE TO ALL PARTIES: This order is final unless, within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

Claim No. A 310030

APRIL 10, 1981

OHMAN E. CHRISTOPHER, CLAIMANT
SAIF Corporation
Own Motion Determination

The Board issued its Own Motion Order pursuant to the provisions of ORS 656.278 in the above-entitled matter on October 29, 1980 and reopened claimant's claim for a worsened condition related to his industrial injury of August 7, 1952.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from August 24, 1977 through November 11, 1977 and from September 18, 1980 through December 7, 1980 and no further award for permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED

WCB Case No. 80-03155

APRIL 10, 1981

CECIL R. FLETCHER, CLAIMANT
Benton Flaxel, Claimant's Attorney
Paul S. Roess, Employer's Attorney
SAIF Corporation, Defense Attorney
Request for Review by Claimant

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's Opinion and Order which denied claimant's request for additional temporary disability benefits, penalties and fees.

The issues are claimant's entitlement to temporary total disability compensation after March 5, 1980, after the effective date of claimant's early retirement, until his condition becomes medically stationary or until claimant's physician releases him to return to regular work; and whether penalties and fees should be imposed for the alleged unreasonable delay in payment of time loss benefits from February 7, 1980 to March 5, 1980.

In support of his contention that he was medically prohibited from working at his regular job after February 6, 1980, claimant cites Dr. Goodman's reports of February 7, 1980 and February 12, 1980. Respondent argues that claimant was paid benefits for time loss on March 5, 1980 and that any delay was caused by claimant's failure to properly notify the employer of the reasons he stopped working on February 6, 1980 until March 5th, the date payment was made.

While it is arguable that the claimant had been advised by his physician to stop falling timber which required use of a chain saw, the Referee accurately concluded that claimant "was never medically prohibited from working" altogether. The Referee accurately applied case law which precludes payment of temporary total disability benefits after the effective date of a voluntary election to retire.

Claimant was paid benefits for all of the time loss to which he was entitled, from February 7, 1980, his last working day, to the date of his voluntary early retirement. The Board concludes that claimant was not entitled to temporary total disability benefits after the effective date of his March 1, 1980 retirement. The Board further concludes that any delay in payment of benefits for the period from February 7, 1980 to March 5, 1980 resulted from claimant's failure to fairly advise the employer of the reason he was stopping work.

Upon de novo review, the Board adopts and affirms the Opinion and Order of the Referee in its entirety.

ORDER

The order of the Referee dated September 30, 1980 is affirmed.

WCB Case No.'s 79-04269 and 79-08883

APRIL 10, 1981

DAVID R. FOSDICK, CLAIMANT
Roger D. Wallingford, Claimant's Atty.
Alan H. Johansen, Employer's Atty.
SAIF Corporation, Defense Atty.
Request for Review by Employer

Reviewed by the Board en banc.

Reed Roofing Co., Inc., (Reed) seeks Board review of the Referee's order which affirmed an order of the Workers' Compensation Department that Reed was a noncomplying employer of the claimant on the date he was injured. The Board affirms and adopts the Referee's order with the following qualifications and additions.

The problem here is trying to put the round peg of informal business arrangements into the square hole of legal classifications, i.e., employee versus independent contractor. Claimant was originally employed by Gary and Phil Smith, dba Roofsmiths & Carpenters (R&C), a partnership between the Smith brothers. R&C became involved with two corporations controlled by

the same principals: Reed Roofing Co., Inc., (Reed) which primarily installed roofing, and 2MKT, Inc., which primarily manufactured roofing. These two corporations were structured in such a way that all employees, even those who did installing rather than manufacturing, were on 2MKT's payroll except for some corporate officers on Reed's payroll.

Starting in early December 1978, R&C worked at least primarily, if not exclusively, installing roofing for Reed. The Smith brothers were paid on a piece-work or flat fee basis. They in turn paid claimant an hourly wage. The Smiths and claimant were supervised at times by Jamie Griffin who was on the payroll of 2MKT but was functionally an employee of Reed.

Employment for workers' compensation purposes requires remuneration plus right of control. ORS 656.005(31). Reed's payment to R&C, who in turn paid claimant, is sufficient to establish that Reed paid claimant under the test of Whitlock v. SAIC, 233 Or. 166 (1962). Jamie Griffin's, as functionally Reed's employee, supervision of the Smiths and claimant establishes Reed's right of control.

Reed's attorney complains that, even if the Smith brothers were Reed's employees, the Referee never explained "by what mystical process" claimant ceased to be R&C's employee as he had been before doing Reed jobs and was "transformed" into Reed's employee while doing Reed jobs. That mystery can be solved by reading ORS 656.029.

ORDER

The order of the referee, dated April 30, 1980 is affirmed and, except as modified above, adopted by the Board. Claimant's attorney shall be paid, as and for a reasonable attorney fee for services rendered in connection with this Board review, the amount of \$450; said fee is to be paid pursuant to the provisions of ORS 656.054 and not out of any compensation due claimant.

WCB Case No. 79-09690 April 10, 1981

HERBERT JONES, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attys.
Lang, Klein, et al, Employer's Attys.
Request for Review by Claimant

Reviewed by Board members McCallister and Lewis.

The claimant seeks review by the Board of the Referee's order which affirmed the employer/carrier's denial and affirmed the Determination Order. We reverse.

The claimant has worked for J. Wiley Co. some 18 years installing floor coverings, a job which is quite heavy work.

Claimant suffered a myocardial infarction in 1955; this was a compensable industrial claim closed without an award of permanent disability. Thereafter, he suffered from angina.

In October 1978 he had influenza and developed congestive heart failure which required hospitalization. He returned to his regular job in January 1979.

On February 12, 1979, claimant was carrying a carpet weighing approximately 100 pounds up some stairs and the temporary stair gave way and claimant had to step back down five steps. This accident caused increased strain from efforts to maintain his balance. He suffered immediate angina and was hospitalized.

Claimant filed a claim for this incident. The carrier accepted the claim. Upon his hospitalization, the diagnosis was myocardial ischemia, congestive heart failure and hypertension. Claimant was found to have a complete left bundle branch block. Dr. MacKay, an internist, had been and continued to be the treating physician.

On June 6, 1979 Dr. Hattenhauer, a cardiologist, examined the claimant. He reported that claimant's condition was a continuation of his October 1978 episode of congestive heart failure and that condition was not yet stationary in February 1979. Dr. Hattenhauer indicated that recurrent episodes of congestive heart failure do substantially worsen a cardiac condition, but he felt it was impossible to tell if that worsening was permanent or temporary. At the time he examined claimant, Dr. Hattenhauer felt claimant had reached his pre-injury status.

On July 19, 1979 Dr. MacKay, who treated claimant upon his hospitalization, reported that he agreed, in part, with Dr. Hattenhauer's conclusion. Claimant had significant coronary artery disease leading to pain; however, he felt it was the cardiomegally incipient congestive heart failure and left bundle branch block which was the primary disabling problems. He reported, "His heart simply cannot pump enough blood to meet the demands required by his strenuous job." He went on to state, "No surgery or more medication will relieve this or get him back to doing strenuous labor."

In September 1979 Dr. MacKay found claimant's condition "stable as far as his heart failure." He further reported: (1) Claimant cannot do heavy labor; (2) claimant's heart disease was not caused by his job; (3) claimant's job exacerbates the condition which progressively gets worse with time; (4) the strain on February 12, 1979 caused claimant to be hospitalized; (5) when he tried to return to work after hospitalization, his heart could no longer meet the demands of its job. Dr. MacKay, based on the

above findings, disagreed with Dr. Hattenhauer's conclusion that claimant's condition "had returned to his previous level before February 12, 1979."

On September 14, 1979 the carrier denied responsibility for the underlying disease condition but accepted responsibility for the temporary aggravation occurring in February 1979.

A Determination Order was issued on October 10, 1979 which granted claimant compensation for temporary total disability only.

In May 1980 Dr. MacKay indicated that claimant did have rather severe heart disease but, with certain restrictions, could return to work. He was to do no lifting over 40-50 pounds but could work a full eight hour day.

On June 2, 1980 Dr. MacKay opined the claimant's work activities (the episode on February 12, 1979) resulted in a worsening of his "underlying problem," and "he was able to do more prior to his episode in February. Claimant's condition, according to Dr. MacKay, was stable, "yet he is worse than he was prior to February of 1979."

The Referee found claimant's work activity on February 12, 1979 produced only a temporary aggravation of his underlying coronary artery disease and proceeded to affirm the denial. The denial only denies the underlying disease condition and admits to acceptance of responsibility for claimant's temporary aggravation. The Referee felt the Determination Order should be affirmed and felt claimant's preclusion from work could just as easily be the result of his underlying disease process as it could be from the temporary aggravation.

The Board concludes, based on a preponderance of the medical evidence, that the work activity on February 12, 1979 aggravated claimant's underlying condition. Both Dr. Hattenhauer and Dr. MacKay felt claimant suffered from an aggravation of the underlying condition, but Dr. Hattenhauer couldn't say whether it was temporary or permanent. Dr. MacKay, the treating physician, felt that it was permanent in that claimant has not and will not return to his pre-injury status.

Therefore, the Board concludes that claimant's injury of February 12, 1979 caused a permanent worsening of claimant's underlying condition which, in truth, now precludes claimant from returning to his employment of 18 years.

The Board further concludes that the medical evidence indicates claimant is employable. In fact, the evidence is he has been released to some forms of hard labor within the restrictions placed upon him by his treating physician. Nonetheless, the Board finds claimant has suffered a significant loss of wage earning capacity in the broad field of the industrial labor market.

ORDER

The order of the Referee, dated July 18, 1980, is reversed.

The denial issued by the employer/carrier is modified in that it is not responsible for claimant's underlying disease but will be responsible for his permanent worsening of the underlying disease arising out of the February 12, 1979 incident.

The Determination Order of October 10, 1979 is modified, and claimant is hereby granted an award of 60% unscheduled disability.

Claimant's attorney is hereby granted as and for a reasonable attorney fee 25% of the award granted by this order and \$500 on the denied claim modification.

Own Motion No. 81-0059M

APRIL 10, 1981

BETTY JEAN McMAHON, CLAIMANT
SAIF Corporation, Defense Atty.
Own Motion Order

Claimant requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for a worsened condition related to her July 17, 1974 industrial injury. Claimant's aggravation rights have expired.

The accompanying medical information indicates that claimant's current condition is related to her 1974 industrial injury and further indicates that her condition required hospitalization. The carrier, Travelers Insurance Company, stated its position by letter of March 26, 1981 that it was opposed to any claim re-opening.

The Board finds, based on the medical information submitted to it, that claimant is entitled to have her claim reopened commencing on the date of her hospitalization and until closed, pursuant to ORS 656.278.

IT IS SO ORDERED.

APRIL 10, 1981

GEORGE PLANE, CLAIMANT
Malagon, Velure & Yates, Claimant's Attys.
SAIF Corporation, Defense Atty.
Request for Review by SAIF
Cross Request by Claimant

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of that portion of the Referee's Opinion and Order which awards 80% unscheduled permanent partial disability as a result of aggravation of the claimant's 1974 injury. Claimant cross-appeals, asserting that claimant's deteriorating mental condition represents an aggravation of his prior injury and that claimant has become, as a result, permanently and totally disabled; claimant contends that he is entitled to an award of permanent total disability.

The sole issue raised on appeal is the extent of claimant's disabilities based upon a psychiatric condition which is alleged to be a "dry aggravation" of claimant's previous condition.

The initial claim was closed by Determination Order dated April 23, 1975 which granted time loss benefits from August 26, 1974 to April 2, 1975 and which awarded permanent partial disability equal to 30% unscheduled disability to the low back. On appeal, the Court of Appeals, on August 1, 1978, upheld the Board's Order on Review which modified the Referee's June 28, 1978 award and which granted 55% unscheduled permanent partial disability to the low back.

In granting an award for aggravation in the instant case, the Referee relied in part upon the report of Dr. Robert C. Luther, a consulting psychiatrist who examined claimant on October 6, 1978 in concluding that claimant suffered a worsened condition by reason of his deteriorating mental state.

The Board notes that Dr. Luther conceded that his evaluation was purely subjective in that "this is difficult to assess objectively, and this thereby has to be pretty much arrived at on the basis of history and other medical reports." The Referee properly concluded that Dr. Luther's evaluation was for the purposes of litigation only, and properly denied the claim for payment of his bill for medical services as well as denying attorney's fees in connection with that medical benefits issue.

The Board disagrees with the Referee's conclusion that Dr. Luther's report adequately supports the lay testimony to the extent needed to justify an award of permanent partial disability for an aggravation. While Oregon statutes provide that "a physician's report indicating a need for further medical services or

additional compensation is a claim for aggravation," ORS 656.273(3), Dr. Luther indicated neither. To the contrary, he believed that the claimant was "not amenable to treatment" and that the claimant did not see it (the presence of some psychopathology) as being a part of his current (1978) condition."

In view of claimant's denial--whether subconscious or actual--of any psychopathology in his own situation, it becomes difficult to comprehend why he later, at the time of his April 1979 hearing, changed his opinion as to his own mental state.

More to the point, a claim for aggravation based upon an alleged worsening of claimant's mental condition in the absence of proof of a causal relationship to the 1974 injury, cannot be upheld. In the entirety of Dr. Luther's report, nowhere can there be found any indication of a causal relationship between the claimant's 1974 injury and any psychiatric disorder he may now have. The only mention of the 1974 injury was the following comment by Dr. Luther:

"You are familiar with the injury and the subsequent treatment, so I will not review that here." (Ex. E, p.2)

Presumably, claimant contends that claimant's alleged mental problems are linked to his physical complaints remaining as a result of the 1974 injury. Yet the only reference to claimant's physical condition by Dr. Luther was that the claimant was "quite preoccupied with his physical condition" and that "this is verified by the M.M.P.I. (Minnesota Multiphasic Personality Inventory) profile."

The mere fact that a claimant has a "significant amount of anxiety and apprehension about his health and the future in general," as observed by Dr. Luther, falls short of proving that the anxiety and apprehension was caused by an earlier injury or residual physical problems. It is common for elderly citizens who do not enjoy perfect health to have similar anxieties and apprehensions.

There is some indication that claimant's history of neurosis dates back as far as 1942 when he received a medical discharge from military service because he was "psychoneurotic." A "psychoneurosis" is defined as an emotional disorder due to unresolved conflicts, anxiety being its chief characteristic. The anxiety may be expressed directly or indirectly, as by conversion, displacement, etc. In contrast to a psychosis, a psychoneurosis does not involve gross distortions of external reality or disorganization of personality and is sometimes called a neurosis. Dorland's Illustrated Medical Dictionary, 25th Ed., p. 1283. Dr. Luther diagnosed claimant's condition as a "neurosis mixed with some anxiety, depressive and psychophysiological components."

While Dr. Luther believed the claimant's problems were mixed with "psychophysiological components"--i.e., having bodily symptoms of a psychogenic origin as opposed to organic--the mere fact that claimant had become psychosomatic (another term used for psychophysiological) in no way establishes that claimant's mental problems were directly related to his physical injuries. It is even conceivable that claimant's neurosis, as observed in 1978, was an exacerbation of his 1942 neurosis brought on more by the aging process than by any intervening traumatic injury.

Dr. Luther's report in no way ventures what disabling effect, if any, the psychiatric problems may have had on the claimant's ability to work. The mere existence of a neurosis or of psychopathology, with no practical impact on a claimant's earning capacity--even if found to be compensable--i.e., causally related to the 1974 injury--would not justify an award of permanent partial disability. Absent medical opinion of a causal relationship or supporting medical evidence of a resultant disability, it is difficult to envision how a claim of aggravation based upon that mental condition can survive.

While the adequacy of a physician's report is not jurisdictional, ORS 656.273(7), a causal relationship between the original injuries and his subsequent condition must be established; and, even if claimant sustained his burden of proving a causal relationship, it must then be established that some disability or incapacity actually resulted. In this case, claimant has failed to prove diminished earning capacity.

Without a showing that some disability actually exists--over and above the disability previously rated and upheld by the Court of Appeals--no award for aggravation can be supported. It should go without saying that a disability award must first be predicated upon the existence of a disability.

The Board concludes, upon de novo review, that the claimant failed to establish by a preponderance of the evidence that his psychiatric disorder, if any exists, was causally related to his 1974 injury, or that his mental state has caused any additional disability or loss of earning capacity. Absent these elements of proof, vital to an award for aggravation, the Board must conclude that the Referee's award of unscheduled disability for aggravation of claimant's condition must be reversed.

ORDER

That portion of the Referee's order dated April 30, 1980 which awarded 80%, or 256 degrees unscheduled permanent partial disability, is hereby reversed.

The remainder of the Referee's order is affirmed.

Own Motion No. 81-0050M

April 10, 1981

ARNOLD F. WYTTEBERG, CLAIMANT
Gary Kahn, Claimant's Atty.
Daniel L. Meyers, Employer's Atty.
SAIF Corporation, Defense Atty.
Own Motion Referring for Hearing

Claimant seeks reopening of his claim for a November 27, 1974 industrial injury. Aggravation rights attached to that claim have expired. The claimant believes his condition has worsened and is causally linked (or related) to the 1974 compensable injury. He requests the Board review the claim under its own motion authority pursuant to ORS 656.278.

Claimant filed an 801 on December 18, 1980 for an occupational disease occurring around September 10, 1980 against his then employer, Garrett Freightlines. This claim is presently pending in the Hearings Division upon a request for hearing by claimant.

In the interest of all parties concerned the Board is referring this own motion claim to the Hearings Division to be heard on a consolidated basis with WCB Case No. 81-01180. The Referee is to hold a hearing and take evidence to determine whether claimant's current hernia condition is related to his 1974 industrial injury, his 1980 occupational disease claim or neither. When the hearing is closed the Referee is to issue a separate appealable order on the 1980 claim and to have prepared a transcript of the proceeding and submit it to the Board, together with his recommendation for the disposition of the own motion claim.

IT IS SO ORDERED.

WCB Case No. 80-05930

APRIL 13, 1981

GARY A. GETMAN, CLAIMANT
Jeffrey Mutnick, Claimant's Atty.
Daryll E. Klein, Claimant's Atty.
SAIF Corporation, Defense Atty.
Order

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 a worsened condition related to his industrial injury of December 11, 1971.

On July 10, 1980 claimant was hospitalized and underwent surgery for removal of the internal fixation. The carrier denied ORS 656.245 medical services on the rather perplexing ground that claimant's aggravation rights had run.

Claimant requested a hearing on that denial which is set before Referee James P. Leahy for May 1, 1981. The Board hereby instructs the Referee, after he has held his hearing on the above issue, to submit a copy of his Opinion and Order to the Board. Upon receipt of the Referee's order the Board will proceed on the claimant's request for the Board to exercise its own motion jurisdiction.

IT IS SO ORDERED.

Claim No. C 363657

APRIL 14, 1981

ERNEST GAGE, CLAIMANT
SAIF Corporation
Amended Own Motion Determination

The Board issued its Own Motion Determination in the above entitled matter on February 25, 1981, and in that order the Board did not grant any compensation for temporary total disability to the claimant because of insufficient information concerning claimant's employment status or lack thereof.

On March 25, 1981 the Board received, from claimant's employer, the dates claimant was off work for his hospitalization and surgery.

The Own Motion Determination is hereby amended to reflect:

Claimant is granted compensation for temporary
total disability from July 31, 1980 through
November 2, 1980.

IT IS SO ORDERED.

Own Motion No. 81-0026M APRIL 14, 1981

EVERETT W. GREVE, CLAIMANT
Richard T. Kropp, Claimant's Attorney
SAIF Corporation
Own Motion Referred to Evaluation Division

Claimant requests that the Board exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of March 1, 1961.

The medical documentation of record does not establish a worsened condition but does indicate that claimant has permanent partial disability of his lumbar spine related to his leg injury.

This case is being referred to the Evaluation Division of the Workers' Compensation Department to determine claimant's loss of wage earning capacity due to the permanent impairment of his low back. We request Evaluation Division to submit an advisory rating to the Board.

IT IS SO ORDERED.

Claim No. B 96609 APRIL 14, 1981

ELMER HICKEY, CLAIMANT
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corporation
Amended Own Motion Order

The Board issued its Own Motion Order in the above entitled matter on March 30, 1981. In order to clarify that order, we amend that portion of the order granting claimant 70% loss of an arm for unscheduled disability to:

"...claimant is entitled to an award of 70% loss of an arm for unscheduled disability. This award is in lieu of all prior awards granted."

IT IS SO ORDERED.

APRIL 14, 1981

STEPHEN L. LAWHEAD, CLAIMANT
Own Motion Order

Claimant requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of February 12, 1969. Claimant's aggravation rights have expired.

The medical reports submitted in support of claimant's request are insufficient to establish a causal relationship between claimant's current condition and his industrial injury of February 1969.

A medical report of February 24, 1981 from Dr. Hopkins indicated on December 1, 1980 claimant was hospitalized and had a laminectomy. By a report of March 3, 1981 Dr. Misko indicated he saw claimant at the hospital on February 10, 1981. Claimant gave a history of recurrent back and leg pain in the summer of 1980 which resulted in hospitalization and surgery in November 1980. Then Dr. Misko concludes:

"Since the patient's symptoms did not clear following the laminectomy in November, it is my conclusion that he had a ruptured disc at L-5S-1 throughout his recent illness dating back to the summer of 1980. I, therefore, feel that he had a true aggravation of his previous condition and that he should receive time loss for any time missed from work during the fall of 1980 up until the present time." (emphasis supplied)

The Board concludes that Dr. Misko's opinion is not sufficient to provide the necessary causal link of claimant's need for hospitalization and surgery in 1980 to his 1969 injury. Claimant's request for the Board to exercise its own motion jurisdiction is denied.

IT IS SO ORDERED.

Claim No. C 300516

APRIL 14, 1981

JAMES R. McCOOL, CLAIMANT
SAIF Corporation
Own Motion Determination

The Board issued an Own Motion Order on October 28, 1980 and reopened claimant's claim for a worsened condition related to his industrial injury of April 21, 1971.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the workers' Compensation Department that claimant be granted compensation for temporary total disability from September 16, 1980 through February 6, 1981 and to an additional award of 20% compensation for permanent partial disability, making a total award of 70% unscheduled disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

Own Motion No. 81-0030M APRIL 14, 1981

JESSIE QUINTEROUS, CLAIMANT
Hewlett-Packard, Claimant's Attorney
Own Motion Order

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his May 6, 1974 industrial injury. Claimant's aggravation rights have expired.

The medical report of Dr. Teal causally links claimant's current condition to his industrial injury. The Board concludes that claimant's claim should be reopened effective January 6, 1981 until closure is proper pursuant to ORS 656.278.

IT IS SO ORDERED.

Own Motion Order APRIL 14, 1981
No. 81-0057M

RAIMO K. TILA, CLAIMANT
Tom Hanlon, Claimant's Attorney
Jerry McCallister, Defense Attorney
Order

The claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and refer his claim to the Hearings Division to be consolidated with a pending request for hearing on the issue of ORS 656.245 medical care and treatment. Claimant's aggravation rights have expired.

The Board finds no justification for referring this case to hearing. The Referee is scheduled to hold a hearing on WCB Case No. 80-05771. The Referee is to provide the Board with a copy of his Opinion and Order on the issue of ORS 656.245 medical care in that case. Upon receipt of the Referee's order, the Board will consider claimant's request for own motion relief.

IT IS SO ORDERED.

WCB Case No. 80-09915 APRIL 15, 1981

ROBERT T. ANDERSON, CLAIMANT
Merten & Saltveit, Claimant
SAIF Corporation
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 Referee is final by operation of law.

WCB Case No. 78-07194 APRIL 15, 1981

JUANITA CLARK, CLAIMANT
Malagon, Velure Yates, Claimant's Attorney
Wiswall, Svoboda, et al, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The employer seeks Board review of the Referee's order which ordered the SAIF Corporation (SAIF) to accept the claim and commence payment of compensation for temporary total disability on May 17, 1978 and assessed a penalty of 10% on all temporary total disability compensation due and owing claimant from May 17, 1978 to the date of the denial, January 4, 1979.

The Board reverses the Referee's order.

There is not one iota of medical evidence in this record to support claimant's contention that the condition which required hospitalization in May 1978 was related to her accepted non-disabling work injury of February 1977.

In his medical report dated November 6, 1978, Dr. Seitz reports:

"In reviewing this patient's history, I cannot with any certainty relate her present low back pain with any single work episode. She has a history of back pain predating her back pain at work and her exacerbation of back pain with radicular symptoms occurred while riding in a car.

"I cannot state that the problems which Juanita is having presently are directly related to the incident at work in February 1977."

Dr. Young in his report of June 28, 1979 makes no mention of claimant's current condition at that time being related to her 1977 industrial injury.

The only evidence of a work relationship is claimant's testimony. In this case, claimant's testimony is insufficient to carry the burden of proof. The failure to produce adequate medical evidence of a causal relationship is fatal to claimant's case. The denial issued by SAIF is approved.

ORDER

The order of the Referee dated May 14, 1980 is reversed in its entirety.

MINER HARRIS, CLAIMANT
James P. O'Neal, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant and the SAIF Corporation (SAIF) seek Board review of the Referee's order which granted claimant an award of 60% unscheduled disability. Claimant contends that this award is inadequate. The SAIF contends the award is unjustified and the Determination Order award was proper. The Board agrees with the SAIF's contention. We reverse.

The evidence indicates that prior to claimant's October 22, 1978 industrial injury in the case before us, he had undergone three back surgeries: A laminectomy and fusion from L4 to the sacrum and a surgery for pseudoarthrosis. Claimant's prior industrial injury resulting in these surgeries occurred in 1964. He was unable to return to gainful employment for five years. Claimant testified he continued to have back problems, and when he returned to work as a driver after five years of non-employment, at first he was on a restricted work schedule as he could only drive a couple of hours at a stretch. The surgeries and claimant's inability to return to work over a long period of time indicate the severity of that injury. In 1969 claimant did return to truck driving full time and worked until this injury in October 1978 and hasn't worked since.

The injury before us was originally diagnosed as lumbosacral sprain aggravating the prior surgical procedures. Dr. Saez and Dr. Wilson both recommended vocational rehabilitation to lighter employment. Claimant was restricted to a job not requiring lifting over 20-25 pounds, nor any bending or twisting.

By a medical report of June 22, 1979, Dr. Saez indicated that within sixty days, claimant would be stationary and will have reached pre-aggravation status.

The Board feels that the award granted by the Referee of 60% unscheduled disability is excessive for the residual effects of this injury and its relationship to claimant's loss of wage earning capacity. The Board concludes that the award granted by the Determination Order of 40% unscheduled disability adequately compensates this claimant for the residuals of this industrial injury.

ORDER

The order of the Referee dated October 15, 1980 is reversed.

The Determination Order dated October 2, 1978 is affirmed.

WCB Case No. 80-00345 APRIL 15, 1981

ROLEOTH M. HILEMAN, CLAIMANT
John C. DeWenter, Claimant's Attorney
J.W. McCracken, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which granted claimant an additional award of 20% unscheduled disability for a total award to date of 30% unscheduled low back, mid-back, neck, left and right shoulder disability. Claimant contends he is entitled to a greater award of unscheduled disability and is also entitled to scheduled disability awards. We modify the Referee's order.

This claimant was employed as a bulldozer operator for Weyerhaeuser, and on March 21, 1978 he was struck by a landslide which pushed his bulldozer off the road and caused multiple injuries.

A Determination Order of December 17, 1979 granted claimant 10% low back disability and an award of 5% for loss of the left arm. Claimant contends he is entitled to scheduled awards for loss of function of his right arm, right hip and leg and left hip and leg. The Board finds the medical evidence is silent as to any loss of function of claimant's right hip and leg or left hip and leg, and claimant has failed to prove he has sustained any permanent partial disability to these scheduled members.

The Board is persuaded that claimant has sustained a loss of function to his right upper extremity. However, the only medical report which deals directly with this issue is that of Dr. Stainsby. In Dr. Stainsby's report of April 13, 1979 he rated permanent partial disability to the right upper extremity as moderate because of residuals of ulnar nerve paresthesia. This report is not detailed and doesn't describe the types of functions of that extremity which is now restricted. Therefore, we felt that, based on that report and the lay testimony, claimant is entitled to 20% loss of the right arm. We note that the Determination Order granted an award to the left arm which we feel must have been in error as there are no medical reports or evidence of any loss of function to that scheduled member.

On claimant's loss of wage earning capacity for the residuals of his injury to the unscheduled body areas, we concur with the Referee's award and his rationale regarding a single award for the combined affects of all unscheduled injuries on claimant's wage earning capacity.

ORDER

The order of the Referee dated July 28, 1980 is modified.

Claimant is hereby granted an award of 20% loss of the right arm.

Claimant's attorney is granted as an attorney fee the sum of 25% of the increased compensation granted by this order.

WCB Case No. 79-10883 APRIL 15, 1981

WALTER E. HUBBLE, CLAIMANT
Olson, Hittle, et al, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which affirms the SAIF Corporation's denial of claimant's claim for an alleged compensable condition arising out of his employment.

The Board affirms the conclusion reached by the Referee. Claimant, at the time of the alleged injury, was merely walking down a level corridor when his knee suddenly "gave out on him." Dr. Gerow reported on July 25, 1980 that the injury to the knee was related to claimant's work and that claimant was walking down a corridor "when usual stress to his left knee caused it to give way." (emphasis added) There was no evidence of any unusual stress either in claimant's testimony or the histories that he gave. Dr. Kaesche reported on July 29, 1980 that individuals may tear the cartilage in their knees when walking and twisting; a certain amount of twisting occurs with normal walking but more so going up or down stairs, or on wet and slippery surfaces.

In Rogers v. SAIF, 289 Or. App. 633, the court adopted a "unitary" approach to causation. Applying Rogers, it cannot be said the injury arose out of conditions of employment or is causally linked to conditions of employment under either an accidental injury or occupational disease theory.

The Board concurs with the Referee's decision that claimant's knee condition is not causally linked to employment with this employer.

ORDER

The order of the Referee dated August 26, 1980 is affirmed.

WCB Case No. 80-02390 APRIL 15, 1981

THOMAS A. RUDOLFI, CLAIMANT
Zafiratos & Roman, Claimant's Attorneys
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which granted claimant compensation for permanent total disability. SAIF contends the award granted is excessive. We modify the Referee's order.

Claimant was employed as a fireman and injured his low back on May 1, 1979. Claimant has had arms, low back and shoulder problems for over 20 years.

The medical evidence in this case does not justify an award of permanent total disability. Dr. Reimer indicated claimant was precluded from returning to his long time profession as a fire fighter but rated his loss of function of his low back from this injury as mild. The Orthopaedic Consultants rated total loss of function of his low back as mild and felt that claimant was capable of returning to gainful employment at light work and recommended vocational rehabilitation. Dr. McLaughlin found claimant "permanently impaired" and "medically unsuitable" for work as a fireman and indicated claimant needed a less stressful job like desk or bench work. He was to be restricted to no bending from the waist and no lifting over 15 pounds.

The evidence further discloses that claimant has made very little effort to seek light employment. Claimant is in need of vocational job placement or assistance in finding employment within his physical capabilities including the difficulty he has with his neck from a 1978 industrial injury not related to the case herein.

The Board concludes that claimant would be adequately compensated by an award of 65% unscheduled disability. Claimant has not proven entitlement to an award of permanent total disability based on the medical record and he could return to light work. Claimant has not shown good motivation for a return to employment within his physical capabilities.

ORDER

The order of the Referee dated September 24, 1980 is modified.

Claimant is hereby granted an award of 65% unscheduled low back disability. This award is in lieu of all prior awards.

Claimant's attorney is granted as an attorney fee 25% of the compensation awarded by this order.

WCB Case No. 80-04610 APRIL 15, 1981

DOUGLAS K. SCOTT, CLAIMANT
Terrence O'Sullivan, Claimant's Attorney
Marcus K. Ward, Defense Attorney
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 Referee is final by operation of law.

WCB Case No. 80-01854 APRIL 15, 1981
WCB Case No. 80-01855

VENDA J. SHACKELFORD, CLAIMANT
Mike Dye, Claimant's Attorney
Gary D. Hull, Defense Attorney
Order on Review

A request for review having been duly filed with the Workers' Compensation Board in the above-entitled matter by the SAIF Corporation, and said request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB Case No. 80-00517 APRIL 15, 1981

WILLIAM A. TEAL, CLAIMANT
Malagon, Velure & Yates, Claimant's Attorney
SAIF Corporation
Order on Review

The claimant has submitted to the Board a Motion for Reconsideration of its Order on Review dated March 26, 1981. After re-reviewing the record, the Board concurs with the contentions made by claimant.

Claimant, in his Motion, contends that the SAIF Corporation unilaterally terminated temporary total disability compensation. The record indicates that SAIF did not unilaterally terminate compensation--it totally failed to process the claim. SAIF not only failed to properly process the claim in the first instance after receipt of the 801, but it failed to commence any compensation benefits whatsoever, even after ordered to do so by a Referee. The record indicates SAIF made no payment to this claimant until almost two years from the date of the claim.

Based upon reconsideration of this case, the Board concludes that the penalties assessed by the Referee in his order were proper; we affirm and adopt his order.

The Board failed to grant claimant's attorney a fee. SAIF appealed to the Board and did not prevail; claimant's attorney is entitled to a fee. We now correct our Order on Review as follows:

ORDER

The order of the Referee dated August 28, 1980 is affirmed in its entirety.

Claimant's attorney is hereby granted as and for a reasonable attorney fee for his representation at this Board review the sum of \$500, payable by the SAIF Corporation.

WCB Case No. 80-01464 APRIL 15, 1981

WILLIAM D. VAIN, CLAIMANT
Flaxel, Todd, & Nylander, Claimant's Attorney
Schwabe, Williamson, et al, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The employer, Sears, seeks Board review of that portion of the Referee's order which granted claimant an award of 30% unscheduled disability. The employer contends the award is excessive. The Board agrees and the Referee's order is modified.

The evidence indicates claimant worked one week for this employer, and on October 20, 1979 he was loading a freezer and injured his low back. He had a prior low back problem in 1977 and was off work for six months. The diagnosis from the injury before us was lumbar sprain.

Claimant treated with two doctors, Dr. Mang, a chiropractor, and Dr. Bert, an orthopaedist. Dr. Bert released claimant for a return to work with no lifting over 30 pounds and with restrictions on bending and stooping. Dr. Bert rated claimant's low back impairment as minimal.

Claimant went to work as an apprentice baker on June 15, 1980 for Albertson's. Claimant testified he quit Sears because he hurt his back and the job was physically too demanding for one person. This testimony was less than candid. An employee of Sears testified claimant told her he quit (1) because he couldn't handle the merchandise alone and (2) because he could make more money on unemployment.

The medical evidence indicates claimant's impairment from this injury is minimal. Claimant is 41 years of age with a high school education plus two years of community college. He has a varied work background. The apprenticeship baker job claimant was performing at the time of hearing could not be classified as "light" work, and he is working full time.

The Board finds the Referee's award excessive. Claimant's injury in October 1979 was not severe; it required no hospitalization and no surgery. Claimant retains a capacity to earn in the broad field of industrial occupations. He has not lost much in the way of earning capacity from the residuals of this industrial injury. The Board concludes claimant would be adequately compensated by an award of 15% unscheduled disability.

ORDER

The order of the referee dated August 7, 1980 is modified.

Claimant is granted an award of 48% for 15% unscheduled disability. This award is in lieu of all prior awards granted.

WCB Case No. 77-00013 APRIL 16, 1981

BARBARA CLARK, CLAIMANT
Warner Allen & Assoc., Claimant's Attorneys
SAIF Corporation
Order on Remand

On March 16, 1981 the Board received a copy of the Judgment and Mandate from the Court of Appeals which returned the above cause to the Board pursuant to the Court's January 26, 1981 opinion. In compliance with the Court's opinion and mandate, the Referee's order of November 29, 1979 is reinstated with the exception of the penalty assessed, which is deleted.

IT IS SO ORDERED.

WCB Case No. 79-08164 APRIL 16, 1981

RUBY J. HAMPTON, CLAIMANT
Bernard Jolles, Claimant's Attorney
Joel Beerman, Defense Attorney
Order on Review

Reviewed by Board members Barnes and Lewis.

The claimant seeks Board review of the Referee's order. Claimant seeks increased compensation for a 1976 industrial injury to her left hand; a finding that the shoulder problems which arose subsequently are causally linked to the 1976 left hand injury; and increased temporary total disability payments.

The Board agrees with the Referee's conclusion that the prior award to claimant of 60% for 40% loss of use of her left hand and forearm is adequate. A doctor who has treated claimant since her 1976 injury, Dr. Smith, reported that claimant "has more use of her hand" now than at the time the prior award was made. Admittedly, two doctors who examined claimant for the first time in 1979 provided evidence that would support an increased disability rating for claimant's left hand and forearm. The Board finds the analysis of the treating physician more persuasive.

We turn to the question of claimant's left shoulder. There is no question that, starting sometime before April 1979, the claimant began to experience pain in her upper left arm and left shoulder. The question is whether claimant has established a causal link between the 1976 injury to her hand and her 1979 problems with her shoulder.

Claimant's 1976 hand injury was a puncture wound to three fingers. Medical reports at that time stated there was no tendon or nerve damage. The claimant was thereafter free of any symptoms above her left elbow for a year and a half or more. None of the many doctors who have examined claimant has any explanation, or even far-fetched theory, of how a 1976 puncture wound in three fingers without ligament or nerve damage could conceivably cause the onset of shoulder symptoms in 1979. The Board is not persuaded that claimant's shoulder condition is causally linked to her hand injury.

Claimant's argument for additional temporary total disability compensation presents a somewhat novel question: Should temporary total disability compensation be terminated on the date of a closing medical examination, the results of which are not then communicated to the worker, or instead on the later date that the worker first learns he or she was found to be stationary at the time of the closing examination?

Claimant was examined by the Orthopaedic Consultants on November 13, 1979. So far as she knew at that time, she was unable to work per instructions from her treating physician. Claimant testified, and we believe, that none of the examining team at the Orthopaedic Consultants told her differently on November 13. Indeed, it was not until December 5, 1979 that the doctors at the Orthopaedic Consultants sent a report of their examination of claimant to the employer. A date stamp indicates this was received by the employer on December 10. There is no indication that a copy of the report was sent to claimant.

Apparently in response to the Orthopaedic Consultants' report, the employer sent claimant a letter dated December 14 instructing her to return to work on December 17. Claimant testified, and we believe, she did not receive this letter until December 18 and returned to work that same day.

The Determination Order terminated claimant's temporary total disability compensation on November 13, the date she was examined by the Orthopaedic Consultants. Ordinarily, as an administrative convenience, it is proper to terminate temporary total disability compensation on the date of a closing medical examination that finds the worker medically stationary. Not only is this convenient, it is reasonable because most workers are probably told, usually at that time, by most doctors that they are being released to return to work.

But that general approach, proper in most cases, produces an injustice in this case. Under the terms of the Determination Order, claimant could have had no income from November 13 to December 18 due to circumstances beyond her control. She did not work during that period because the last doctor to speak to her on the subject had told her not to work. Claimant returned to work the same day she was told she had been medically released to do so. The Board concludes it would be grossly unfair to deny claimant temporary total disability compensation until her return to work under these circumstances.

ORDER

The order of the Referee dated June 22, 1980 is modified to provide that claimant is entitled to temporary total disability compensation from November 13, 1979 to December 18, 1979, less amounts paid.

In all other respects, the Referee's order is affirmed.

Claimant's attorney is entitled to 25% of the increased compensation ordered as and for a reasonable attorney fee, not to exceed \$300.

WCB Case No. 77-02741 APRIL 16, 1981

THOMAS D. ORMAN, CLAIMANT

James D. Vick, Claimant's Attorney

Schwabe, Williamson, et al, Defense Attorney

Order on Review

Reviewed by Board members Barnes and McCallister..

The claimant seeks Board review of the Referee's order which affirmed the denial of the employer/carrier. The sole issue is whether, at the time of his alleged fall, claimant was a subject worker.

The record is obscure. Claimant did not testify. The only witnesses were two supervisors, apparently only one of which had any direct contact with claimant on the day of his fall. Many of their answers were: "I don't remember."

As the Board interprets the record, claimant went to the employer's premises the day he fell as a job applicant; or, stated differently, without any testimony from claimant or documentary evidence he had previously filled out application forms, claimant has not proven he was on the employer's premises other than as a job applicant.

While he was going through the process of completing his application and before employment had been formally offered or formally accepted, claimant fell on a flight of stairs. He was then en route to the personnel office at the direction of a supervisor to complete the next phase of the application process.

ORS 656.005(31) provides in part, "'Worker' means any person...who engages to furnish services for a remuneration, subject to the direction and control of an employer..." Interpreting this language in Dykes v. SAIF, 47 Or. App. 187 (1980), the Court of Appeals denied workers' compensation benefits for a broken leg sustained while the claimant was performing a physical agility test as part of the application process for a deputy sheriff position. If the claimant/applicant in Dykes, who was injured during a required physical test is not a subject worker within the meaning of ORS 656.005(31), it follows that the claimant/job applicant in this case who was walking down the stairs to the personnel office is not a subject worker within the meaning of ORS 656.005(31).

ORDER

The order of the Referee dated September 20, 1978 is affirmed.

WCB Case No. 79-08618 APRIL 16, 1981

PETE TREMPER, CLAIMANT
Joseph Robertson, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which granted claimant compensation equal to 67.5% for 45% loss of function of the left hand and forearm. SAIF contends this award is excessive.

The issue before us is extent of disability.

Claimant sustained a compensable injury to his left thumb on April 7, 1978. There is no dispute that disability of the thumb is significant, necessitating two surgeries during the summer of 1978. Claimant has received an award equal to 33.6° for 70% loss of function of the thumb, and it is this award that SAIF asks us to affirm.

We concur with the Referee's finding that claimant's impairment not only includes his left thumb, but extends into his hand and forearm. A three centimeter portion of nerve was taken from the forearm and grafted into an area of the thumb in order to repair lacerations of the radial digital nerve and ulnar digital nerve. This surgery could cause impairment in the forearm.

Dr. Nathan, claimant's surgeon, concluded claimant's combined impairment was equal to 52% of the thumb. Based on this opinion, the Evaluation Division granted claimant compensation for 70% loss of function of the thumb.

On March 13, 1980, Dr. Stanford, an orthopedist, reported that claimant had complained of numbness over the anteromedial forearm as well as over the thumb. At that time, claimant felt his pain had decreased and that his gross strength was quite normal. His major problem was with fine movements of the fingers which caused problems picking up small objects, etc. On September 3, 1980, Dr. Stanford related the numbness in claimant's forearm to the surgery on his thumb. He did not attempt to rate the forearm disability but indicated the numbness would persist indefinitely.

We find that although claimant has lost some sensation in his hand and forearm, he apparently has good strength and range of motion with little pain. We feel a more appropriate award for his loss of function would be 45° for 30% loss of the forearm.

ORDER

The order of the Referee dated September 30, 1980 is modified.

Claimant is hereby granted compensation equal to 45° for 30% loss of function of his left hand and forearm for his injury sustained on April 7, 1978. This award is in lieu of, and not in addition to, that granted by the Referee in his order which, in all other respects, is affirmed.

APRIL 16, 1981

LARRY D. WRIGHT, CLAIMANT
Allen G. Owen, Claimant's Atty.
SAIF Corporation, Defense Atty.
Own Motion Determination

This claimant's claim was reopened per a stipulation dated November 16, 1977 signed by the Board which reopened claimant's claim for a worsened condition effective January 9, 1977.

The claim has now been submitted for closure and it is the recommendation of the Evaluation Division of the workers' Compensation Department that claimant be granted compensation for permanent total disability commencing January 13, 1979.

The Board, based on the entire record before us, concurs with this recommendation.

IT IS SO ORDERED.

WCB Case No. 79-01446 APRIL 17, 1981

ARDEN HOWARD, CLAIMANT
Lovejoy & Green, Claimant's Attorneys
SAIF Corporation
Order Granting Motion to Strike

Before Board members Barnes and McCallister.

The SAIF Corporation requested Board review of the Referee's order. By letter dated January 12, 1981 the Board informed the parties: "All briefs shall be filed within 50 days from the date of this letter, to-wit, March 3, 1981."

On March 4, 1981 the attorney for the claimant/respondent wrote to the Board complaining that SAIF had not yet filed an appellant's brief. By letter dated March 10, 1981, the Board responded as follows:

"Appellant has failed to file a brief or move for an extension of time within the time allowed for filing all briefs. Therefore, appellant will not be permitted to file a brief. Respondent will be permitted to March 25, 1981 to file a brief."

The brief on behalf of respondent was received by the Board on March 25, 1981.

Despite our March 10 letter, a brief from SAIF was received on March 27, 1981. That brief was accompanied by a "Motion for Leave to File Brief." The motion recited two reasons for the tardy submission of the brief. One was a problem with clerical assistance. The Board deems that insufficient reason for neither timely submitting a brief nor making a timely motion for an extension of time.

The other reason stated in SAIF's motion is that during a phone conversation, claimant's attorney allegedly told SAIF's attorney "she would not oppose further time being taken to file appellant's brief." By letter dated March 31, 1981 claimant's attorney disputes this allegation: "On March 2, when I called his office, my purpose was not to obtain an extension for [SAIF's attorney] but to make sure that if [he] filed on the deadline date...I would have reasonable time in which to file a response."

One obvious purpose for written motions for extension of time addressed to this Board is to avoid the unseemly situation that the attorneys for the parties find themselves in regarding their conflicting understandings and memories of an unrecorded phone conversation.

Claimant's March 31 letter includes a motion to strike appellant's brief as not timely filed. Were it not for this Board's prior letter of March 10, this motion might require the Board to resolve which of the attorney's understanding and memory of their phone conversation is more accurate. But given our March 10 letter, the Board sees no need to resolve that conflict. Claimant's motion is well taken and will be granted.

ORDER

SAIF Corporation's brief is sticken from the record and will be returned to SAIF with a copy of this order. This case is docketed for Board review based on the record and respondent's brief.

DONNA P. KELLEY, CLAIMANT
Brian L. Welch, Claimant's Attorney
SAIF Corporation
Order on Review

Claimant has moved to remand to the Hearings Division for further consideration of whether she had good cause for filing her requests for hearing more than 60 days after the denials in issue. ORS 656.319(1)(b). The motion raises the following questions: (1) Whether failure to request a timely hearing is excused under the good cause standard when the failure is due to the negligence of an employee in an attorney's office; and (2) whether claimant has established that the evidence of good cause she now wants considered "could not" have been produced at the hearing within the meaning of OAR 436-83-480(2)(b).

As this Board recognized in Curtis A. Lowden, WCB Case No. 79-10215 (March 30, 1981), the Supreme Court, in Brown v. EBI Companies, 289 Or. 455 (1980), held that interpretation of "good cause" in ORS 656.319(1)(b) was for this Board, not the courts. The Brown case itself involved the same question presented here: Whether an attorney's employee's negligence is good cause for an untimely request for hearing.

The Board implicitly answered that question in the affirmative when, on remand from the Supreme Court, it remanded the Brown case to the Hearings Division for a hearing on the merits. The Board now makes explicit what was previously implicit: In our judgment, an attorney's employee's negligence is good cause for an untimely request for hearing.

The facts of this case, as set out in an affidavit in support of the motion to remand, come within that rule. Claimant was first represented by Lawrence Wobbrock. Claimant sent him a packet of materials relevant to her Oregon workers' compensation claims from Texas where she resided. Mr. Wobbrock found the materials he was sent far from self-explanatory. As he put it in his affidavit, "Three dates of injury were noted, and two separate claim numbers."

Mr. Wobbrock made efforts to clarify the situation with SAIF by phone, without success. He then asked his secretary to further pursue the effort to learn what claims were being made and the date of injury associated with each claim. He instructed the secretary to file requests for hearing, but she did not do so by the 60th day because of her continuing efforts to clarify the situation.

Claimant was represented at the hearing by a different attorney.

The remaining question is whether the attorney who represented claimant at the hearing "could not" have discovered and produced this information at the hearing within the meaning of OAR 436-83-480(2)(b). Mr. Wobbrock's affidavit states that after referring claimant's cases to another attorney, Mr. Wobbrock did not recall the request he had made of his secretary to clarify the situation or her frustrated attempts to do so. This establishes to the Board's satisfaction that the attorney who represented claimant at the hearing could not have discovered and produced this new information relevant to the good cause issue.

On remand, claimant will be required to prove to the Referee's satisfaction the allegations set out in Mr. Wobbrock's affidavit. SAIF will be entitled to contest the completeness and accuracy of those allegations. If the Referee finds the facts to be as now assumed by the Board--that the reason for the untimely filing was the act of Mr. Wobbrock's secretary in failing to execute his instructions, and the failure to raise this at the time of the hearing was due to Mr. Wobbrock's lapse of memory--then the Referee is directed to proceed to hear the merits of the case.

IT IS SO ORDERED.

WCB Case No. 79-06561 APRIL 17, 1981

HARRY E. MUNDELL, CLAIMANT
Green & Griswold, Claimant's Attorneys
G. Howard Cliff, Defense Attorneys
Order on Review

Reviewed by Board members McCallister and Lewis.

The employer seeks review of the order of the Referee as amended and republished which remanded claimant's claim for aggravation to it and assessed a penalty and attorney fee. The employer contends that the aggravation claim is not compensable because of intervening injuries and that the award of penalties and attorney fees were excessive. We modify the Referee's order.

The Board finds that the evidence indicates claimant's condition related to his industrial injury has worsened and the Referee properly remanded the claim to the employer's carrier for acceptance and payment of benefits. The Board disagrees with the commencement date of compensation for temporary total disability. The February 4, 1977 report is from an Admissions secretary and does not authorize temporary total disability. The aggravation should have commenced upon claimant's hospitalization of October 9, 1978. The Referee's order is amended accordingly.

ORDER

The order of the Referee dated August 14, 1980 as amended on September 12, 1980 is amended.

Claimant's claim is remanded to the carrier for acceptance and payment of compensation commencing October 9, 1978 and until closure is authorized pursuant to ORS 656.268.

The penalty assessed by the Referee is modified with penalty to commence on October 9, 1978. The attorney fee granted by the Referee is modified to \$1,000.

Claimant's attorney is granted the sum of \$300 for his services at this Board review, payable by the carrier.

WCB Case No. 79-05443 APRIL 17, 1981

MARVIN PETERSON, CLAIMANT
Malagon, Velure & Yates, Claimant's Attorney
Linsay, Hart, et al, Defense Attorneys
Abatement Order

The Board issued its Order on Review for the above-entitled matter on March 18, 1981. By cover letters dated March 23, 1981 and March 27, 1981, claimant's attorney moved for reconsideration of that Order on Review.

As the Board has not had sufficient time to give due consideration to this request, we are hereby abating our Order on Review of March 18, 1981 so appeal time will not run.

IT IS SO ORDERED.

WCB Case No. 79-05270 APRIL 17, 1981

ARNI RAUTIO, CLAIMANT
Tom Hanlon, Claimant's Attorney
MacDonald, McCallister, et al, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which awarded the claimant permanent total disability for injury to his heart.

On appeal, SAIF argues the award granted by the Referee is excessive or, in the alternative, that claimant has failed to prove any injury related permanent disability.

The claimant argues that the Referee's award should be affirmed and cross appeals, arguing that SAIF, by contending at hearing the claimant has no injury related disability, was, in fact, denying compensability and therefore claimant is entitled to an attorney fee for prevailing on the issue of compensability.

We affirm the Referee's order. We find there was no denial of compensability and claimant's request for an attorney fee on that issue is denied. The claimant is entitled to an attorney fee at Board level for prevailing on the SAIF appeal.

Claimant's attorney is hereby awarded \$500 payable by SAIF in addition to and not out of claimant's award.

IT IS SO ORDERED.

WCB Case No. 78-08643 APRIL 17, 1981

CLIFFORD RICE, CLAIMANT
Cater & Johnson, Claimant's Attorneys
Schwabe, Williamson, et al, Defense Attorneys
Order on Review

Reviewed by Board members McCallister and Lewis.

The employer, Hoffman Construction Co., requests Board review of the Referee's Opinion and Order which affirmed the denial of Commercial Union Assurance Co. as insurer for H.B.E. Corporation and which remanded the claim to SAIF for processing.

The sole issue is which carrier is responsible for the claimant's compensable right knee condition from and after May 16, 1978.

Claimant's right knee was initially injured on January 27, 1977 when he was working for H.B.E. Corporation when he twisted his leg and slipped into a ditch. The claim for that injury was closed by Determination Order dated February 14, 1980 which awarded temporary total disability and 10% loss of the leg. Thereafter, while employed by Hoffman Construction Company on May 16, 1978, claimant was again involved in an incident where he tripped and fell, again injuring his right knee.

Appellant contends that the second injury was caused by the pre-existing weakness of the knee and that the second injury should be treated as an aggravation of the 1977 injury to his knee

superimposed over the pre-existing damage and that, under Oregon law, responsibility for subsequent compensation rests with claimant's new employer and carrier.

The Board accepts as fact that evidence which indicates that on May 16, 1978 claimant tripped and fell when his foot became caught in the rebar through which he was walking; in the fall, he twisted his knee and once again injured it. The Board, therefore, rejects the position that the second injury did not contribute even slightly to the causation of the disabling condition. To the contrary, that second injury independently and significantly contributed to the need for a second surgery and the claimant's subsequent disability. The Board concludes that the Referee correctly applied applicable law--the last injurious exposure rule--in determining that claimant sustained a new injury.

Upon de novo review, the Board affirms and adopts the Opinion and Order of the Referee.

ORDER

The order of the Referee dated July 16, 1980 is affirmed.

WCB Case No. 79-06956 APRIL 17, 1981

BETTY J. WAGNER, CLAIMANT
Noreen K. Saltveit, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's order which set aside the second Determination Order and remanded claimant's psychological condition to it for acceptance and the payment of compensation and granted claimant's attorney a fee of \$1,000 based on the de facto denial. The Board modifies the Referee's order.

Claimant's industrial injury involved the left leg. Claimant underwent a psychological examination by Dr. Parvaresh in May 1977, and at that time he diagnosed depressive reaction and chronic anxiety tension and indicated that claimant was not interested in psychological counseling. When seen at the Pain Clinic in February 1979 the diagnoses of compensation neurosis and secondary gain were made. The physicians at the clinic felt claimant had no motivation to change her situation and her complaints grossly outweighed physical findings. Psychologically her condition was rated as mild.

On July 20, 1979 a second Determination Order granted her 30° for 20% loss of the left leg and 32° for 10% psychological unscheduled disability.

Claimant came under the care of a psychiatrist, Dr. Roberts, after a family fight in which claimant, as she testified, ran away from home, spent the night in the woods and, when located, was taken to the hospital. In the hospital she was examined by Dr. Roberts.

In a report of September 20, 1979 Dr. Roberts indicated that a lot of claimant's problems stem from her inability to work; this forced a dependency upon her husband from whom she had been separated for ten years. Dr. Roberts felt the psychological impairment was impossible to rate because she had long-standing marital dependency-independency relationship problems. He felt claimant needed psychological care. By report of January 22, 1980 Dr. Roberts opined that the injury was a partial contributing factor to claimant's psychological condition.

The Board finds that claimant's psychological condition is compensable even though most of claimant's problems stem from a long-standing situation. However, Dr. Roberts' finding that claimant's injury-related psychological problems stemmed from her inability to work, thus forcing her to depend on her estranged husband, is not totally supported by the medical evidence. Claimant was released to return to work, and her inability to work arises from her own lack of motivation, with some element of compensation neurosis. The Board also concurs with the Pain Clinic personnel who felt that claimant would, as long as her claim remained unsettled, use her situation as a means of financial security.

The record, taken as a whole, indicates that the psychological counseling should be provided to claimant as recommended by Dr. Roberts. However, this counseling can be provided under the provision of ORS 656.245. The Pain Clinic report seems to indicate claimant's condition was psychologically stable and they rated her impairment as mild. Claimant is, however, entitled to on-going psychological care to be provided by the SAIF Corporation as claimant's psychological condition was stable when discharged from the Pain Clinic. We find that the issuance of the second Determination Order and the rating of claimant's extent of disability for that psychological condition were proper at that time.

On the SAIF's contention that the Referee's award of attorney fee was excessive and contrary to law, the Board finds that the fee granted was high but not contrary to law. Claimant's attorney argues that the fee was fair as two hearings were held and the case was complicated. The Board notes that the second hearing was required because two medical reports were not in evidence or available at the first hearing which required a second session. The issue of the compensability of claimant's psychological condition was not particularly complex as the only medical evidence

dealing with causation was two reports from Dr. Roberts. Therefore, the board concludes that the Referee's award of \$1,600 to claimant's attorney for prevailing on the de facto denial is excessive and will be modified accordingly.

ORDER

The order of the Referee dated September 30, 1980 is modified.

The second Determination Order is reinstated in its entirety.

Claimant is entitled to psychological care and counseling under the provisions of ORS 656.245.

The attorney fee granted by the Referee is reduced to \$800. Claimant's attorney is granted an attorney fee at the Board level in the sum of \$300, payable by the SAIF Corporation.

WCB Case No. 79-08496 APRIL 20, 1981

TOM MOORE, CLAIMANT
Peter Hansen, Claimant's Attorney
Mary Danford, Defense Attorney
Order on Reconsideration

The employer, by and through its attorney, requested the Board reconsider its Order on Review of February 17, 1980. Based upon this motion for reconsideration, the Board issued an Order of Abatement on March 13, 1981.

The Board has now fully reconsidered its Order on Review and finds that the employer's motion is generally unpersuasive. On the single issue of the Board's failure to offset the temporary total disability compensation ordered by sums earned during vocational rehabilitation, our order will be modified accordingly.

ORDER

The Workers' Compensation Department is hereby ordered to reimburse claimant for his expenditures of tuition, mileage, etc., while he was attending machinist school. The carrier is to pay claimant compensation for temporary total disability where appropriate and temporary partial disability compensation pursuant to OAR 436-61-052(2). The carrier may apply for reimburseable temporary total disability compensation from the Department.

The remainder of our Order on Review and the Amended Order of March 10, 1981 are hereby reaffirmed and republished.

MRS. WILLIAM SHIPMAN, CLAIMANT
Deane Sterndale Bennett, Claimant's Attorney
Rankin, McMurray, et al, Defense Attorney
Order on Review

Reviewed by Board members Barnes and McCallister.

The employer seeks Board review of the Referee's order which granted the decedent's widow an award of 60% unscheduled disability. The employer contends that the award granted is excessive, and we agree.

Dr. Grewe rated claimant's physical impairment for his low back injury at 20% which was the award granted by the first Determination Order. He last examined claimant on December 10, 1979 at which time claimant's chief complaints were upper trunk and arm problems. Dr. Grewe diagnosed possible carpal tunnel syndrome, possible thoracic outlet syndrome associated with increased muscle tension and associated cervical strain with occipital neuralgia headaches. None of these diagnosed conditions were causally related by the doctor to claimant's industrial back injury. The doctor remarked that the "low back residuals are surprisingly few considering the amount of paralysis he had initially."

At the time of his death, claimant was 40 years of age with an 8th grade education. He had only a 5th grade reading ability but did have good mechanical aptitudes. Claimant's past work experience was metal sorter for a junk yard, furnace operator, general laborer, offbearer and hyster driver. The information provided by the Callahan Center indicates claimant was physically capable of light to medium work but no bending, stooping or twisting. He could lift 50 pounds occasionally and not over 25 pounds repetitively.

The criteria for determining unscheduled disability is the permanent loss of wage earning capacity. ORS 656.214(5) states, in part:

"Earning capacity is the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience."

Based on this criteria and the medical evidence before us, the Board finds that claimant, at the time of his death, was entitled to an award of 40% unscheduled disability which would adequately compensate him for his loss of wage earning capacity.

ORDER

The order of the Referee dated June 20, 1980 is modified.

Claimant is hereby granted an award of 128° for 40% unscheduled disability. This award is in lieu of the award granted by the Referee.

WCB Case No. 78-03668 APRIL 21, 1981
WCB Case No. 78-05218

GUS BARLAS, CLAIMANT
Evohl Malagon, Claimant's Attorney
Schwabe, Williamson, et al, Defense Attorney
Order on Reconsideration

By letter dated April 17, 1981, claimant's attorney entered a Motion for Reconsideration of the Board's Order on Review dated March 30, 1981. It is claimant's contention that his psychological condition is compensable and renders him permanently and totally disabled.

The Board, after giving due consideration to claimant's motion, affirms its prior decision. The Board's Order on Review dated March 30, 1981 is reaffirmed and ratified.

IT IS SO ORDERED.

WCB Case No. 79-08349 APRIL 21, 1981

DOUGLAS DOOLEY, CLAIMANT
Malagon, Velure & Yates, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which remanded claimant's claim for aggravation for processing and payment of benefits as a compensable claim and which awarded attorney's fees to claimant's attorney for prevailing on the claim.

Appellant contends that claimant's headaches were not causally related to his compensable 1977 injury and, as such, do not qualify for the provision of medical services under ORS 656.245. Appellant further contends that the claimant's Aggravation Application, dated September 26, 1979 did not constitute an aggravation claim which the SAIF should have processed. Appellant asks that the Referee's award of attorney's fees, awarded for prevailing on an aggravation claim which was denied de facto, be rescinded.

The issues are compensability of an aggravation claim and related medical services claimed under ORS 656.245 and attorney fees.

Claimant was compensably injured on September 3, 1977 when he struck his head on a metal bar under a conveyor belt while working for Agripac. In that accident, he was rendered unconscious and sustained head trauma and scalp laceration. The claim was closed by Determination Order dated November 3, 1977 which granted time loss benefits for six days in September of 1977.

A claim for aggravation was filed on September 26, 1979 to which was attached a medical report dated August 31, 1979. At the time the claim was filed with SAIF, no time loss had been authorized or claimed. The claim was neither accepted, rejected, nor acknowledged by the insurer.

I. Compensability of the Aggravation Claim and Entitlement to Payment of Medical expenses under ORS 656.245.

Appellant argues that the medical evidence did not adequately support a finding of a causal relationship between the claimant's headaches and associated symptoms and his 1977 injury. There is no evidence of an intervening head injury. Claimant testified that he began seeing his treating doctor in November of 1977 regarding the headaches. Dr. Paul Jones, the neurologist who evaluated claimant on October 8, 1979 concluded that claimant's headaches were "post-traumatic." In considering the evidence as a whole--including lay testimony, Dr. Abel's report and Dr. Jones' report--the Referee concluded that the claimant had established a worsening of his original injuries.

Upon de novo review, the Board accepts and adopts the findings and conclusions of the Referee concerning compensability of the claimant's condition and related medical expenses.

II. Sufficiency of the September 26, 1979 Claim for Aggravation.

Appellant argues that the Court has held in Silsby v. SAIF, 39 Or. App. 555 (1979), that the triggering event for failure to process a claim is medical verification which states there is a worsened condition arising out of the original injury or disease. What the Court actually said in Silsby is that:

"...the apparent intent of ORS 656.273(6), combined with the penalty provisions, is not to establish the substantive rights of the claimant to compensability as of a certain date, but to insure prompt payments of interim support to a worker who has filed a claim for aggravation, pending final determination of compensability of the claim.

* * *

"...Unless such verification flies in the face of other evidence sufficient to make the verification inherently incredible, the carrier's duty to pay commences, and failure to pay (or deny the claim) will expose the carrier to the possibility of penalties after 14 days."

Appellant contends that the doctor's report in this case dated August 31, 1979 was "inherently incredible" simply because it included mention that the claimant felt his complaints were related to his on-the-job injury of September 1977. The Board disagrees. The report was signed by Dr. David J. Abel, the physician and surgeon who first saw claimant for his industrial injury three days after his 1977 accident. Clearly, Dr. Abel saw claimant's complaints as related to the 1977 injury, as evidenced by his request that the claim be reopened. Absent other evidence which would show that Dr. Abel's verification flies in the face of reality, it should be accepted as a valid medical verification of the attached claim for aggravation. No other evidence exists to controvert Dr. Abel's verification.

While it might be argued that Dr. Abel's August 31, 1979 report--standing alone--merely sought authorization for the provision of medical services under ORS 656.245, his report did satisfy the requirements of ORS 656.273(3) for the filing of an aggravation claim, which states:

"A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation." (emphasis added)

Thus, Dr. Abel's report by itself is sufficient to satisfy the statutory requirements for the filing of a claim for aggravation. The fact that time loss was not authorized in no way detracts from the sufficiency of the report as a valid aggravation claim.

It should be noted that since 1975 there has been no statutory requirement that a physician's report show a "worsening" of a claimant's condition in the claim itself. The applicable statute was amended in 1975 to require a lesser standard. The pre-1975 statute required that "the claim for aggravation must be supported by a written opinion from a physician that there are reasonable grounds for the claim..." This is no longer required.

As indicated in Silsby, supra, a distinction must be made between the mere filing of a claim for aggravation, and the proving of a claim for aggravation. The former requires only that the physician's report indicate a need for further medical services or additional compensation; the latter requires proof of a worsened condition arising out of the original injury where any increased award is sought.

The Board concludes that the September 26, 1979 claim for aggravation supported by Dr. Abel's medical verification was, in fact, a valid claim; that the insurer unreasonably failed to accept or deny it; and had any time loss benefits been payable, it would have been subject to penalties authorized by ORS 656.262(8).

II. Entitlement to Attorney Fees for Prevailing on a Denied Aggravation Claim.

The Board concludes, from a review of the record, that the insurer unreasonably failed to accept or deny the claim for aggravation within the time allowed by law or at all. The Board further concludes that such failure constituted a de factor denial of the claim and that an award of attorney fees, pursuant to OAR 83-47-020 is appropriate.

ORDER

The order of the Referee dated August 14, 1980 is affirmed.

Claimant's attorney is hereby granted the sum of \$300 for his services at this Board review, payable by SAIF Corporation.

WCB Case No. 79-06123 APRIL 21, 1981

MAURICE L. EDWARDSON, CLAIMANT
Bloom, Ruben, et al, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of the referee's order which remanded claimant's heart condition claim to it for acceptance and payment of compensation due.

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the Referee.

ORDER

The order of the Referee dated May 2, 1980 is affirmed.

Claimant's attorney is hereby granted the sum of \$350 for his services at this Board review, payable by SAIF Corporation.

I respectfully dissent from the majority of the Board as follows:

I would reverse the Referee and reinstate the denial issued by SAIF.

I find the opinion of Dr. Kloster the most persuasive of all the medical evidence in the record.


Robert L. McCallister
Board Member

WCB Case No. 80-04669 APRIL 21, 1981

GERALDINE EVANS, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attorneys
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which remanded claimant's aggravation claim to it for acceptance and the payment of benefits as required by law, commencing around June 15, 1980. We reverse.

The medical evidence does not establish a valid claim for aggravation. There was no authorized time loss because of an inability to work. Claimant merely went to the doctor and a cast was put on. There is no proof that claimant could not return and perform her job as a proofreader with her arm in a cast. Claimant did not return to work because she was fired. The medical reports do not indicate a need for medical services beyond the casting of her arm nor any request for "additional compensation" pursuant to 656.273(3). Therefore, the denial issued by the SAIF Corporation is affirmed.

ORDER

The order of the Referee dated October 23, 1980 is reversed.

The denial of September 18, 1980 is affirmed.

WCB Case No. 79-09713 APRIL 21, 1981

RANDY HOWERTON, CLAIMANT
Michael Strooband, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which granted 50% loss of claimant's left forearm as a scheduled injury in lieu of the 1978 award of 10% loss of the forearm and which awarded a penalty of 25% and attorney's fees for SAIF's unreasonable delay in the payment of time loss for the period from November 13, 1979 to December 19, 1979.

SAIF finds no fault with the Referee's findings but contends that his conclusion as to the extent of the claimant's disability on his aggravation claim is excessive and further contends that the penalty and fees assessed for its delay are also excessive. The Board disagrees.

The record clearly shows that a substantial worsening of claimant's left wrist condition had occurred between the time of the July 1978 and August 1978 medical reports which were the basis of the first Opinion and Order, dated January 29, 1979, which affirmed the Determination Order's award of 10% loss of the forearm, and the final closing evaluation dated April 28, 1980, which was the basis of the Referee's award of 50% loss of the forearm.

Appellant contends that no vindictive intent surrounded SAIF's delay in payment of more than a month's time loss benefits. An unjustified delay of nearly sixty days in the payment of benefits designed to assure an income for the provision of the necessities of life to a worker who has been compensably injured is, on its face, unreasonable as contemplated by Oregon statutes. Such delays are to be discouraged; thus the imposition of penalties and fees.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee.

ORDER

The order of the Referee dated May 22, 1980 is affirmed.

Attorney's fees in the sum of \$500 are awarded to claimant's attorney to be paid by SAIF in addition to and not out of any compensation payable to claimant.

WCB Case No. 80-03070 APRIL 21, 1981

ELLIS HUNSAKER, CLAIMANT
Benton Flaxel, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The employer seeks Board review of the Referee's order which remanded claimant's claim for a left knee condition to it for acceptance and payment of compensation to which claimant is entitled.

The issue before us is compensability.

The employer contends that claimant's condition is the result of an off-the-job incident. There is no dispute that claimant's condition became disabling as a result of rising from his chair and experiencing his knee give way on or about March 9, 1980. What claimant must prove is a causal connection between his employment and the disabling condition. He must show that the incident of March 9, was a natural consequence of his condition of employment.

Claimant's credible testimony and the medical documentation support the finding that claimant sustained "mini traumas" from 1966 to May 1978 while working on the planer chain. Claimant has also shown that from 1978 to March 1980 he frequently "aggravated" his knee condition by squatting, walking and climbing on the job. There was apparently no "injury" per se on March 9 to cause his disabling condition. Claimant's knee merely gave way. We find this evidence persuasive that the incident at home was causally connected to his employment. The mini traumas suffered at work resulted in claimant's weakened knee condition; his "injury" at home was a natural consequence of his employment. The Referee's order should be affirmed.

ORDER

The order of the Referee dated September 22, 1980 is affirmed.

Claimant's attorney is hereby granted the sum of \$150 for his services at this Board review, payable by the SAIF Corporation.

WCB Case No. 80-00797 APRIL 21, 1981

KATHY LARSEN, CLAIMANT
Welch, Bruun & Green, Claimant's Attorney
Lang, Klein, et al, Defense Attorneys
Order on Reconsideration

By letter dated April 13, 1981, the claimant's attorney requested the Board to reconsider its Order on Review of March 20, 1981.

After giving due consideration to this request, the Board adheres to its prior Order on Review. The Order on Review dated March 20, 1981 is hereby reaffirmed and ratified.

IT IS SO ORDERED.

WCB Case No. 79-09367 APRIL 21, 1981

JAMES MASON, CLAIMANT
Welch, Bruun & Green, Claimant's Attorneys
Lang, Klein, et al, Defense Attorneys
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which reversed the employer's denial of any further responsibility for compensation for permanent partial disability, but sustained the denial of compensation claimed and medical bills from September 10, 1979 to October 15, 1979 granted claimant compensation for 16° for 5% unscheduled disability and affirmed the Determination Order relating to the industrial injury of October 15, 1979. Claimant contends he is entitled to compensation for temporary total disability, a greater award of permanent partial disability and penalties and attorney fees. The employer contends claimant is not entitled to any award of permanent partial disability. We modify the Referee's order.

The evidence indicates that claimant is not entitled to an award of permanent partial disability. Dr. Kelley, a chiropractor, could find nothing objectively wrong with claimant and Dr. Poulson, an orthopedist, released claimant to full time regular employment. Claimant has not proven that he has lost any wage earning capacity. On that issue the Referee is reversed and the Determination Order is affirmed.

ORDER

The order of the Referee dated September 17, 1980 is modified.

The Determination Order of March 25, 1980 is affirmed.

The remainder of the Referee's order is affirmed.

WCB Case No. 79-10808 APRIL 21, 1981

FREEMAN P. WALKER, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attorneys
Paul L. Roess, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which granted claimant an award of 96% for 30% unscheduled disability. The SAIF contends claimant is not entitled to any award of unscheduled disability. The Board agrees.

Claimant was employed by Cape Arago Lumber Company as a watchman and cleanupman. While making his rounds on October 14, 1978, he stepped in a hole and twisted his low back. Claimant testified he continued working until he was fired by the employer on January 7, 1979 for stealing gas.

For this injury claimant saw Dr. Smith who diagnosed lumbosacral sprain. The last report is dated December 13, 1978.

Claimant, after losing this employment, got a job running a tavern on an oral lease basis and worked there for four months. During the summer of 1979, claimant worked one month as a commercial fisherman. He testified his back finally forced him to quit. There is no medical report indicating any ongoing medical problems from the last report of December 13, 1978 until Dr. Holbert's examination and report of September 17, 1979.

The Determination Order from the October 1978 injury was not issued until November 14, 1979 and granted no compensation for permanent partial disability.

On January 24, 1980 Dr. Holbert opined that claimant's condition would be aggravated by repetitive bending or lifting over 40 pounds and claimant had some permanent impairment of function.

The Board finds no proof that, if claimant does suffer from some permanent loss of function as stated by Dr. Holbert, it is related to claimant's October 1978 industrial injury. Claimant continued working as a night watchman and cleanupman until he was fired. Claimant's next two jobs involved heavy work. He testified he was finally forced to quit working because of his back condition after the short period of employment as a commercial fisherman. Dr. Holbert does not correlate claimant's "permanent impairment of function" to claimant's industrially-related condition in 1978. Further, claimant testified that if he would not have been fired he would have continued to perform his regular occupation with Cape Arago Lumber Co.

Claimant has the burden of proof to support his contention that he has sustained any loss of wage earning capacity related to his injury of October 1978. Claimant has failed in that burden.

ORDER

The order of the Referee dated October 27, 1980 is reversed.

The Determination Order of November 14, 1979 is affirmed.

WCB Case No. 80-05127 APRIL 22, 1981

STEPHEN CHOCHREK, CLAIMANT
Bullivant, Wright, et al, Claimant's Attorneys
Order of Dismissal

Claimant requested Board review of the Referee's order on January 9, 1981. The Board acknowledged claimant's request and set up briefing dates. Claimant's brief was due on March 16, 1981 with final brief due April 15, 1981. No brief was received by the Board on March 16.

By letter dated March 30, 1981 the defendant's attorney requested that claimant's appeal be dismissed if no brief was received by him by final briefing date of April 15, 1981. A copy of this letter to the Board was sent to claimant by certified mail. To date, there has been no response from claimant; therefore, the defendant's motion to dismiss claimant's appeal is granted.

IT IS SO ORDERED.

WCB Case No. 80-09920 APRIL 22, 1981

JAMES D. CLARK, CLAIMANT
Steven C. Yates, Claimant's Attorney
SAIF Corporation
Order of Dismissal

A request for review was received by the Board on March 3, 1981 from the SAIF Corporation, seeking review of the Referee's order dated February 25, 1981 in the above entitled matter.

The Referee's order of that date is a non-appealable order. Therefore, respondent's motion to dismiss this request for review is hereby granted, and the order of the Referee is final by operation of law.

IT IS SO ORDERED.

WCB Case No. 79-01139 APRIL 22, 1981

DAVID T. MEDDLETON, CLAIMANT
Carney, Probst & Cornelius, Claimant's Attorney
Schwabe, Williamson, et al, Defense Attorney
Order on Review

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the Determination Order of January 12, 1979, the fourth in a series of orders issued by Evaluations Division, which, on redetermination, affirmed the prior award of 10% loss of use of the right arm.

That final Determination Order was appealed by claimant who asserts that he is permanently and totally disabled as a result of psychiatric problems which were worsened by the November 8, 1974 injury to his right arm. Respondent argues that claimant's psychiatric problems, diagnosed as schizoid personality, bordering on psychosis, anxiety neurosis and depressive neurosis, pre-existed the 1974 injury.

The issue is extent of disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee.

ORDER

The order of the Referee, dated April 12, 1980, is affirmed.

WCB Case No. 80-03744 APRIL 24, 1981

DANIEL W. ARNETT, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attorneys
Paul L. Roess, Defense Attorney
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which granted him an increased award of compensation for a total equal to 240° for 75% unscheduled disability for injury to his low back. Claimant contends he is permanently and totally disabled.

The only issue before the Board is extent of permanent disability.

Claimant sustained a compensable injury to his low back on June 20, 1974 while working as a logger. Since that date, he has sustained at least six related injuries and other minor episodes. He has undergone surgery three times. After each injury and surgery, claimant has returned to work, generally in the woods, and generally doing work which is too heavy for him. Claimant has made admirable efforts to continue working at some gainful and regular occupation. He has worked with the unemployment office and with his union on a regular basis. He has consistently made himself available for work by signing any postings that come up for work in the woods. Weyerhaeuser, claimant's employer, is a

large company with jobs available in three areas: The woods, the sawmill and the plywood plant. Jobs are made available to those with seniority in any of the three areas. Claimant has seniority in the woods and has none in the other areas. His chances of getting light work in the mill or plywood plant are extremely slim.

Dr. Bert, an orthopedist, was claimant's treating physician throughout his disability since the original injury. On March 9, 1979 he stated: "I feel this man has made five attempts at returning to work in the woods, he really is, on the basis of pain, now completely disabled because of pain as the result of multiple surgeries and scar tissue and perhaps an element of arachnoiditis in his back. I think that he is going to be permanently completely disabled." In May 1979 he found claimant to have a moderately severe impairment of 60-70% as a result of his injury. In July 1979, Dr. Bert felt claimant was completely impaired from "...all usual and customary work..." When claimant's attorney asked Dr. Bert if claimant's condition had worsened to the point that he would be unable to work, Dr. Bert answered "yes."

We find claimant severely disabled, although probably not totally disabled as a result of his physical condition alone. Claimant has a fourth grade education but apparently only because they passed him on because he was too old for the grade. He cannot read sufficiently to handle any type of office work. He has a year of vocational school and experience in farming and putting up television antennas. The majority of his work experience has been in logging. He is currently 48 years old. Claimant's work history over the last six years indicates a worker who is motivated to do anything he can to work regularly. The evidence indicates that claimant cannot be regularly and gainfully employed in the general labor market. We find that claimant is permanently and totally disabled.

ORDER

The order of the Referee dated September 29, 1980 is reversed.

Claimant is hereby granted compensation for permanent total disability as of the date of the Referee's order, September 29, 1980. This is in lieu of any previous awards he has been granted for his June 1974 industrial injury. The employer can offset any payments made on the permanent partial disability award against this award for permanent total disability.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation payable out of said compensation as paid, not to exceed \$3,000.

GERALD FREEMAN, CLAIMANT

Galton, Popick & Scott, Claimant's Attorneys

Lang, Klein, Defense Attorneys

Order on Review

The Board referred this own motion matter to the Hearings Division with instructions for the Referee to determine and make a recommendation to the Board on whether claimant's November 1969 injury is responsible for his present condition. This case was heard on a consolidated basis with two claims for new injuries, both allegedly occurring in 1978.

After the hearing the Referee issued an appealable order on the 1978 cases and made a recommendation to the Board on the own motion case. Based on the medical evidence presented, the Referee found that claimant's present condition and symptomatology which arose in 1978 were aggravations of the pre-existing condition from the 1969 industrial injury. She recommended that claimant's claim for the 1969 injury be reopened pursuant to ORS 656.278, Board's own motion jurisdiction.

The Board, after reviewing the transcript of proceedings and the evidence presented, concurs with the Referee's recommendation.

ORDER

Claimant's claim is hereby remanded to the SAIF Corporation for acceptance and payment of compensation for temporary total disability from June 16, 1978 to October 2, 1978. The carrier is to submit the claim to Evaluation Division of Workers' Compensation Department for an advisory rating for closure pursuant to ORS 656.278.

GERALD C. FREEMAN, CLAIMANT
Galton, Popick, & Scott, Claimant's Attorneys
Lang, Klein, Defense Attorneys
Own Motion Order

Reviewed by the Board en banc.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order and the claimant seeks cross-review of that order. This matter came before the Referee on the propriety of two denials, one by Transportation Indemnity and the other by EBI. Hearing on these denials was consolidated with an own motion proceeding which was referred to the Referee on the issue of whether claimant's present condition was related to his industrial injury of November 26, 1969 when SAIF was on the risk.

The Referee found that claimant's present condition is the responsibility of SAIF as an aggravation of his 1969 injury and affirmed the denials issued by Transportation Indemnity and EBI.

SAIF's request for Board review relates only to the non-appealable portions of the Referee's order, specifically the Referee's recommendation in the referred own motion proceedings. The Board has considered SAIF's arguments in the own motion proceeding, decided by separate order this date. However, those arguments are not properly before us on the Board review of the appealable portion of the Referee's order. SAIF's request for Board review is, therefore, dismissed.

Claimant's cross-request for Board review does relate to an appealable portion of the Referee's order, i.e., the Referee's affirmance of EBI's denial. Claimant contends that his current condition should be the responsibility of EBI because he sustained a new injury in 1978, not an aggravation of his 1969 injury. The Board disagrees for the reasons stated by the Referee.

ORDER

The appealable portions of the order of the Referee dated July 14, 1980 are affirmed and adopted by the Board. SAIF's request for Board review is dismissed.

WCB Case No. 79-02158 APRIL 24, 1981

THOMAS R. KNOWLES, CLAIMANT
Martin J. McKeown, Claimant's Attorney
R. Ray Heysehl, Defense Attorney
Corrected and Supplemental Order of Dismissal

The Board's April 6, 1981 Order of Dismissal in the above case was erroneously captioned WCB Case No. 80-11229. It should have been captioned WCB Case No. 79-02158 as shown above.

Claimant suggests that the Board has own motion authority to accept a request for review that is untimely filed under statutes and rules. The Board does not so interpret ORS 656.278.

IT IS SO ORDERED.

WCB Case No. 79-08172 APRIL 24, 1981
WCB Case No. 79-06131
WCB Case No. 79-06120
WCB Case No. 79-08940

EVELYN M. LABELLA, CLAIMANT
Leslie Bush, Claimant's Attorney
Galton, Popick & Scott, Defense Attorneys
Order on Review

Reviewed by the Board en banc.

One of the employers for whom claimant worked as a meat wrapper, Cruse for Foods, seeks Board review of the Referee's order. Another of claimant's employers, Safeway, seeks cross-review. Claimant also seeks cross-review. The principal issues are: The compensability of claimant's occupational disease claim; claimant's entitlement to interim compensation; and whether good cause was established for not requesting a hearing within 60 days of Safeway's denial.

Claimant worked for four employers as a meat wrapper as follows: Thriftway, November 1962 to January 1973; Tradewell, March 1976 to August 1976; Safeway, July 1977 to October 1977; and Cruse for Foods occasionally during the summer of 1977 (overlapping with work at Safeway) and for four or five half-days in the summer of 1978. Since leaving full-time work with Thriftway in January 1973, claimant has thus worked a total of less than one year. Claimant did not leave any of these four employers because of an injury or disease; all separations were either voluntary on claimant's part or because she was laid off.

In May and June 1979--almost a year after the four or five half-days she last worked the prior summer--claimant made claims on all four employers, contending that her work over the years as a meat wrapper had caused disability in her neck, shoulder, back, arms and hands. All four employers denied her claims. On claimant's request for hearing, the Referee found that: (1) Claimant had a compensable occupational disease; (2) Cruse for Foods was responsible under the last injurious exposure rule; (3) claimant had good cause for not requesting a hearing within 60 days of Safeway's denial; and (4) that Thriftway and Safeway were liable for penalties and attorney fees for not paying interim compensation. The Board reverses the Referee's order in its entirety, although we do not reach the last-injurious-exposure issue.

(1) Compensability.

Claimant has a history of back discomfort that dates back to the 1940's and 1950's when she was working for Pendleton Woolen Mills as a seamstress. Indeed, there is some suggestion in the record that she changed from that occupation to meat wrapping because of the strain of the seamstress job on her back. There are other suggestions in the record of other sources of back problems: Two car accidents before 1972 and another about 1977 or 1978; references in medical reports dating from 1965 to the onset of back pain while doing exercises; and a reference to a 1974 fall on ice (apparently non-industrial).

Notwithstanding these other possible sources of her problems, claimant testified that it was the bending, stooping and lifting involved in her work as a meat wrapper that, over the years, gradually made her back, neck, shoulder, arm and hand pain more extensive and more severe. There is little support in the medical evidence for this proposition. Dr. Sloop reported in 1977:

"Normal physical and laboratory examination to date...There were no findings today which would contraindicate her return to work."

Dr. Pasquesi reported in 1979:

"...If this patient is unable to perform her work as a meat wrapper, it is probably on the basis of a generalized systemic disease rather than on a specific orthopedic problem."

Dr. Nash reported in 1980 that a myelogram performed on claimant showed only "natural degenerative changes" and concluded: "I do not believe that [work activities] could have in any way worsened her natural physical condition."

Claimant relies on reports from and testimony of Dr. Nag. Claimant insists that Dr. Nag's conclusions are entitled to more weight because he was her "treating physician." In this assertion, claimant overlooks the fact that Dr. Nag only saw her three or four times over a couple year period and also overlooks Dr. Nag's own testimony: "Other physicians were treating her and I saw her as a consultation only."

More significantly, there are two reasons the Board is not persuaded that Dr. Nag's opinion outweighs the balance of the medical evidence which is generally adverse to claimant. First, as stated in the uniform jury instruction, in determining the weight to be given to an expert's opinion, we can consider "the reasons given" for that opinion. Dr. Nag's reasons for his opinion are not impressive. Dr. Nag explained that his diagnosis of cervical strain and his opinion of a nexus with claimant's work was based on his reasoning that claimant had to repeatedly bend and twist her neck in her work. However, apart from paralysis victims or patient's in cervical traction, it is difficult to imagine someone who does not bend and twist his or her neck throughout the day, both on the job and off the job.

So viewed, Dr. Nag's reasoning is inconsistent with the requirement of James v. SAIF, 290 Or. 343 (1981), that, in order to be compensable, an occupational disease claim must arise from circumstances unique to the work environment. Claimant's bending and twisting of her neck was not in any way limited to her work as a meat wrapper; as Dr. Nag himself put it, all "industrial and non-industrial activities all of her life" contributed to claimant's condition. This is insufficient under James.

The second major flaw with Dr. Nag's opinion is that he was asked, the Board finds, the wrong question. From his opening statement to his closing argument, claimant's attorney was relying on the "could have" language from Inkley v. Forest Fiber Products Co., 288 Or. 337, 344 (1980), in which the court stated: "The rule requires the claimant to show only that the employment environment during the relevant period could have been a contributing cause of the disease." (emphasis in original) Specifically, claimant's attorney was taking the position that this language governs the determination of compensability in this case. The Board disagrees. In context, which was a discussion of the last injurious exposure rule, the Supreme Court was addressing the issue of carrier responsibility as between successive carriers--an issue that is only reached after there has been a finding of compensability. Inkley does not in any way deal with the test for compensability of an occupational disease. Unless so interpreted, Inkley is inconsistent with James.

Claimant's attorney's contrary reliance on Inkley is indicated by his question to Dr. Nag in a letter:

"Could Mrs. LaBella's employment environment in her 15 years as a meat cutter [sic: wrapper] have been a contributing cause of the disease?" (emphasis added)

This is, in the Board's understanding of Inkley, the wrong question. The fact that Dr. Nag was responding to this question specifically in a subsequent written report and possibly generally in his testimony leaves us unpersuaded by his opinion.

Claimant has not sustained her burden of proving a compensable occupational disease.

(2) Good Cause for Untimely Filing

Claimant signed her claim on Safeway on May 24, 1979. Scott Wetzel Services, representing Safeway, denied that claim on July 24, 1979. Claimant's request for hearing was dated October 5, 1979. The request for hearing was thus about two weeks late under the 60-day rule stated in ORS 656.319(1)(a).

ORS 656.319(1)(b) permits such a late filing if claimant establishes "good cause" for not filing within 60 days. Claimant's good cause argument here presents what claimant called, in a memorandum filing before the Referee, a question of first impression: Whether, when an employer knows that a claimant is represented by an attorney, is it necessary for the employer to serve a copy of the denial letter on claimant's attorney?

That question arises from the following facts. Claimant retained an attorney before making any of the four claims here in question. This was known to all four employers/carriers because there was contact between claimant's attorney and representatives of the employers/carriers before any of them denied the claims. The denials of Thriftway, Tradewell and Cruse for Food were addressed to claimant with a copy to claimant's attorney. Claimant filed timely requests for hearing on these three denials.

Scott Wetzel Services, on behalf of Safeway, likewise sent its denial to claimant but did not send a copy to claimant's attorney. Claimant testified that she filed that denial away with her other papers and did nothing because she assumed her attorney would have gotten a copy and assumed he would take care of everything. Claimant was not asked whether she noticed that a copy to her attorney was shown on the denial letters of Thriftway, Tradewell and Cruse for Food but was not shown on her denial letter from Scott Wetzel Services.

Whether these facts establish good cause for the late request for hearing is a policy question for the Board. Curtis A. Lowden, WCB Case No. 79-10215 (March 30, 1981). The Board concludes that the above facts do not establish good cause for a tardy request for hearing. The statutes state that written notice of denial "shall be furnished to the claimant," ORS 656.262(5), and "shall be given to the claimant," ORS 656.262(6). It may well be that service of a denial on a claimant's attorney would be functionally the same as service on the claimant under an agency theory. But it does not follow that there is any legal or policy basis for requiring service on a claimant's attorney in addition to service on the claimant.

The essence of "good cause" is some cogent and reasonable explanation for the inaction of not requesting a hearing within the 60 days allowed. Claimant's assumption that her attorney received a copy of Safeway's denial letter was neither cogent nor reasonable. That denial letter shows copies were sent to several persons, but no copy was sent to claimant's attorney. Moreover, even if claimant's attorney had received a copy of Safeway's denial, it was not reasonable for claimant to assume he would request a hearing in the absence of standing instructions or subsequent instructions from her to do so. Claimant offered no evidence of any such instructions.

Claimant has not sustained her burden of proving good cause for her late request for hearing on Safeway's denial.

(3) Interim Compensation, Penalties and Attorney Fees.

Safeway denied within 60 days but did not pay interim compensation. Thriftway did not deny within 60 days but instead took almost four months to do so and did not pay interim compensation. Based on these facts, the Referee assessed penalties and attorney fees against Safeway and Thriftway.

The duty to pay interim compensation "no later than the 14th day after the subject employer has notice of knowledge of the claim" within the meaning of ORS 656.262(4) only applies if the employer has effective notice or knowledge that the worker is, by reason of the alleged industrial injury or disease, unable to work. For most claimants, this presents no problem; they are working when they are injured and are unable to return to work due to the injury.

The claimant in this case is in a different situation. She last worked for Thriftway in 1973; last worked for Tradewell in 1976; last worked for Safeway in 1977; last worked for Cruse for Foods in 1978; left all of those jobs for reasons other than medically verified inability to work; and then made claims in 1979. In this situation, all of claimant's employers were entitled to some documentation that claimant would have been working or seeking work in 1979 but for her alleged occupational disease before they were under any duty to pay interim compensation.

Claimant did not supply any documentation. Claimant quotes selectively from Dr. Nag's June 29, 1979 report to the effect that "she was unable to work since September of 1977." However, the full sentence reads: "She stated that she was working as a meat wrapper and her condition became worse and she was unable to work since September of 1977." A doctor repeating a worker's story does not add anything to the worker's story in the sense of being any medical verification of that story.

Claimant's brief says it all: "At no time did Mrs. LaBella miss work or terminate her employment because of her physical problems." The Board finds that an accurate statement based on the record. It follows that since claimant did not miss any work because of physical problems, none of her employers were under any duty to pay interim compensation. It further follows that penalties and attorney fees cannot be assessed for failing to pay when there was no duty to pay.

Thriftway did deny late, but since it has been found not responsible to claimant in any way, there is no liability upon which to base a percentage penalty.

ORDER

The order of the Referee dated October 2, 1980 is reversed. The denials issued by all employers are affirmed.

RICHARD McPHAIL, CLAIMANT
Doblie, Francesconi & Welch, Claimant's Attorneys
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's denial of claimant's claim for aggravation. We reverse.

Claimant sustained a compensable low back injury while employed as a laborer for Scrap Metal Processors on August 2, 1978 when he tripped and fell against an angle iron while working in a boxcar. Claimant never returned to work for this employer.

His claim was closed by a Determination Order of March 7, 1979 with compensation for temporary total disability only. Claimant did not appeal that Determination Order.

On July 27, 1979 while splitting wood, claimant developed a sudden and severe onset of low back pain. Dr. Stadler requested claim reopening on August 7, 1979 and again on August 28. On October 9, 1979 SAIF denied the requests to reopen because no aggravation had occurred and claimant had an intervening injury. Claimant did not appeal that denial.

In April 1979 claimant worked one month as a grocery store clerk. He testified stocking shelves bothered his back. Between October 1979 and January 1980 claimant was employed doing interior and exterior housepainting. He testified he had to quit that type work because it bothered his back. While unemployed, claimant developed back pain and on February 19, 1980 he sought medical attention.

On March 3, 1980, Dr. Stadler reported that claimant had persistent back pain with muscle spasms and was unable to work. On April 1 Dr. Stadler indicated that when he examined claimant on February 19, 1980 the claimant had been working at a janitorial service. The doctor opined that all claimant's back problems stemmed from the original industrial injury.

On April 10, 1980 SAIF denied the aggravation claim.

On May 15, 1980 Dr. Kiest reported that no intervening episodes were particularly significant and only caused flareups of the underlying problem. The doctor felt claimant must change jobs.

On June 12, 1980 Dr. Stadler reported that claimant's condition had materially worsened since the claim closure in March 1979. The doctor felt claimant had never fully recovered from his industrial injury.

Dr. Stadler was deposed June 26, 1980 and testified, by the date of that deposition, claimant's condition was medically stationary with moderate impairment. Dr. Stadler further testified that (1) the intervening flareup and episodes caused symptoms which would never have occurred but for the original injury, and these episodes were merely "aggravations;" (2) that when claimant was seen in February 1980, he had objective signs of a worsened condition (claimant was stiff, he could not bend, had real muscle spasms and very restricted range of motion).

We conclude the evidence establishes that claimant's August 1978 injury had become aggravated and the compensable injury related condition worse when Dr. Stadler examined him on February 19, 1980.

The Referee found a conflict between claimant's testimony and Dr. Stadler's history. The Board finds no such conflict.

Medical causation has been established. The Court has repeatedly stressed that where medical causation is established and uncontradicted by the evidence, the fact-finder is bound by that evidence. Nethamer v. SAIF, 16 Or. App. 402, 518 P 1051 (1974).

The Board finds that the report of Dr. Stadler dated March 3, 1980 was a valid claim for aggravation. ORS 656.273(3) states:

"A physical report indicating a need for medical services or additional compensation is a claim for aggravation." (emphasis added)

Dr. Stadler's report states:

"Because of persistent back pain and muscle spasm, Richard McPhail is unable to work. For this reason, I'm asking that his industrial accident claim be reopened."

This report was received by SAIF. SAIF denied the claim on April 10, 1980 but failed to commence payment of interim compensation within the 14-day statutory limit. For this unreasonable resistance to the payment of compensation, SAIF will be assessed a penalty and attorney fee.

ORDER

The order of the Referee dated August 21, 1980 is reversed.

Claimant's claim is remanded to the SAIF Corporation to be accepted as an aggravation with compensation for temporary total disability commencing on March 3, 1980 and until closure is authorized pursuant to ORS 656.268.

Claimant is granted an additional amount in the sum of 15% of the compensation granted by this order from March 3, 1980 to the date of the SAIF Corporation's denial as and for a penalty for the SAIF's unreasonable resistance to the payment of compensation.

Claimant's attorney is granted as and for a reasonable attorney fee \$1,400 payable by the SAIF Corporation for prevailing on a denied claim and for the penalty issue.

WCB Case No. 79-03984 APRIL 28, 1981

CECIL BLACK, Jr., CLAIMANT
Alan B. Holmes, Claimant's Attorney
R. Ray Heysell, Defense Attorney
Order of Remand

Reviewed by the Board en banc.

The Boeing Company of Portland and its carrier, Aetna, seek Board review of the Referee's order which found that claimant had established good cause for his failure to file a request for hearing within 60 days of their denial of his claim.

Claimant injured his shoulder in June 1978 while working for Boeing. That claim was accepted and closed by Determination Order dated September 28, 1978. Claimant changed jobs and injured his shoulder again in September 1978 while working for Black Enterprises, which was insured by SAIF.

On October 16, 1978 claimant submitted claims for his September injury to both Aetna and SAIF, the former on the theory that his September injury was an aggravation of his June injury, and the latter on the theory that his September injury was a new injury. Aetna denied the claim on September 19, 1978. SAIF denied the claim on December 22, 1978. Claimant requested a hearing on both denials on March 12, 1979. This was almost five months after Aetna's denial and about two and a half months after SAIF's denial.

Under ORS 656.319(1)(a), a request for hearing must be filed within 60 days after a denial, except ORS 656.319(1)(b) permits a request for hearing to be filed up to 180 days after a denial if "the claimant establishes at the hearing that there was good cause for failure to file the request by the 60th day after notification of denial." The Board recently interpreted this statute in Curtis A. Lowden, WCB Case No. 79-10215 (March 30, 1981). In this case, as in that one, the denial letters "stated in the usual form that claimant had to request a hearing within 60 days if he was dissatisfied." Order on Review at 1. In this case, as in that one, "claimant admitted receiving, reading and understanding" the denial letters. Id. In this case, as in that one: "If this is all there were to the case, it would be hard to imagine good cause for requesting hearing beyond 60 days." Id.

Lowden suggests one possible basis for a good cause finding in this case. In that case we found that the claimant was "caught in a cross-fire between two insurance carriers, each claiming that responsibility for the claim rests with the other" and that the reason for the claimant's tardy hearing request "was due to his pursuing his claim with SAIF as suggested by INA." Order on Review at 3. There is a surface similarity here in that claimant initiated claims for the same injury with two different carriers. There is, however, a subtle but significant distinction. In Lowden, we were satisfied that the claimant was actively pursuing his claim. Here, by contrast, the majority find that claimant did nothing between receiving denials in October and December 1978 and contacting an attorney in early March of 1979. A majority of the Board concludes that claimant's inaction makes the Lowden analysis of good cause inapplicable here.

The Referee's Supplemental Order, if we understand it correctly, found good cause for the delayed requests for hearing based on the fact that claimant had not yet retained an attorney. The Board majority emphatically rejects that reasoning. The standard denial language advises a worker to contact an attorney to pursue and protect his or her legal rights. If a worker's unexplained failure to follow that advice were good cause, the 60-day limit of ORS 656.319(1)(a) would be meaningless.

The dissent seems to take the position that a worker who has multiple claims pending with different carriers should always be allowed up to 180 days to request a hearing on a denial. No prior Board decision has so held, and the Board majority now rejects that reasoning. The only significance of having multiple claims pending, as the Board recognized in Curtis A. Lowden, is that 60 days might run on one denial while another is being pursued. In this case, by contrast, the 60 day period ran on both denials before claimant took any action. The dissent would apparently explain that on the basis that claimant was confused. The Board majority finds there was no possible reasonable basis for confusion between when claimant received the second denial, that is, SAIF's of December 22, and when claimant contacted an attorney in early March--by which time more than 60 days had run on the later of the two denials.

Claimant's March 12, 1979 requests for hearing on Aetna's October 19, 1978 denial regarding his September 1978 injury and SAIF's December 22, 1978 denial regarding his September 1978 injury were untimely and no good cause for the tardy filing has been established. Therefore, the majority of the Board affirms those denials.

There are remaining issues. SAIF did not issue a denial or begin to pay time loss within 14 days as required. The Referee found SAIF's inaction unreasonable and assessed a penalty of "25% of the time loss, if any, payable for the period from November 1, 1978 to December 22, 1978, not to exceed \$200" and ordered SAIF to pay claimant's attorney \$100. SAIF suggests no reason for the Board to modify this portion of the Referee's order, so it will be affirmed.

Claimant also raised at the hearing the question of the sufficiency of the September 28, 1978 Determination Order regarding his June 1978 injury while working for Boeing of Portland, insured by Aetna. The Board cannot tell from the record what became of that issue. It was discussed before the Referee, but not mentioned in the Referee's Opinion and Order. The Board will, therefore, remand to the Referee to consider the issues raised regarding the Determination Order.

ORDER

The order of the Referee dated March 31, 1981 is modified. The denials issued by Aetna and SAIF regarding claimant's September 1978 injury are affirmed, and the Referee's contrary finding with respect to Aetna is reversed. The Referee's assessment of penalties and attorney fees against SAIF is affirmed. This case is remanded to the Referee to resolve the issues raised in connection with the September 1978 Determination Order.

Board Member George Lewis respectfully dissents:

On October 16, 1978, claimant signed an 801 claim form which was submitted to both carriers.

Aetna promptly denied responsibility by its letter to claimant dated October 19, 1978. SAIF neither denied nor accepted the claim nor paid time loss benefits within the 14 days as required by law.

Presumably, had SAIF complied with its statutory duty to do one or the other, claimant would not have held to the misconception that SAIF was the responsible carrier. Not until claimant received SAIF's late denial, issued more than 60 days after its receipt of the claim, did claimant have reason to believe that he had been caught in a cross-fire between insurers.

Without the aide of an attorney to help him sift through the morass of procedural complexities, claimant allowed the 60-day period of time allowed for filing a request for hearing to lapse. In view of the language contained in the first denial from Aetna, it is understandable that claimant was misled into believing that liability for his injuries rested with SAIF.

As observed by the Board In the Matter of the Compensation of Curtis A. Lowden, WCB Case No. 79-10215, in March of 1981, there are a large number of appellate decisions interpreting ORS 656.319(1)(a) which requires that a request for hearing be filed not later than the 60th day after a claimant is notified of a denial of his claim. In view of the extensive number of disputes arising concerning this time limit, it is not surprising that claimant, a lay person, might be confused.

It would appear that the majority decision is based, primarily, upon the claimant's admission that when he finally received the second denial in December of 1978 he simply didn't know what to do. Where, as here, a situation of successive injuries to the same area of the body exists with different carriers involved, both of which deny responsibility, the claimant's confusion can be readily understood.

By the time claimant received the second denial, dated December 22, 1978, his time to appeal the first denial by Aetna had already lapsed. If, in fact, it was clear that his 60 days had already expired, it is reasonable to conclude that there would remain no reason to hurry. It would appear, however, that claimant simply had no idea of what course of action he should take once he had let the time lapse to appeal the first denial.

Frequently, a worker with a compensable injury will return to work and suffer an exacerbation of the compensable condition while engaging in work activity. The issue then arises, as in this case, of whether the exacerbation constitutes an aggravation under ORS 656.273, i.e., a worsening of the initial injury, or a new injury. In such cases, Oregon follows the "last injurious exposure rule," as expressed in 4 Larson, Workmens' Compensation Law, Section 95.12 (1980) which states:

"If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. In this class would fall most of the cases discussed in the section on range of consequences in which a second injury occurred as the direct result of the first, as when claimant falls because of crutches which his first injury requires him to use. This group also includes the kind of case in which a man has suffered a back strain followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion.

"On the other hand, if the second incident contributes 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 the major part to the final condition..."

The point here should become inescapably clear: It is not always clear, from the factual situation surrounding any case, whether an aggravation or new injury exists. To expect an injured worker to make a timely and binding decision on liability, upon which even the experts--lawyers, doctors, and the courts--cannot always agree, is to impose upon the claimant a burden not intended by the legislature or the courts.

The Court of Appeals, in Bracke v. Baza'r, Inc., ___ Or. App. ___, CA 17587 (April 1981), discussed the problems encountered by a claimant when attempting to decide which of two or more employers was responsible for compensation. Although Bracke concerned an occupational disease rather than successive injuries, as in this case, the rationale is applicable. In Bracke, the court stated:

"...where, as here, the question is not one of compensability but, rather, which of several employers is responsible, the problem is whether the claimant must assume all of the risk of choosing the employer who the evidence ultimately will show is responsible, in fact, for the compensable condition. In Mathis v. SAIF, 10 Or. App. 139, 499 P2d 1331 (1972), we held that a claimant was not required to assume that risk, but could make a claim against the last employer where working conditions could cause the disease or injury." (emphasis added)

The Lowden decision, *supra*, discussed briefly above, involved a dispute between two insurance companies on the question of which was responsible for the claimant's compensable injuries. In Lowden, the Board referred to the holding of the Supreme Court in Brown v. EBI Companies, 289 Or. 455 (1980):

"'Good cause' under ORS 656.319(1) (b) is not a matter of 'discretion' but of agency judgment in the sense stated in McPherson v. Employment Division, 285 Or. 541, 591 P2d 1381 (1979)." 289 Or. at 460 n. 3.

The Board noted that under McPherson, *supra*, the term "good cause" was to be defined as a policy matter by the agency entrusted with administration of the statutes rather than by the judiciary, and that the Brown holding extended that rule to the workers' compensation area. Concluding that it was not bound by pre-Brown appellate decisions, the Board held:

"In exercising that responsibility, this agency is not foreclosed from following persuasive judicial analysis. In both Hanna v. McGrew Bros. Saw Mill, 44 Or. App. 189 (1980), and Calder v. Hughes and Ladd, 23 Or. App. 66 (1975), the Court of Appeals indicated that a claimant should not be penalized when he is caught in a cross-fire between two insurance carriers, each claiming that responsibility for the claim rests with the other. The Board finds that reasoning to be here applicable and cogent. Factually, we find that the reason for claimant's having requested a hearing more than 60 days after INA's denial was due to his pursuing his claim with SAIF as suggested by INA. Legally, and as a policy matter, we conclude that is good cause for the amount of delay here in question (32 days)." Order on Review, March 30, 1981, p. 3.

In another case where the claimant was caught between two insurers both denying liability, In the Matter of the Compensation of James Griffin, WCB Case No.'s 79-10206 and 79-08314, the Board found that claimant had good cause for his failure to file a request for hearing within 60 days of the date of a denial because the claimant was "lulled into a sense of security" and had no reason to believe he should take legal action on the SAIF denial. In that case, claimant's false sense of security stemmed from the fact that another insurer was already making compensation payments. While this is not the factual situation in the case at bar, it is reasonable that the claimant relied upon the language contained in the first denial from Aetna:

"Due to the circumstances you report, it appears that you had a separate accident with your current employer and that any compensation which may be due you should rightfully come from the workers' compensation carrier for Black's Enterprises and not from this Company as the workers' compensation carrier for Boeing of Portland. Further, the medical information in our file indicates that you had sufficient time to completely recover from the injury you sustained on June 7, 1978. Consequently, compensation for aggravation is denied."

The mere fact that the denial letter contained the usual notice of appeal rights does not diminish the claimant's assertion that he had good cause for his failure to request a hearing within the 60 days allowed by statute.

Certainly, the "good cause" provisions of ORS 656.319(1)(b) contemplated situations such as this one where a claimant is misled by one insurance carrier into believing that liability rests with another.

ORS 656.307(1) addresses the method in which determination of an issue regarding responsibility for compensation shall be resolved:

"(1) Where there is an issue regarding:

(a) . . .

(b)

(c) Responsibility between two or more employers or their insurers involving payment of compensation for two or more accidental injuries...

the director shall, by order, designate who shall pay the claim, if the claim is otherwise compensable..."

Unfortunately, at the time of the denial in this case, there was no provision, by rule or statute, for the method in which the director is to be notified of the existence of a dispute as to which insurer is responsible. In contemplation of problems which arise in determining responsibility for the acceptance and processing of a compensable injury claim, the Department has, since that time, adopted rules which govern the conduct of the parties involved in such a dispute. OAR 438-54-332, now in effect, requires the first insurer receiving the claim to immediately forward it to the other insurer, and the two shall notify the Compliance Division of their differing positions. Upon receipt of such notice, the Compliance Division then issues what is commonly referred to as a "307 Order"

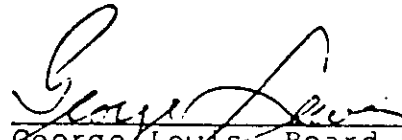
designating one of the insurers as the paying agent with a monetary adjustment to be made upon final determination of which insurer is responsible in fact.

Had the Department's rules--adopted in 1980--been in effect at the time of Aetna's 1978 denial in this case, the subsequent problems which arose, in which claimant was caught in a cross-fire between two insurers, might never have arisen. Yet we are faced with a situation where those rules did not exist.

The majority of the Board concluded that the Referee failed to address the issue of premature closure by Determination Order dated September 28, 1978 on the initial claim for injuries arising out of the June 7, 1978 incident. I agree. The Referee, in his first Opinion and Order dated March 31, 1980, concluded that the claimant had not had adequate time to completely recover from his June 7, 1978 injury by the time his second injury occurred on September 28, 1978. Coincidentally, that is the same date as the Determination Order which closed the first claim. It is conceivable, therefore, that, at the time the claim was closed, claimant's condition was not medically stationary. Unfortunately, neither the first Opinion and Order nor the Supplemental Order dated April 23, 1980 specifically addresses the issue of premature closure, raised by claimant's second supplemental request for hearing. By treating the second injury as an "aggravation" claim, it would appear that the Referee concluded that the first claim had not been prematurely closed. Because such a conclusion is inconsistent with the other finding--that claimant had not had time to fully recover--I agree that the issue of premature closure should be remanded to the Referee for a determination.

The majority decision, assessing penalties for SAIF's failure to comply with statutory requirements, is appropriate, under the circumstances surrounding this case.

But to deny claimant an opportunity to have his claim now considered on the merits, in view of the complexities and procedural complications encountered by the claimant, is inconsistent with the policy heretofore adopted by the Board and is inconsistent with guidelines set down by the courts.


George Lewis, Board Member

Dated this 28th day of April 1981.

WCB Case No. 80-04245 APRIL 28, 1981

JOHN W. COFFIELD, CLAIMANT
Doblie & Francesconi, Claimant's Attorneys
SAIF Corporation
Amended Order on Review

Our Order on Review dated April 6, 1981 in the above entitled matter inadvertently omitted a provision for attorney's fee.

IT IS HEREBY ORDERED that claimant's attorney hereby be granted the sum of \$400 for his services at that Board review, payable by the SAIF Corporation.

WCB Case No. 80-00608 APRIL 28, 1981

DAVID C. REID, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attorneys
SAIF Corporation
Order on Review

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's denial of claimant's request for reimbursement for mileage expenses incurred in connection with a form of medical treatment.

Claimant's treating physicians recommended swimming as a form of therapy for claimant's shoulder and neck injury. Claimant incurred the mileage expenses here in issue traveling to various places to go swimming. While there seems to be some dispute in the record and briefs regarding whether travel expense to go swimming can ever properly be part of compensation, the Board regards that as a red herring. Given the claimant's injury and the specific advice of two doctors to swim as therapy, the Board is satisfied that claimant's mileage expense incurred to follow the doctors' recommendation should, abstractly, be part of claimant's compensation.

The problem is whether claimant proved the amount of reimbursement to which he was entitled. Claimant testified that he drove as much as 115 miles a day to go swimming. His total claim is for about \$900 of travel expense for over 5,500 miles of traveling to swim. There were short-comings with the records claimant kept to document that claim, as claimant admitted during his testimony. The Referee found: "I don't believe claimant drove the amount he alleges." The Board interprets this as a credibility finding. We find no basis in the record for us to make a contrary credibility finding.

The Board is thus left with this unhappy situation: (1) We are satisfied beyond any doubt that claimant incurred some travel expense in driving to places where he could swim, as recommended by his doctors; (2) claimant's travel expense should be paid for by SAIF; (3) on this record, the exact amount of claimant's travel expense is unknown and unknowable; (4) we are not aware of any legal options, on this record, except to grant claimant all that he seeks or nothing; and (5) since claimant has not proven entitlement to all that he seeks, he gets nothing.

The Board regards this as unfair. If we had authority to do so, we would grant claimant reimbursement for one-half of the travel he claims. But attorneys might criticize, rightly under current law, that the Board's conclusion was based on speculation, not on the record.

ORDER

The order of the Referee dated September 23, 1980 is affirmed

WCB Case No. 79-08182 APRIL 28, 1981

TERRY RIDDLE, CLAIMANT
Malagon, Velure & Yates, Claimant's Attorneys
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's order which granted claimant an additional award of 25% for a total award of 35% loss of the left leg. SAIF contends that the award is excessive. The Board agrees and reverses the Referee's order.

Claimant was employed, and still is, as a skidder operator and injured his left knee on August 28, 1978 when he jumped off the skidder. Initial diagnosis was possible tear of the lateral meniscus. Claimant was released to his regular work on September 5, 1978 and his claim was closed by a Determination Order on January 25, 1979 with time loss only.

On February 12, 1979 Dr. Lilly reported claimant had signs and symptoms of internal derangement. Claimant was hospitalized two days later, and on February 15 underwent a meniscectomy.

An independent examination was performed by Dr. Casey on July 19, 1979. That examination revealed claimant had full range of motion but full flexion caused pain, and patellar compression into the femur was markedly tender. There was no anterior, posterior or mediolateral instability. X-rays were normal. Claimant's condition was considered stationary, but he was to continue with his exercises. Dr. Casey felt that the present symptoms were due to mild arthritis. Claimant should do no work requiring climbing up and down stairs or getting on and off machinery.

The claim was closed by a second Determination Order dated September 17, 1979 and granted 15° for 10% loss of the left leg.

Dr. Casey first released claimant to light work and subsequently regular work on November 1, 1979. Dr. Casey again examined claimant in December 1979 and reported on February 7, 1980 that the earlier examination was normal and claimant had only subjective complaints of pain.

The Board finds, based on the medical evidence and claimant's testimony at hearing, that the award granted by the Referee is excessive. By the medical information claimant had a normal examination and his only complaints were of pain which is not disabling. Claimant has returned to his regular job and missed no time from work due to his knee condition. The medical evidence does not support an award for loss of function of claimant's left leg in excess of that granted by the Determination Order which we would reinstate.

ORDER

The order of the Referee dated September 19, 1980 is reversed.

The second Determination Order of September 17, 1979 is affirmed.

WAYNE BATDORF, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attorney
SAIF Corporation
Amended Order on Review

Our Order on Review in the above entitled matter was misdated.

The correct date for that Order on Review is April 22, 1981.

IT IS SO ORDERED.

ALBERT H. BLITON, CLAIMANT
Pozzi, Wilson, et al, Claimant's Attorneys
SAIF Corporation
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of the Referee's order which reversed its denial and found this claim compensable. The Board affirms and adopts the Referee's finding of compensability.

SAIF also complains about the \$1,500 attorney fee that the Referee awarded claimant for a less than two hour hearing at which claimant offered no exhibits. Despite this Board's express statutory authority to adopt rules governing awards of attorney fees, ORS 656.388(4), and despite the Board having adopted rules pursuant to that authority, ORS 656.386(1) and ORS 656.388(2) create an ambiguity about whether the Board can review the application of its attorney fee rules by the Referees. The latter statutes refer to disputes about amount of attorney fees, possibly meaning both a claimant's contention that they are too low and a defense contention that they are too high, being resolved in circuit court.

We need not attempt to resolve that ambiguity in this case because we find that the attorney fee awarded by the Referee is within the range of reasonableness if it covers both claimant's representation at the hearing level and on Board review. Therefore, we will not grant any additional attorney fee on Board review.

ORDER

The order of the Referee dated September 19, 1980 is affirmed.

WCB Case No. 80-01244 APRIL 29, 1981

HAROLD L. HETLAND, CLAIMANT
Michael N. Gutzler, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members Barnes and McCallister.

The SAIF Corporation (SAIF) seeks Board review of that portion of the Referee's order which granted 45% permanent partial unscheduled low back disability. SAIF contends the award is excessive.

Medical reports indicate permanent impairment sufficient to preclude claimant's return to his previous employment as a carpenter. Dr. Stevens states that claimant should be limited to carrying 20 pounds with occasional 50 pound tolerable load. Additionally, the claimant should not be subject to repeated bending, stooping, twisting or walking on rough ground. Dr. Anderson finds "mild, permanent impairment of function of the lower back."

The claimant is 46 years old with an eighth grade education and a GED. The claimant's work experience is limited to heavy manual labor. He has permanent impairment in the lower back precluding return to work in heavy manual labor. Normal activity outside of heavy labor is not curtailed. Additionally, though the claimant's education is limited, the limitation is not so severe as to preclude vocational rehabilitation. However, claimant's lack of cooperation and low motivation have hampered vocational rehabilitation efforts.

ORDER

The Referee's order of October 24, 1980 is modified. Claimant is hereby granted an award of 30% unscheduled disability. This is in lieu of all previous awards.

The remainder of the Referee's order is affirmed in its entirety.

WCB Case No. 79-10564 APRIL 29, 1981

JIMMIE TROY PALMER, CLAIMANT
Richard Sly, Claimant's Attorney
SAIF Corporation
Order on Review

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which granted him an award of 224° for 70% unscheduled low back and psychological disability. Claimant contends he is permanently and totally disabled.

The Board concurs with the conclusion reached by the Referee. Claimant has not proven he is permanently and totally disabled. The preponderance of the medical evidence indicates claimant can be employed at sedentary work, but claimant has shown very little motivation to return to work or help himself. Claimant's treating psychiatrist felt most of claimant's problems were physical and it would be beneficial to settle claimant's claim. The award granted by the Referee, based on the Board's findings, quite adequately compensates claimant for his loss of wage earning capacity.

ORDER

The order of the Referee dated September 17, 1980 is affirmed.

TABLE OF CASES

SUBJECT INDEX

Volume 30

AGGRAVATION

Denial affirmed; need for surgery related to prior injury: C. Bigsby-----	682
Denial affirmed; intervening non-industrial injury was significant: E. Bollinger-----	475
Denial affirmed: P. Brown-----	103
Denial affirmed; based on treating doctor's reports: R. Brown-----	89
Denial affirmed; no worsening: A. Colbert-----	488
Denial affirmed; no "additional" compensation warranted: G. Evans-----	727
Denial affirmed; off work because claimant wanted it: W. Flisram-----	515
Denial affirmed; no worsening proven: J. Flower-----	305
Denial affirmed; claimant not credible: C. George-----	306
Denial affirmed; no worsening shown: O. Harmon-----	479
Denial affirmed; no disabling or worsened condition shown within year of injury: C. Helmick-----	624
Denial affirmed: L. Hunt-----	64
Denial affirmed: O. Larson-----	651
Denial affirmed: no worsening shown despite hospitalization: D. Morton-----	529
Denial affirmed; orthopedist's opinion more persuasive than chiropractors': G. Mumblo-----	551
Denial affirmed; police incident responsible for worsened condition: L. Murphy-----	510
Denial affirmed; pre-existing psychological condition not worsened by work: R. Payne-----	191
Denial affirmed; inconsistent testimony makes doctors' histories unreliable: M. Peterson-----	717
Denial affirmed; psychological condition unrelated: G. Stose-----	558
Denial affirmed; no new evidence admitted on review: B. Vogt-----	559
Denial affirmed; conflicting testimony and evidence: S. Warnack-----	542
Denial reversed; despite intervening auto accident: B. Harrison-----	19
Denial reversed; motorcycle incident no intervening injury: V. Holdridge-----	595

AGGRAVATION

Distinction between filing aggravation claim & proving it
discussed: D. Dooley-----723

"Dry" aggravation not compensable where not caused by
injury: G. Plane-----691

Medical cause not proved for worsened back condition:
compensable, R. McPhail-----744

New injury or: latter found where sudden onset new
symptoms: M. Acree-----165

New injury or: latter found in roofer with pre-existing
back condition: R. Allen-----246

New injury or: latter found in off-job accident:
R. Black-----76

New injury or: aggravation found: H. Crow-----661

New injury or: finding of former affirmed: G. Freeman-----736

New injury or: latter found: T. Ganger-----32

New injury or: first found for shoulder condition:
J. Griffin-----593

New injury or: latter found: J. Hyde-----641

New injury or: latter found in 2 carrier case: M. LeDoux--411

Incident in California was new injury: legs not affected
by original injury: L. Mitchell-----121

New injury or: latter found in carpet tunnel case:
K. Mozzilo-----435

New injury or: latter found in ankle condition: M. Nations--553

New injury or: former found in 2 carrier case: J. Reeves--418

New injury or: latter found in knee injury: C. Rice-----718

New injury or: latter found with sudden, severe onset of
pain: D. Scofield-----444

New injury or: latter found in shoulder injury/PTD case:
J. R. Smith-----446

Psychological condition not found worsened, with dissent:
S. Webster-----219

Remand for acceptance affirmed: no PPD determination until
WCD makes its determination: E. Wallace-----316

Right not expired: hearing on merits appropriate:
F. Farance-----51

Worsening of original injury proved in headache claim:
D. Dooley-----723

No worsening: hospitalized for traction; hysterical
component: R. Dupont-----168

Worsened condition due solely to intervening injury:
G. Goodman-----234

Work activity permanently worsened underlying heart
disease: H. Jones-----687

Affirmed remand: injury condition worsened; TTD dates
changed: H. Mundell-----716

No worsened condition despite hospitalization: G. Sexton--179

AOE/COE

Applicant for job is not subject worker: T. Orman-----710
Arthritis; not worsened by sitting: D. Davis-----389
Back condition denied: didn't arise from circumstances
 unique to work environment: E. LaBella-----738
Congenital anomaly in back not caused by injury or work:
 J. Meador-----190
Congenital back condition made symptomatic only not
 compensable: J. Plummer-----176
Back condition not caused or aggravated by work:
 V. Powell-----34
Breast mastitis caused by industrial injury: B. Love-----652
Carpal tunnel syndrome work-related: L. Hunt-----64
Cough causing back injury not sufficient work connection:
 I. Daugherty-----226
Circuit court reporters are employers of county, not
 state: G. Hunter-----561
Denial affirmed: K. Annen-----5
Denial affirmed: acute strain 1979 unrelated to 1978
 injury: T. Truesdale-----539
Denial affirmed: left ankle condition: G. Stose-----558
Denials affirmed in chaotic back case; should injury
 compensable: J. Raifsnider-----554
Denial affirmed: bronchial asthma, allergic rhinits not
 worsened by work: H. Woodford-----571
Denial affirmed: bunion surgery unrelated to fracture
 of foot: D. Loscar-----480
Denial affirmed: carpal tunnel not proven to reasonable
 probability to be work related: M. Tracy-----647
Denial affirmed: carpal tunnel not caused, worsened by
 injury: R. Davidson-----513
Denial affirmed: claimant not credible: D. Riske-----569
Denial affirmed: claimant not credible re off-job
 injuries: M. Rosa-----287
Denial affirmed: pre-existing foot condition not proven
 to be accelerated by work: J. Lavin-----626
Denial affirmed: hip condition (aseptic necrosis) not
 caused by injury to other leg: E. Current-----437
Denial affirmed over dissent; hypertension not caused,
 aggravated by injury: G. Everts-----228
Denial affirmed: Knee injured in prohibited basketball
 game: R. Condon-----620
Denials affirmed: knee conditions and carpal tunnel:
 J. Eber-----257
Denial affirmed: knee condition not worsened by injury
 to other leg: A. Florence-----458
Denial affirmed for knee condition: inconsistent lay
 testimony: J. Wade-----601
Denial affirmed: medical causation for rheumatic fever
 following puncture wound not shown: E. Shackleford-----469

AOE/COE

Denial of myocardial infarction affirmed: inconsistencies in histories: L. Cramer-----	154
Denial affirmed: no injury nor occupational disease proven for shoulder: D. Hanner-----	460
Denial affirmed: no medical evidence supports compensability: J. Clark-----	699
Denial affirmed: no medical causation shown for heart attack: E. Harris-----	438
Denial affirmed: no medical evidence of causation shown: R. Hosley-----	505
Denial affirmed: no prejudice for late filing, but claimant failed to meet burden of proof: B. Ice-----	665
Denial affirmed: no proof waitress hurt back as stated: S. Church-----	115
Denial affirmed: no worsening of underlying condition proven (with dissent): L. Magwood-----	340
Denial affirmed: pharyngitis not related to work: R. Davis-----	321
Denial affirmed: pseudourthmosis condition not worsened by work: S. Johnson-----	491
Denial affirmed: psoriasis condition: E. Zozosky-----	572
Denial affirmed: SAIF payment of benefits doesn't preclude denial: L. Reynolds-----	521
Denial affirmed: typing did not aggravate underlying condition: B. Carlson-----	284
Denial affirmed: wrist, finger conditions unrelated to injury: W. May-----	440
Denial affirmed: urinary tract infection unrelated to low back injury: R. Taylor-----	487
Denial reversed with dissent: M. Edwardson-----	726
Denial of back injury reversed: claimant's history of injury credible: M. Barnett-----	92
Denial reversed: employment contributed to hearing loss: D. McKamey-----	610
Denial reversed: lateral epicondyle condition caused by heavy work: B. Jones-----	308
Denial reversed: hepatitis probably contracted through fecal exposure: M. Anderson-----	317
Denial reversed: knee injured at work, not on vacation: R. Smith-----	
Denial reversed by Supreme Court: D. Rogers-----	441
Denial reversed work incidents contributing cause for treatment: J. Syrop-----	544
Emotional stress not cause of esophrogeal hiatal hernia: J. Earley-----	202
Headaches, personality change related to neck injury: P. Summers-----	110
Headaches caused by work; arm pain not: D. Tyler-----	3
Injury compensable, but surgery for synovial plica unrelated: M. Brooks-----	534
Following injury occurring purely social gathering while on out-of-state assignment not compensable: R. Collier-----	591
1978 claim for 1975 injury allowed; employer discouraged claims: L. McCollam-----	56

AOE/COE

Insomnia condition compensable; unique to employment:	
Dissent: D. Sonnefeld-----	678
Insurer not estopped to deny claim after paying	
benefits: J. Burns-----	655
Kidney cancer caused or aggravated by fumes of bridge	
tender: R. Hensley-----	204
Knee injury at work not causally linked to work	
activity: W. Hubble-----	703
Knee collapse at home caused by 12 years of "mini"	
traumas at work. E. Hunsaker-----	729
Myocardial infarction not compensable: W. Batdorf-----	613
Myocardial infarction unrelated to work: E. Braget-----	31
Current neck problems unrelated to 1972 non-disabling	
injury: J. Moore-----	66
Nervous condition not aggravated by work where	
objective evidence of work conditions considered:	
D. Gobler-----	650
Osteoarthritis condition not worsened by work	
activity: R. Paddock-----	530
Partial denials of hearing loss, knee, back affirmed:	
P. Hart-----	423
Partial denial set aside, but found reasonable:	
I. Mathews-----	372
Partial denial of psychological treatment affirmed:	
P. Moyer-----	295
Partial denial of psychological condition affirmed:	
N. Olds-----	416
Pre-existing condition disregarded; new back injury	
found: L. Iles-----	666
Pre-existing frostbite condition worsened by work;	
with dissent: G. Turley-----	211
Psoriasis denial affirmed; dermatitis condition	
compensable: E. Zozosky-----	572
Psychological condition not related to injury: G. Barlas---	723
Psychological condition unrelated to industrial injury:	
H. Eastling-----	663
Psychiatric condition not caused by work: E. Ringer-----	124
Psychiatric condition compensable; claimant not at	
hearing: B. Rogers-----	35
Psychological condition complicated by poor motivation,	
compensation neurosis: B. Wagner-----	719
Psychological condition compensable, related to leg	
injury: B. Wagner-----	719
Remand for acceptance affirmed: claimant an employee,	
activity work related. J. Coffield-----	754
Remand for acceptance affirmed: P. Goodwin-----	258
Remand for acceptance affirmed; dissent argues mental	
stress from nonwork causes: K. Haley-----	260
Remand for acceptance affirmed: G. Mc Donald-----	374
Retention of urine unrelated to back injury: L. Logan-----	118
Possible rheumatoid arthritis not work-related: O. Sosa----	27
Shoulder condition not worsened by work activity: K. Ivie---	606
Tendinitis condition work related; condition made disabling	
by off-job aggravation: G. Woosley-----	653
Alleged work injury denied where testimony, medical	
histories inconsistent: P. Mitchell-----	82

AOE/COE

Inconsistent lay testimony defeats eye claim; no medical
causation shown: R. Watson-----138

CRIME VICTIM'S COMPENSATION

Claimant's injury substantially attributable to wrongful act:
no recovery: K. Berke-----185

DEPENDENTS

Referee, Board won't rule on constitutionality of ORS 656.226:
F. Hewitt-----189
Unmarried male survivor not entitled to benefits under
ORS 656.226: F. Hewitt-----189

EVIDENCE

Accident must result in compensable injury, proven by
medical causation: L. McCollam----- 56
Insufficient credible evidence of non-medical character
discussed: D. Davis-----513
Post hearing evidence not admitted where available
pre-hearing: C. Gallea-----407
Post hearing evidence not admitted where available
pre-hearing: O. Larson-----651
Pre-existing condition must be shown to be accelerated
and worsened by employment: J. Lavin-----626

MEDICAL SERVICES

Box checked on 827 form given some weight; denial affirmed:
D. Hanner-----460
Claimant entitled to chiropractic services under
ORS 656.245: M. Bluhm-----546
Electro cyclo chair not a form of medical treatment:
C. Smith-----485
Insurer not required to pay electric bill for hot tub:
T. McHugh-----413
Must be paid for pending appeal of pre-Oct. 3, 1979
injuries except where there is first dollar health
coverage: R. Condon-----620
Psychologist not medical servitor under Oregon Statutes:
D. Kemery----- 54
Travel expenses allowed only where related to treatment:
D. Burch-----385
Where no referral to psychologist, services not
compensable: D. Kemery----- 54

MEDICALLY STATIONARY

Determination order reinstated: O. Sosa-----	27
Discussion where orthopedically stationary, but not psychologically: R. Klum-----	668
No premature closure; follow-up care compensable under .245: L. Hunt-----	64
Preponderance of evidence indicates earlier date appropriate: L. Brault-----	378
Psychological condition stationary: vocationally stationary criteria are different: D. Berliner-----	589

NON-COMPLYING EMPLOYER

Complicated hierarchy of corporations and employment relationships: D. Fosdick-----	686
Revocation of non-complying status order affirmed: renewal fee paid timely: W. Amrhein-----	150

NOTICE OF INJURY

Good cause for late claim: other carrier delays denial: I. Daugherty-----	226
Good cause shown for late filing in lengthy discussion: R. Hosley-----	505
Failure to file claim timely no bar unless prejudice shown: C. Jackson-----	173
Late claim: unjustified fear of firing not "good cause" M. Kantor-----	268
Showing of prejudice immaterial where good cause for late claim shown: R. Hosley-----	505

OCC DISABILITY

Alcoholism: W. Schaecher-----	466
Asceptic necrosis of femoral head: E. Current-----	437
Carpal tunnel: R. Davidson-----	513
Carpal tunnel: M. Tracy-----	647
deQuervain's disease: W. Streeter-----	314
Contact dermatitis: A. Woodfin-----	281
Dermatitis: E. Zozosky-----	572
Esophageal hiatal hernia: J. Earley-----	202
Frostbitten foot condition aggravated by work as cook: G. Turley-----	211
Heart attack: E. Harris-----	438
Hepatitis: M. Anderson-----	317
Hernia condition covered by carrier covering time when it becomes disabling: H. Cruchelow-----	455
Humeral epicondylitis: B. Jones-----	308

OCC DISABILITY

Hypertension: G. Everts-----	228
Malignant kidney: R. Hensley-----	204
Mastitis (breast): B. Love-----	652
Myocardial infarction: E. Braget-----	31
Myocardial infarction: L. Cramer-----	154
Occupational disease claim timely filed where attorney advised of compensability: S. Johnson-----	491
Prolapsed bladder: L. Logan-----	118
Psoriasis: E. Zozosky-----	572
Psychological condition: G. Barlas-----	723
Rheumatoid arthritis: W. Schaecher-----	466
Seronegative rheumatoid arthritis: O. Sosa-----	27
Synovial plica: M. Brooks-----	534
Urinary tract infection: R. Taylor-----	487
Weller cases apply where underlying condition exists: R. Davidson-----	513

OWN MOTION JURISDICTION

Amendment: 50% arm changed to 20%: F. Barnette-----	455
Amendment: Omit Appeal Rights: F. Barnette-----	351
Amendment: Date: D. Bronson-----	290
Amendment: Date change for PTD: A.J. Brugato-----	383
Amendment: New information allows for TTD: J. Crow-----	536
Amendment: Change of dates: D. Fast, Jr.-----	496
Amendment: Appeal notice: B. Foss-----	324
Amendment: Inclusion of attorney's fee: N. Freeman-----	664
Amendment: TTD: E. Gage-----	695
Amendment: Changes claim number: R. Gemmell-----	99
Amendment: Time loss denied: J. Grover-----	433
Amendment: 70% arm: E. Hickey-----	696
Amendment: S. Kaser-----	520
Amendment: Deletion of SAIF references: A. Keith-----	667
Amendment: Earlier time loss date: A. Lapping-----	528
Amendment: Change of carrier's name: V. (Stern) Magden-----	1
Amendment: Omit appeal notice: F. Ozan-----	521
Amendment: Abridgement of TTD Period: T. Raz-----	197
Amendment: Change in attorney's fee: M. Rose-----	277
Amendment: Attorney's fee: M/ Rose-----	277
Amendment: Attorney's fee: I. Young-----	422
Board will rule pending referee's opinion: G. Getman-----	694
Only board can authorize claim reopening: P. Holstrom-----	70
Decision withheld on 1972-1980 claims pending review of hearing record: G. Christensen-----	684
Denied compensability for injury in pre-work hours: L. Adamson-----	524
Denied consolidated hearing: R. Tila-----	698
Denied motion to dismiss request for review and denied reconsideration of order: Ambiguity in law: J. Turnbull-----	680

OWN MOTION JURISDICTION

Relief denied: PTD cannot worsen thereafter: J. Davis-----	575
Denied relief: No aggravation on back claim: D. Gordon-----	516
Denied relief: 1979 accident unrelated to 1968 injury: V. Neal-----	131
Denied relief: K. Nuse-----	484
Denied relief: V. Powers-----	531
Denied relief: Issure could have been raised as request for hearing or aggravation: I. Young-----	475
Denied reopening of 1964-67-73 claims due to lack of jurisdiction: D. Blair-----	407
Denied reopening of 1961 claim: H. Boutin-----	653
Denied reopening of 1975 claim: D. Brosig-----	614
Denied reopening due to lack of information: R. Faust-----	484
Denied reopening: E. Miller-----	499
Denied reopening: N. Muir-----	529
Denied reopening: P. Pankratz-----	465
Request to reopen claim because of employer fraud denied: B. Seibel-----	241
Denied reopening: lack of information: E. Stangl-----	533
Denied reopening of 1977 claim: L. Vance-----	40
Denied reopening of 1967 back claim: C. Bigsby-----	682
Denied reopening of 1972 back claim: D. Brown-----	494
Denied reopening of 1974 low back claim: C. Fahy-----	337
Denied reopening of 1967 back claim: E. Fisher-----	497
Denied reopening of 1970 back claim: J. Hood-----	126
Denied reopening of 1973 back claim: A.E. (Belles) Johnson-----	396
Denied reopening of back claim: S. Lawhead-----	697
Denied reopening of 1970 back claim: J. Legore McGinnis-----	428
Denied reopening of 1973 back claim: D. Ott-----	132
Denied reopening of 1971 back claim: L. Parsons-----	272
Denied reopening of 1973 back claim: J. Poelwijk-----	11
Denied reopening of 1967 back claim: M. Schallberger-----	421
Denied reopening of 1974 back claim: J. Snethen-----	330
Denied reopening of back claim: E. Stevens-----	534
Denied reopening of 1969 back claim: O.L. Vetter-----	280
Denied reopening of 1967 back claim: K. Wentz-----	40
Denied reopening of 1972 foot burn claim: medial meniscectomy not related: R. Close-----	656
Denied reopening for excision of Baker's Cyst but assured continuing medical: J. Crow-----	661
Denied reopening of hernia claim: H. Alderson-----	526
Denied reopening of 1973 knee claim: G. Lewis-----	175
Denied reopening of 1973 knee claim: J.K. Truesdale-----	304
Denied reopening of 1974 leg claim: D. Bronson-----	382
Denied reopening of 1973 leg claim: J. Holmes, Jr.-----	596
Denied reopening of 1956 leg claim: C. Stratton-----	600
Denied reopening of 1953 neck-arm claim: R. Bettendorf-----	30
Denied reopening of 1978 neck-back-hands claim: D. Densberger-----	8
Denied reopening of occupational disease claim: S. Beeson--	51
Denied reopening of 1970 claim: osteoarthritis unrelated to injury: T. Quarles-----	618

OWN MOTION JURISDICTION

Denied reopening but affirmed entitlement to psychological care: W. Franks-----	526
Determination: TTD and no PPD: C. Atwell-----	502
Determination: TTD and no PPD: J. Batson-----	614
Determination: TTD and no PPD: B. Bult-----	512
Determination on 1974 claim: TTD and TPD: N. Chasteen-----	387
Determination on 1952 claim: TTD only: O. Christopher-----	685
Determination vacated: claim to be closed under .268: J. Church-----	184
Determination on 1973 claim: TTD only: R. Crooks-----	660
Determination on 1968 claim: TTD and no PPD: L. Cross-----	575
Determination: TTD and no PPD: S. Cushing-----	457
Determination on 1974 claim: TTD and no PPD: R. Dunlap-----	616
Determination: TTD following pain clinic obligation: D. Gray-----	10
Determination: 65% unscheduled: W. Johnson-----	498
Determination: TTD and no PPD: E. Aldine Keith-----	667
Determination: TTD, TPD, and no PPD: P. English Kezar-----	270
Determination: no TTD and no PPD: G. Krueger-----	537
Determination on 1970 claim: no TTD or PPD: B. Martin-----	579
Determination: TTD and 20% more unscheduled: J. McCool-----	697
Determination: no TTD and no PPD: J. Powers-----	531
Determination on 1971 claim: no PPD and no TTD pending further information: B. Rattay-----	619
Determination on 1965 claim: TTD and no PPD: E.A. Wofford--	587
Determination: PTD: L. Wright-----	713
Determination: TTD and no PPD: T. Yates-----	681
Determination on 1968 ankle claim: TTD and 10%: S. Davis---	256
Determination on 1971 ankle claim: 10% and reopened: L. McKinnis-----	73
Determination on 1960 arm claim: TTD and no PPD: C. Brewster-----	560
Determination on 1964 arm claim: 70%: E. Hickey-----	696
Determination: TTD and 30% arm: J. Mizar-----	528
Determination on 1966 back claim: 50% arm and no TTD: F. Barnette-----	97
Determination on 1955 back claim: TTD and PTD: E. Brockett--	153
Determination on 1972 back claim: TTD: G. Christensen-----	684
Determination on 1963 back claim: TTD only: K. Dillon-----	78
Determination on back claim: TTD: K. Gubrud-----	361
Determination on 1972 back claim: 10%PPD: A. Hanksaker----	267
Determination on back claim: TTD and 5%: N. Jarvis-----	462
Determination on 1969 back claim: TTD only: L. Jones-----	53
Determination on 1973 claim: 15% back, 5% foot, and TTD: D. Langan-----	410
Determination on 1968 low back claim: TTD: L. Sapp-----	291
Determination on 1973 back claim: TTD and no PPD: D. Tarter-----	631
Determination on 1972 low back claim: TTD and 15% neck: I. Young-----	475

OWN MOTION JURISDICTION

Determination: PTD for impairment of consciousness and unemployability: R. Spurgeon-----	471
Determination on 1969 finger claim: TTD: D. Holland-----	395
Determination on 1973 foot claim: TTD: K. Barrett-----	377
Determination: TTD and 5% foot: E. Gage-----	695
Determination on 1974 foot claim: TTD only: H. Young-----	87
Determination: TTD and no PPD for forearm claim: R. Gregor-----	497
Determination on hand claim: TTD and no PPD: G. Wilson----	493
Determination on 1970 head claim: TTD and 30%: C. Mills----	341
Determination on 1966 hip claim: TTD only: T. Raz-----	197
Determination on 1971 knee claim: TTD and 5%: B. Bush-----	253
Determination on 1972 knee claim: TTD and 20% leg: R. Childress-----	387
Determination on 1961 knee-eye claim: TTD only: J.H. Elwell-----	9
Determination on 1962 knee claim: TTD and 60% PPD: R. Gemmell-----	99
Determination on 1969 knee claim: TTD only-----	100
Determination on 1971 knee claim: TTD, TPD, and 30% leg: T.O. Keen-----	130
Determination on 1969 knee claim: TTD and 25%: F. Lyon----	130
Determination on 1973 knee claim: 10% leg and TTD: L. Payn----	310
Determination on 1969 knee claim: TTD: M. Rose-----	300
Determination on 1963 knee claim: TTD and 15%: O. Rosin----	135
Determination on knee claim: TTD and no PPD: B. Walls-----	454
Determination on 1959 leg claim: TTD and no PPD: G. Anderson-----	248
Determination on 1964 legs claim: PTD: A.J. Brugato-----	431
Determination on 1971 leg claim: TTD and 20%: B.O. Casper----	561
Determination on 1967 leg claim: 15%: G. Cooper-----	6
Determination on 1972 leg claim: TTD, TPD, and 30% PPD: V. Crowder-----	50
Determination on 1969 leg claim: TTD only: D. Dickenson----	322
Determination: TTD and 25% leg: D. Fast, JR.-----	549
Determination: TTD only for leg claim: E. Fletcher-----	664
Determination on 1967 leg claim: TTD only: R. Haines-----	127
Determination on 1972 leg claim: TTD and 20 PPD: A. Lapping-----	528
Determination on 1966 claim: TTD and 10% leg: R. Piefer----	492
Determination on 1962 leg claim: TTD only: N. Randall-----	101
Determination on leg claim: TTD and no PPD: M. Socia-----	533
Determination on 1972 leg claim: TTD and TPD only: N. Wilson-----	494
Determination: 75% leg and no unscheduled back: N. Wilson-----	494
Determination on 1973 neck claim: TT and additional 15%: D. Johnson-----	579
Determination on 1970 pelvis-collarbone-wrist, etc. claim: TTD: R. Yarberry-----	436

OWN MOTION JURISDICTION

Determination on shoulder claim: TTD only: D. Zucher----- 88
Determination on 1974 wrist claim: TTD and 10%: R. Hefflin- 80
Determination on 1968 wrist claim: TTD, TPD and 20%:
 L. Steele-----279
Dismissed 1972 and 1977 back claims: one withdrawn, other
 settled: W. Craig-----574
Order abated for provision of additional evidence:
 K. Waring-----405
Ordered 1972 claim be considered according to 11-7-80
 order that dealt also with 1975 claim:
 J. E. Robertson-----430
Order confirmed on reconsideration of 1972 back claim:
 A. Handsaker-----267
Reaffirmed earlier (8-14-80) order to deny reopening:
 B. Foss-----324
Reinstated earlier (9-22-80) order to reopen claim:
 A. Keith-----667
Reconsidered claim on basis of evaluation Div. of W.C.
 Dept. recommendation: R. Spurgeon-----471
Reconsideration denied: R. Bult-----512
Referred 1960 claim for hearing: L. Marin-----675
Referred 1971 claim for hearing: F. Nahorney-----580
Referred 1974-75 claim for hearing: F. Ozan-----521
Referred claim for hearing: L. Payn-----191
Referred 1971 claim for hearing: B. Weathers-----58
Referred 1971 and 1980 claims for consolidated hearing:
 L. Bruce-----511
Referred 1975 claim for consolidated hearing: J. Hunt-----431
Referred 1972 claim for consolidated hearing: S. Kaser-----520
Referred 1969 and 1976 claims for consolidated hearing:
 T. Riske-----178
Referred 1968-79 injuries for consolidated hearing:
 R. Rogers-----532
Referred 1968 claim for consolidated hearing with 1980
 claim: C. Spooner-----585
Referred 1966 back claim for hearing: F. Barnette-----455
Referred 1973 back claim for hearing: R. Boggs-----333
Referred 1973 back claim for hearing: H. Browning-----615
Referred 1967 back-leg claim for hearing: J. Fritz-----325
Referred 1976 back claim for expedited hearing: W. Mabe---234
Referred 1971-72 back claims for consolidated hearing:
 D. Meyers-----299
Referred 1971-78-80 back claim for consolidated hearing:
 C. Ohler-----271
Referred 1970 back claim for consolidated hearing:
 R. G. Sanchez-----2
Referred hernia occupational disease for hearing:
 A. Wyttenberg-----694
Referred 1972 knee-finger-psychiatric claim for hearing:
 R. Nash-----414
Referred 1974 knee claim for expedited hearing: L. Ryan---301

OWN MOTION JURISDICTION

Referred leg-back claim to evaluation division: E. Greve---	696
Referred occupational disease - back-shoulder claim for consolidated hearing: M. Gotchall-----	360
Referred 1975 poisoning claim for consolidated hearing: J. Dawley-----	7
Referred 1975 shoulder claim for consolidated hearing: J. Robertson-----	430
Referred shoulder-neck claim for hearing: T. Smith-----	471
Reopened 1970 claim following hearing: R. Bult-----	512
Reopened claim: I. Cornelius-----	535
Reopened 1969 claim: G. Freeman-----	737
Reopened 1955 claim: S. Lindsley-----	618
Reopened claim: J. Marley-----	372
Reopened 1970 claim: B. Martin-----	579
Reopened 1974 claim: B. McMahon-----	690
Reopened 1971 claim: J. Melcher-----	564
Reopened 1974 claim: J. Quinterous-----	698
Reopened 1974 claim: I. Phipps-----	466
Reopened 1971 claim: C. Plummer-----	176
Reopened claim: D. Stevens-----	452
Reopened 1969 claim: J. Turnbull-----	680
Reopened 1972 arm claim: R. Gregor-----	497
Reopened 1974 claim for arthrotomy surgery: C. Johnson----	625
Reopened 1974 back claim: P. Ayo-Williams-----	319
Reopened 1970 back claim: P. Buchanan-----	384
Reopened back claim: L. Peterson Cody-----	495
Reopened 1968 back claim: H. Curry-----	226
Reopened 1956 back claim: D. Davis-----	389
Reopened 1973 back claim; with evaluation Div. to make PPD recommendation: J.J. Devoe-----	390
Reopened 1974 back claim: C. Fahy-----	337
Reopened back claim: N. Jarvis-----	462
Reopened back-hernia claim: W. Lane-----	293
Reopened 1971 back claim: J. McCool-----	697
Reopened 1971 back claim: J. Oxford-----	243
Reopened 1972 back-leg claim: R. Parrott-----	2
Reopened 1973 back-neck claim: G. Peyton-----	244
Reopened 1962 back claim: W.C. Smith-----	401
Reopened 1973 back claim: S. Soulder-----	211
Reopened eye claim: C.W. Smith-----	401
Reopened 1966 foot claim: H. Bodda-----	98
Reopened 1952 foot claim: O. Christopher-----	685
Reopened 1972 foot claim: C. Williams-----	140
Reopened 1972 foot-knee claim: N. Wilson-----	494
Reopened herniated disc claim: H. Stanton Lovell-----	520
Reopened 1949 hip claim: O. Barlow-----	74
Reopened 1947 hip claim: P. Carrol-----	95
Reopened 1971 hip-leg claim: J. Grover-----	433
Reopened 1971 knee claim: E.G. Fletcher-----	664
Reopened 1972 knee claim: J. Foley-----	95
Reopened 1961 knee claim: H. Howell-----	241

OWN MOTION JURISDICTION

Reopened 1974 knee claim: D. Machin-----	72
Reopened 1973 knee claim: M. Socia-----	533
Reopened 1971 knee claim: B. Rattay-----	619
Reopened 1973 leg-ulcer claim: K. Waring-----	405
Reopened 1972 neck claim: P. Kezar-----	270
Reopened 1974 shoulder claim: N.J. Chasteen-----	638
Reopened 1975 shoulder claim: D. Johnson-----	579
Reopened 1972 shoulder-arthritis claim: J. Sullivan-----	345
Reopened 1972 Claim for subtalar joint surgery: P. Johansen-----	617
Reopened 1971 claim for thoracic outlet syndrome surgery: N. Freeman-----	664
Reopened 1972 thumb claim: J. Bradford-----	45
Reopened 1973 toe claim: D. Neville-----	58
Reopening of 1973 claim withheld pending further information: G. Nordling-----	583
Reopening of 1950 claim withheld pending further information: D. Wilson-----	586
Revoked order of 8-14-80 and referred claim to evaluation division: L. Simmons-----	400
Withdrew August order and remanded claim to carrier: A. Potterf-----	275
Withheld consideration pending out-of-state claim: F. Mahoney-----	371

PENALTIES AND FEES

Additional fee awarded for review: P. Moyer, Sr.-----	295
Award affirmed for unreasonable resistance to payment of medical bills: O. Harmon-----	479
Award improper: Claimant voluntarily agreed to repay overpayment: L. Brault-----	378
Awarded for late iterim TTD, denial: R. Collier-----	591
Awarded for late signing of 801; failure to pay interim benefits: D. Davis-----	648
Award reversed where denial of aggravation affirmed: E. Bolliger-----	548
Amendment to order on review fixing fee: M. Torhan-----	524
Attorney fee based on percent of increased compensation, not flat fee: J. Johnson-----	463
Attorney fee for supreme court review must be ordered by that court. D. Rogers-----	441
Carrier not unreasonable in its refusal to pay TTD where surgery after job terminated: H. San Miguel-----	547
Date changed for penalty period, on reconsideration: M. Myers-----	329
Defacto denial to attorney within 14 days held reasonable: G. Goodman-----	234
Delay in TTD benefits unreasonable: R. Howerton-----	728
Denied; order of suspension due partly to claimant's fault: P. Barrett-----	654
Denial of fees reaffirmed where Referee's order reinstated: A. Boyce-----	334
Denial reasonable; but unreasonably delayed: oenalty imposed: G. McDonald-----	374

PENALTIES AND FEES

Fee denied where no service provided at Board level:	
E. Radmacher-----	330
Dispute between attorney, referee to be decided in	
circuit court: T. Ganger-----	32
Failure to comply with penalty results in second penalty:	
J. Jaeger-----	363
Penalty and fee assessed for denial, issued 10 days late:	
K. Annen-----	5
Jurisdiction to consider fee dispute avoided by affirming	
fee: A. Bliton-----	757
Fee increased to include hearings level efforts:	
N. Bluhm-----	590
No additional fee for successful appeal to court of appeals:	
A. Boyce-----	334
Request for extraordinary fee denied: no documentation:	
C. Clapp-----	633
Order amended to include attorney's fee: J. Coffield-----	754
No fee where claimant appeals and loses: P. Davis-----	662
None awarded for time loss payment made one day late:	
R. Ellison-----	601
Order amended to include fee for Board review: S. Forgacs---	604
Maximum penalty imposed for refusal to pay interim	
compensation; untimely denial: P. Goodwin-----	258
No order proper where issue dropped at hearing:	
M. Hathaway-----	550
Penalty reversed for failure to pay TTD where doctor's	
report confusing: N. Holcomb-----	394
None awarded; no statutory basis for unreasonable denial:	
J. Hyde-----	641
No penalty on penalty can be imposed: J. Jaeger-----	363
Penalty for unreasonable delay by denial reversed:	
N. LeDoux-----	411
Penalty imposed for overpayment offset under stipulation	
which did not acknowledge overpayment: R. Leone-----	425
Increased on reconsideration: M. Lopez-----	563
Failure to reopen claim unreasonable, but penalty	
reduced: T. McCullom-----	56
Fee awarded by amendment for Board review: T. Moore-----	564
25% penalty awarded on interim compensation not paid:	
M. Myers-----	329
Fee not increased where Board, not attorney, efforts	
increased award: R. Nelson-----	677
Fee awarded where no reasonable basis for appeal:	
R. Rabern-----	584
Fee for hearing, board review ordered: D. Rogers-----	441
No entitlement to fee out of subsequent awards:	
J. Simmons-----	501
No penalty, fee, where no compensation owed: P/ Stevens----	620
Penalty for failure to process claim, fee for win on	
appeal affirmed: W. Teal-----	706
Fee reduced: case not complicated: B. Wagner-----	719
Nominal fee awarded for slightly modified order:	
G. Woosley-----	653

PERMANENT PARTIAL DISABILITY

- (1) Arm & Shoulder
- (2) Back
- (3) Foot
- (4) Hand
- (5) Leg
- (6) Neck & Head
- (7) Unclassified

(1) Arm & Shoulder

10% arm affirmed; 10% shoulder reversed: M. Flint-----286
40% affirmed; shoulder condition not related: R. Hampton----708
50% affirmed: R. Howerton-----728
Award was for injury to arm, not hand: L. Hunt----- 64
10% affirmed; no PTD because of psychiatric problems:
D. Meddleton-----733
30% award for left shoulder, neck conditions; right
shoulder unrelated: R. Nelson-----677
Reduced to 25% for middle-aged, 8th grade, laborer: N. Olds-416
40% shoulder reduced to 20% poor motivation,
exaggerated symptoms: R. Parker-----537
70% thumb increased to 30% forearm: P. Trempel-----711
Determination order reinstated for forearm injuries:
S. Walley----- 29

(2) Back

10% increased to 50% for strain superimposed on severe
degenerative process: P. Andrews (Fife)----- 59
75% increased to PTD: poor education, good motivation
heavy labor experience: D. Arnett-----734
Award reduced to 60%; efforts to reduce disability
deficient: D. Blank----- 41
10% award reversed where no loss of wage earning capacity:
L. Brault-----378
10 increased to 25% young claimant cannot return to
heavy labor; strong dissent. P. Brown-----103
None awarded where no loss of earning capacity shown:
R. Brown----- 89
30% affirmed for middle-aged sheet metal worker: D. Burch---385
100% increased to PTD for illiterate manual laborer:
C. Burleson----- 16
10% increased to 20%: chronic moderate pain. J. Clarke-----476
50% reduced to 30% based on age, education and experience:
G. Costa----- 46
75% reduced to 50% based primarily on medical evidence:
E. Cox-----187
75% reduced to 50%: 57 year old construction worker, GED:
H. Cummings-----457
35% awarded: two surgeries, secretarial training: K. Dunn---157
20% reduced to 10% for minimal disability: N. Fain-----358
Increased to 50%; pulmonary condition not considered:
R. Gurney
60% reversed; D.O. affirmed where serious prior injuries:
M. Harris-----701

(2) Back

30% award affirmed for multiple injuries in young driver:	
B. Harrison-----	19
25% affirmed for middle aged carpenter with mild	
impairment: J. Hayter-----	605
Reduced to 15% based on medical, work experience:	
S. Henthorne-----	22
45% reduced to 30% limited education, heavy labor	
precluded, poor motivation: H. Hetland-----	758
30% affirmed; 20% arm added: R. Hileman-----	702
20% decreased to 10% where returned to same work:	
T. Jacobs-----	616
35% reduced to 25%: retrained, high school education,	
pre-existing disability. Jo Jenkins-----	129
None awarded; affirmed on review: J. Johnson-----	463
25% reduced to 15% where doing pre-injury work:	
D. Kemery-----	54
Reduced to 80%; no PTD where seeking retirement:	
E. Knight-----	142
60% award affirmed: physical disability not equal to	
loss of earning capacity: J. Kappert-----	508
10% increased to 25% for young heavy laborer precluded	
from heavy labor: R. Lane-----	398
40% reduced to 25% for middle aged laborer precluded	
from heavy work: B. Langford-----	424
35% reduced to 25% for truck driver: M. Lawrence-----	298
70% affirmed; claimant unwilling to attempt work:	
E. McClellan-----	675
60% reduced to 40% for middle aged man, GED, poor	
motivation: L. McGhee-----	604
Reduced to 35% based on lack of motivation, age, 9th	
grade education: L. Mitchell-----	121
25% for two injuries affirmed: T. Mitchell-----	611
5% neck, 5% back affirmed; 54 years old, semi-skilled	
laborer: M. Myers-----	329
85% affirmed: pre-1977 case requires showing of	
motivation: L. Palandri-----	429
70% affirmed: poor motivation: J. Palmer-----	750
60% affirmed: poor motivation prevents PTD finding:	
F. Peters-----	565
Determination order reinstated where conservative	
treatment, no objective findings: A. Rentaria-----	122
60% reduced to 40% on widow's claim: W. Shipman-----	722
100% reduced to 60%: complicated conditions aggravated	
by work: A. Siems-----	158
70% reduced to 50%; no PTD based on medicals, motivation:	
G. Smith-----	109
30% reduced to 20%: minimal objective disability: T. Sutton-----	331
20% increased to 50% for bak & hip; movtivation poor:	
M. Tohran-----	452
Reduced to 15% for overweight well-educated unmotivated	
female: C. Tucker-----	111
Award increased to 20%: middle-aged part-time aide:	
J. Turner-----	346
30% reduced to 15%: no hospitalization, little lost	
earning capacity: W. Vain-----	707

(2) Back

Reduced to 35%; 20 years, 11th grade education: D. Vitro----163
40% increased to 50% for older, uneducated manual
laborer: S. Wadley-----69
30% reversed: any permanent impairment not due to
injury: F. Walker-----731
10% awarded for minimal impairment: V. Wise-----570

(3) Foot

10% loss leg changed to 10% loss of foot: J. Hills-----490
10% affirmed for phlebitis flareups: K. Kraft-----597
35% reduced to 20% based on loss of function: M. Simila-----584

(4) Hand

50% reduced to 25% based on medical, lay testimony:
K. Adams-----282
15% each hand affirmed: Reynaud's syndrome: M. Hathaway-----550
35% reduced to 25% based on medical evidence: W. May-----440

(5) Leg

25% reduced to 15% overweight claimant stressing knee:
C. Fellows-----18
50% reversed to 15% leg: works on feet all day:
M. Gibbs-----478
D.O. affirmed: hip injury limited to scheduled PPD:
P. Hart-----423
Reduced to 30% paramount consideration is impairment:
D. LeFrancois-----174
35% reduced to 15% where minimal loss of function:
T. Riddle-----755
20% leg, 10% psychological affirmed: B. Wagner-----719
10% increased to 20% for surgical weakening of knee:
L. Watson-----218

(6) Neck & Head

20% reduced to 10%: subjective complaints: C. Ashe-----198
Award reversed for injury to neck, shoulder:
Z. Culbertson-----356
20% increased to 25%: no work above should level:
R. Gonzalez-----169
70% reduced to 50%: very limited neck motion:
C. Gustafson-----259
15% awarded for minimal disability, few limitations:
D. Morton-----529

(7) Unclassified

Issue lost at hearing: remanded to referee for finding:	
C. Black -----	746
70% reduced to 50% over dissent: poor motivation,	
bad lungs: R. Geisler-----	43
60% awarded where heart condition permanently worsened:	
H. Jones-----	687
5% reversed where no PPD shown: J. Mason-----	730
20% increased to 40% based on medical evidence: J. Moore----	66
80% psychological reversed: "dry" aggravation not	
compensable: G. Plane-----	691
25% reduced to 15%: R. Porter-----	484
Hearing loss reduced to 31.87% based on administrative	
guide lines: J. Putnam-----	108
60% reduced to 40% for respiratory problems: R. Shields-----	136
80% award for groin injury affirmed: dissent argues	
PTD: T. Timonen-----	162
35% unscheduled PPD awarded for contact dermatitis:	
A. Woodfin-----	281

Procedure

WCD has authority to suspend benefits by non-cooperation	
with Callahan center: C. Andrews-----	14
On reconsideration, Board's order affirmed: N. Anlauf-----	30
Motion to include overpayment issue or remand for	
additional evidence denied: M. Arata-----	350
Motion to dismiss denied despite lack of appellant's	
brief: R. Atkins-----	573
Motion to re-open record denied: R. Barnett-----	319
Amendmend:date of order is 4/22/81: W. Batdorf-----	613
Order of dismissal final unless appealed within 30	
days: G. Beus-----	353
On reconsideration: award for TTD affirmed: M. Bluhm-----	540
Order on review abated for reconsideration: E. Bolliger-----	548
Claimant may voluntarily repay overpayment: L. Brault-----	378
Carrier may request claim closure where failure to show	
for closing exam: L. Brault-----	378
Late appeal from denial excused where good cause shown:	
remanded: R. Brown-----	89
Case remanded to hearings for further proceedings:	
S. Bunch-----	495
Date of order amended: C. Clapp-----	633
Order on review affirmed on reconsideration: Psychological	
problem unrelated to injury: A. Colbert-----	488
On reconsideration, PPD award reinstatedL W. Cole-----	242
Amendments to order on review: P. Corbett-----	140
Remand to referee for further evidence where no	
opposition: G. Crippen-----	320
Order denying remand was interim order; no appeal rights:	
W. Dethlefs-----	188
Board appeal not dismissible where no brief filed:	
T. Dorsey-----	336

Procedure

Request to withhold review for additional evidence	
denied: G. Everts-----	228
Order on review abated during reconsideration:	
H. Fleishman-----	323
Where denial reversed, not determination of time loss,	
PPD, by referee: H. Fleishman-----	403
Reconsideration: order on review affirmed: H. Fleishman-----	536
Order of dismissal amended to include attorney:	
S. Fountain-----	639
Order abated for consideration of remand: D. Gobler-----	650
Amendment: G. Goodman-----	234
On reconsideration Board's order affirmed: H. Hamilton-----	106
No need for referee to consider legal theory not	
advanced by parties L. D. Hanner-----	460
Remand to referee for further evidence: L. Harry-----	14
Motion for reconsideration denied: L. Harry-----	142
Order amended to include attorney's fee: D. Hart-----	204
Where aggravation, new injury cases not consolidated,	
appeals proceed independently: R. Haskell-----	128
Order of abatement to allow reconsideration: G. Hawke-----	33
On reconsideration Board's order affirmed: G. Hawke-----	91
Within year of non-disabling injury claimant need only	
prove condition disabling: C. Helmick-----	624
Insurer cannot stipulate to reopen claim after	
aggravation rights run: P. Holmstrom-----	70
Claimant cannot appeal from own motion determination:	
P. Holmstrom-----	70
Carrier can elect to request reconsideration of PTD	
or hearing, not both; dissent: W. Hopson-----	172
Motion to strike late appellant's brief granted: A. Howard--	713
Prior order abated for reconsideration: G. Hunter-----	434
Order on review affirmed on reconsideration: G. Hunter-----	561
Occupational disease claim timely filed where attorney	
advised of compensability: S. Johnson-----	491
Order of abatement to allow reconsideration brief:	
A. Keith-----	667
Premature claim closure issue may be raised before	
Determination order: R. Klum-----	668
Amendment: E. J. Knight-----	142
Interim compensation due only if employer has knowledge	
of inability to work: E. LaBells-----	738
Case remanded for taking of post-hearing evidence:	
J. Laughlin-----	328
Party estopped to assert res judicata where false	
representation made: A. Logan-----	627
Unclear order amended on TTD, PPD: G. Lucas-----	143
Request for dismissal denied: New determination order	
does not make PPD appeal moot: L. McGehee-----	609
Motion to reconsider own motion order denied:	
J. Marley-----	236
Cases not closed by determination order closed when	
requested: J. Moore-----	66
Order abated for reconsideration: T. Moore-----	499
Order on review abated for reconsideration: D. Morton-----	529
Order on review abated for reconsideration: B. Painter-----	583

Procedure

Appellant's brief filed after closing date stricken:	
S. Patterson-----	630
Own motion matter and hearing on extent bifurcated: L. Payn-	310
Amendment for attorney's fee: B. Prater-----	147
Briefing schedule extended in aggravation/ new injury	
cases: E. Rios-----	148
Claimant need not attend hearing: B. Rogers-----	532
Denial issued after .307 order did not alter.307	
proceeding: R. Saunders -----	538
Unreasonable refusal to attend Doctor's appointment	
results in suspension of TTD: B. Savage-----	311
Remand for further evidence: K.Smith-----	110
Motion to dismiss denied: R. Spillers-----	12
Request for reconsideration denied: P. Stevens-----	620
Order on reconsideration: claimant's contentions	
without merit: G. Stose-----	558
Carrier aware of non-delivery of denial letter, should	
take further steps to deliver: T. Truesdale-----	304
Referee cannot remand for processing and determine	
PPD simultaneously: E. Wallace-----	316

Remand

Motion granted where no opposition: J. Albert-----	589
Court of appeals case remanded for further evidence:	
M. Shaw-----	343
Supreme Court case remanded for further evidence	
D. Woodman-----	348
Supreme court affirmed Board: A. Bell-----	166
Referee's order reinstated: 20% PPD for head injury:	
F. Billings-----	167
Referee's order reinstated by order of Court of Appeals:	
B. Clark -----	708
Case remanded to referee for determination of extent:	
B. Colwell-----	225
Request denied: additional evidence obtainable before	
hearing: W. Dethlefs-----	188
Supreme Court case remanded to Board: PTD reduced to 60%:	
H. Gettman-----	337
Case remanded from Court of Appeals for new hearing:	
D. Higgins-----	326
Case remanded where referee failed to rule on central issue:	
R. Morris-----	629
Case remanded from Court of Appeals to Evaluation Div:	
R. Pederson-----	646
Order on review affirmed by Court of Appeals: P. Pemble----	176

Reconsideration

Order on review reaffirmed: psychological condition not	
compensable: G. Barlas-----	723

Reconsideration

Order on review modified to allow offset of TTD: T. Moore---580
Order on review affirmed: K. Larsen-----730
Order on review abated for reconsideration: M. Peterson----717

Request For Hearing

Good cause for late filing" pursuit of claim against other
carrier as suggested by first: C. Lowden-----642
Good cause for late filing: none shown where claimant
assumed attorney got copies of denial: E. LaBella-----738
Evidence of good cause for late filing to be heard on
remand: D. Kelley-----715
Good cause for late request: attorney's employee's
negligence: D. Kelley-----715
Late filing excused where two denials, two insurance
companies: J. Griffin-----593
Good cause for late filing: none shown: Dissent:
C. Black-----746

Request For Review

Board won't use own motion authority to accept untimely
Request for Review: T. Knowles-----674
Dismissed: B. Noice-----436
Dismissed where carrier contest own motion
recommendations: G. Freeman-----664
Dismissal: claimant's brief not received: S. Chochrek-----732
Dismissed: claimant did not respond in time unit:
W. Wassing-----92
Dismissed: not timely filed: M. Miller-----414
Dismissed: not timely: D. Mitchell-----481
Dismissed: order is non-appealable: J. Clark-----733
Dismissed: referee's order not final: L. Barnett-----502
Dismissed: referee's order not final: B. Painter-----583
Dismissed: service on parties not timely: B. Rupp-----556
Dismissed: Request copies not sent to all parties on
time: E. Gibson-----63
Dismissed: untimely request: T. Knowles-----738
Dismissed: withdrawn: D. Scott-----705
Dismissed: withdrawn: V. Shackelford-----523
Dismissal amended: K. Ward-----197
Dismissal rescinded: B. Rupp-----556
Dismissed: withdrawn: O. McKenzie-----677
Dismissed: withdrawn: R. Anderson-----699
Motion to dismiss denied: Insurer served. L. Cole-----513
Motion to dismiss denied: Request for Review timely:
A. DelRio-----522
Motion for dismissal denied: Request timely filed
upon mailing: R. Geisert-----43
Motion to dismiss denied: employer served with notice
of appeal: V. Shackelford-----706
Must be served on Board only within 30 days: B. Rupp-----523
No dismissal for failure to file brief: A. Colbert-----488

Request For Review

No dismissal for failure to file brief: M. Edwardson-----	726
No dismissal for failure to file brief: G. Stose-----	558
Order of dismissal vacated: G. Muehlhausen-----	343
Timely made where denial received late: T. Truesdale-----	304
Withdrawn: C. Blair-----	638
Withdrawn: R. Borders-----	560
Withdrawn: N. Brauer-----	433
Withdrawn: G. Gleason-----	391
Withdrawn: L. Gonce-----	392
Withdrawn: J. Hull-----	519
Withdrawn: L. Jones-----	53
Withdrawn: P. Kirby-----	292
Withdrawn: R Klinebough-----	11
Withdrawn: M. Mabou-----	235
Withdrawn: G. Muehlhausen-----	343
Withdrawn: F. Negus-----	565
Withdrawn: G. Renolds-----	521
Withdrawn: B. Walker-----	483
Request for review withdrawn: K. Ward-----	197
Withdrawn: B. Washington-----	150
Withdrawn: J. Wecker-----	586

Stipulations & Settlements

Discussion of stipulations made after aggravation	
rights run: J. Davis-----	575
No deduction of overpayment premitted where not	
stipulated to: R. Leone-----	425
Stipulation entered into under claimant's false	
representation not res judicata: A. Logan-----	627
Stipulations not set aside unless inadequate on face	
of record: S. Fountain-----	359

Temporary Total Disability

Award reversed where claimant stionary, with subjective	
complaints only: K. Larsen-----	730
Benefits end on date claimant told she is stationary	
under unusual facts: R. Hampton-----	708
Claim remanded for processing as disabling injury:	
W. Simmonds-----	180
Where claimant refuses to keep doctor's appointment,	
TTD suspended: B. Savage-----	311
Interim compensation must be retroactive to receipt of	
801 unless denied in 14 days: G. Turley-----	211
Where medically stationary, then reopened for surgery,	
no interim TTD due: W. Streeter-----	314
o additional awarded to very uncooperative claimant:	
R. Ellison-----	601
No additional awarded" medically stationary date proper:	
J. Hayter-----	605

Temporary Total Disability

No additional award, claimant stationary: S. Henthorne----- 22
No requirement to pay interim compensation until
 medical verification: G. Turley-----211
No time loss before placement in authorized Vocational
 Rehabilitation Program: W. Flisram-----515
Payable from date aggravation claim made, not later
 date: M. Bluhm-----590
Precluded after effective date of voluntary retirement:
 C. Fletcher-----685
Two years' TTD awarded with no penalty where reports
 unclear: W. Teal-----706
Unilateral termination proper where release to
 regular work: E. Cortez-----200

Total Disability

Affirmed for heart condition; no denial of condition at
 hearing to base attorney's fee on. A. Rautio-----717
Affirmed for teacher with multiple injuries: J. Jaeger-----363
Award increased; teacher with severe neck, psychological
 conditions: W. Poole-----133
Awarded for 48 year old, 4th grade education, heavy
 laborer with good motivation: J. Turnbull-----680
Awarded for illiterate, manual laborer with limited
 back: C. Burleson-----16
Awarded with reminder that client has responsibility
 to reduce disability: C. Clapp-----633
Reduced to 75%; no reasonable effort to find light
 work: R. Bozarth-----113
Reduced to 60%: claimant chose to retire: H. Gettman-----694
Reduced to 75% for active claimant earning through
 investments: R. Harris-----339
Reduced to 65% leg: psychiatric, osteoarthritis
 conditions unrelated: L. Partridge-----598
Reduced to 50%: claimant chose to retire: H. Peterson-----273
Reduced to 80%: poor motivation: V. Rasmussen-----276
Reduced to 65%: fireman with poor motivation: T. Rudolphi-----704
Reduced to 60%: rheumatoid arthritis not aggravated by
 injury; poor motivation: W. Schaecher-----466
Reduced to 75% psychological condition unrelated, GED,
 30's: P. Silveira-----208
Reduced to 60%: Well-educated heavy laborer: B. Stotesbury--182
Reversed: claimant chose to retire: J.R. Smith-----446
Reversed: matter was ripe for own motion determination:
 L. Wright-----713

VOCATIONAL REHABILITATION

Referee not authorized to direct providisional suitable
vocalational rehabilitation program: J. Clarke-----476
Transportation expenses for college program allowed:
J. Meeker-----645
Claimant vocationally handicapped: Field services to
reimburse cost of education: T. Moore-----564
Severely reduced wage post-injury is not "reasonable
wage" under OAR-438-22-304: T. Moore-----580

NAME	WCB NUMBER	PAGE
Acree, Marshall	79-8521	165
Adams, Karl W.	79-5278	282
Adamson, Lorraine	80-1338	524
Albert, Joseph	79-9720	589
Alderson, Howard	81-0035M.D 68938	526
Allen, Rickey D.	79-665	246
Amrhein, William John	79-9808	150
Anderson, George W.	Ka 72 46 27	248
Anderson, Marvin	79-10, 193	317
Anderson, Robert T	80-09915	699
Andrews, Charles F	78-9575	14
Andrews, Patricia	79-2180	59
Anlauf, Norman	78-431	30
Annen, Karl Jo	79-8982	5
Arata, Mark	79-9568	350
Arnett, Daniel W	80-03744	734
Arnett, Daniel W	80-03744	734
Ashe, Charles G.	796393	198
Atkins, Sandra	79-3505	573
Atwell, Craig E.	C 444778	502
Ayo-Williams, Paulette	D 61541	319
Barlas, Gus	78-03668 78-05218	635
Barlas, Gus	78-03668 78-05218	723
Barlow, Orin A.	A 141676	74
Barnett, Larry J.	80-5440	502
Barnett, Michael	79-10450	92
Barnett, Robert	79-11, 012 & 79-7210	319
Barnette, Franklin D.	49505	97
Barnette, Franklin D.	C 49505	351
Barnette, Franklin D.	GC 49505	75
Barnette, Franklin D.	C 49505	455
Barrett, Karl W.	Hc 464440	377
Barrett, Phillip	79-09391	654
Barrows, John	79-7211	13
Batdorf, Wayne	79-05894	757
Batdorf, Wyane	79-05894	613
Batson, Joyce	C 465282	614
Beeson, Seere E.	78-4951	511
Bell, Aldwyn C.	76-6895	166
Berke, Keith	CV 00800000	185
Berliner, Dennis E	79-9454	589
Bettendorf, Robert	A 335461	30
Beus, Gary	78-3125	353
Bigsby, Charles	78-9424	682

NAME

WCB NUMBER

PAGE

Bigsby, Charles	C 97536	683
Billings, Frank A.	79-1924	167
Black, Cecil	79-03984	746
Black, Raymond M.	79-9157	76
Blair, Clarence H	80-689	638
Blair, David D.	80-0001 M	407
Blank, Donald	78-7834	41

Bliton, Albert H.	80-01973	757
Bluhm, Myrl C	78-09709	590
Bluhm, Myrl C.	78-0709	503
Bluhn, Myrl C.	78-9709	546
Bodda, Harvey O.	52-862587	98
Boggs, Ruth P.	AK 390	333
Bolliger, Edwin A.	78-9001	475

Bollinger, Edwin A	78-9001	548
Borders, Robert C	79-9637	560
Boschsler, Gerald J.	C 42295	574
Boutin, Hannum	A 855419 C 199674	653
Boyce, Adrean T.	77-6519	334
Boyce, Adrian T.	77-6519	199
Bozarth, Richard d.	79-9159	113

Bradford, James M.	C 399673	45
Braget, Elmer	78-9760	31
Brauer, Norma L.	80-5060	433
Brault, Lanae	79-7108 & 78-7392	378
Brewster, Charles	GA 779323	560
Brockett, Ettis R.	A509799	153
Bronson, David L.	D 15827	382

Bronson, David L.	D.15827	290
Brooks, Michael A.	79-10, 425	534
Brosig, Dale	81-0017M	614
Brown, Dale C.	C 366457	494
Brown, Paul G.	79-9035	334
Brown, Phillip	79-8846	103
Brown, Ray	79-2895	89

Brown, Rhonda	78-9419	354
Browning, Harold	81-0053M	615
Bruce, Larry	80-9781 & 80-11,106	511
Brugato, Anthony J.	B 91918	431
Brugato, Tony Jack	B 91918	383
Buchanan, Patrick L.	C 228487	384
Bult, Richard	GC 242435	512

Bult, Richard A.	C 242435	355
Bult, Richard A.	Ca 242435	249
Bunch, Shirley Ann	78-4618	495

NAME	WCB NUMBER	PAGE
Burch, Dwane M.	79-4037	385
Burleson, Chester E	79-1333	16
Burns, Jere	79-05989	655
Bush, Bessie M.	TC 288027	253
Carlson, Beverly A.	79-8992	284
Carrol, Paul	A 49793	95
Casper, Bernard O	323765	561
Chasteen, Noble J	WD 51562	638
Chasteen, Noble John	D 51562	167
Childress, Richard C.	RC 383397	387
Chochrek, Stephen	80-05127	732
Chochrek, Stephen	80-05127	732
Christensen, Gary T	RC 388724	684
Christensen, Gary T.	RC 388724	46
Christopher, Ohman e.	A 310030	99
Christopher, Ohman E	A 310030	685
Church, John	HC 455427	184
Church, Sharron L.	79-7873	115
Clapp, Cleve E	78-04721	559
Clapp, Cleve E	78-04721	633
Clapp, Glenn	784721	543
Clark, Barbara	77-00013	708
Clark, James D	80-09920	733
Clark, James D	80-09920	733
Clark, Juanita	78-07194	699
Clarke, John A.	79-3146	476
Close, Robert	81-0080M	656
Cody, Lily Peterson	C 243139	495
Coffield, John	80-04245	656
Coffield, John W	80-04245	754
Colbert, Arye Nell	79-7258	549
Colbert, Arye Nell	79-7258	168
Colbert, Arye Nell	79-7258	488
Cole, Lee	80-1786	513
Cole, Wiley F.	79-10, 374	242
Collier, Rhoda Mae	80-640	591
Colwell, Barbara	79-22	225
Condon, Robert V	80-05218	620
Condon, Robert V.	79-8395	254
Cooper, George	AC 101733	6
Corbett, Phyllis I.	79-3260	140
Cornelius, Irene	AK 909	535
Cortez, Estrada H.	80-924	200
Costa, Gregory E.	79-5992	46
Cox, Elbert Wes	78-8667	187

NAME	WCB NUMBER	PAGE
Craig, William C	80-530	574
Cramer, Lynn	78-2647	154
Crippen, Gwendolyn	78-2939	320
Crooks, Raymond N	81-0075M	660
Cross, Louis	C-121906	575
Crow, Harold	80-02949 80-06809	661
Crow, James	81-0051M	536
Crow, James	81-0051M	615
Crowder, Virgie Mae	C356792	50
Cruchelow, Harry	79-4967-E	455
Culbertson, Zane	79-5162	356
Cummings, Herbert	80-778	457
Current, Edward R.	80-3905	437
Curry, Harold	C 153689	226
Cushings, Stearns	ZC 378279	457
Daris, Patricia J	79-10704	662
Daugherty, Ivan E.	79-2040 & 79-4874	226
Davidson, Richard A.	80-1001	513
Davis, Dorothy	A 535871	389
Davis, Doreen D	79-01032	648
Davis, Joseph	C604-14077	575
Davis, Robert A.	79-5551	321
Davis, Stuart J.	168-008	256
Dawley, Jeffery L	80-8104	7
Del Rio, Ada C.	80-10, 596	522
Densberger, Dora E	ZD 307161	8
Dethlefs, Walter J.	79-4604	188
Dethlefs, Walter J.	79-4604	127
Devoe, John J.	C 452228	390
Dickenson, Dowel	C 174885	322
Dillon, Kenneth L.	B18969	78
Dooley, Douglas	79-08349	723
Dooley, Douglas	79-08349	723
Dorsey, Terry	80-7029	336
Downham, Robert M.	79-7608	489
Dunlap, Raymond P	133 CB EO3 6584	616
Dunn, Katherine	78-9487	157
DuPont, Ruben F.	79-5584	168
Earley, Joseph F.	79-9710	202
Eastling, Harold	79-10662	663
Eber, James	79-4969 & 79-4048	257
Edwardson, Maurice L.	78-6123	188
Edwardson, Maurice L	79-06123	726
Edwardson, Maurice L	79-06123	726
Ellison, Robert	80-268	601

NAME	WCB NUMBER	PAGE
Elwell, John Henry	ZA 865987	9
English Kezar, Patricia L.	C604-13464	498
Evans, Geraldine	80-04669	727
Evans, Geraldine	80-04669	727
Everts, George A.	79-10,988	143
Everts, George A.	79-10, 988	228
Fahy, Curtis G.	D 3824	144
Fahy, Curtis G.	D 3834	337
Fain, Neil E.	79-9579	358
Farance, Robert D.	76-3579	51
Fast, Donald D	75000086	549
Fast, Donald D	75000086	496
Faust, Raymond E.	81-0012M	484
Fellows, Carol J	79-1763	18
Fisher, Eugene W.	C 88978	497
Fleishman, Herman	79-6548	323
Fleishman, Herman	79-6548	536
Fleishman, Herman	79-6548	403
Fletcher, Cecil R	80-03155	685
Fletcher, Emroy G	C 286853	664
Fletcher, Emroy G.	C 286853	1
Flint, Mark W.	79-4715	286
Flisram, Wayne	79-6815	515
Florence, A. L.	79-860 & 79-966	458
Flower, Jerald Paul	79-7117	305
Foley, James	C 369629	95
Forgacs, Sandor	79-09869	604
Fosdick, David R	79-04269 & 79-08883	686
Foss, Barbara	B 66126	145
Foss, Barbara	B 66126	324
Fountain, Stanley	79-07643	639
Fountain, Stanley	79-7643	359
Franks, William A.	C 322560	526
Freeman, Gerald C.	78-07527	737
Freeman, Nadine	80-0005M	664
Freeman, Nadine	80-0005M	592
Freeman, Gerald	78-07527	736
Fritz, Jerry	D53-122693	325
Gage, Ernest	C 363657	527
Gage, Ernest	C 363657	695
Gallea, Cindy	80-7747	407
Ganger, Tonne	79-6818. 79-6817	32
Ganzalez, Reynaldo	79-8856	169
Geisert (Deceased), Robert	C79-8218	391
Geisler, Robert J.	79-5777 80-308	43

NAME	WCB NUMBER	PAGE
Gemmell, Roscoe	KD 99866	79
Gemmell, Roscoe	A 903544	99
George, Claudia	79-8388 & 79-5430	306
Gerlitz, Roland E.	HC 210898	100
Getman, Gary A	80-05930	694
Gettman, Harry	78-4221 & 78-4222	337
Gibbs, Marvin K.	80-1789	478
Gibson, Elsie	80-399	63
Gleason, Gregory, G.	79-3393 & 80-5377	391
Gobler, Dianna	79-03896	650
Gonce, Larry	79-8899	392
Goodman, Gary Y.	78-2698	170
Goodman, Gayle Y.	78-8225	234
Goodwin, Patricia Ann	79-4401	258
Gordon, David W.	80-7560	516
Gotchall, Mary A.	WCB 80-9494, et. al.	360
Gray, Delbert D	GC 449993	10
Gregor, Robert	C 364445	349
Gregor, Robert	C 364445	497
Greve, Everett W	81-0026M	696
Griffin, James	79-10,206 79-8314	593
Grover, James L.	806366	433
Grover, James L.	80-6366	392
Gubrud, Keith	WD 3632	361
Gurney, Ray	79-2457	141
Gustafson, Charles	79-5734	259
Haines, Robert J.	YC 69382	127
Haley, Kent L.	79-4345	260
Hamilton, Harold	79-6586	106
Hampton, Ruby J	79-08164	708
Handsaker, Alfred	C 377803	52
Handsaker, Alfred	C 377803	267
Hanner, Delores A.	79-6689	450
Harmon, Orry W.	80-742	479
Harris, Earl L.	80-2710	438
Harris, Miner	79-09167	701
Harris, Rex	79-7093	339
Harrison, Billy Joe	79-3659	19
Harry, Linda Lee	78-730	14
Harry, Linda Lee	78-730	142
Hart, Deborah A.	79-8019 & 79-9018	204
Hart, Paul L.	77-3225	423
Haskell, Richard	80-932	128
Hathaway, Michael L	79-6216	550
Hawke, Gerald	78-4018 77-7564	33

NAME	WCB NUMBER	PAGE
Hawke, Gerald	78-4018 77-7564	91
Hayter, Jim	79-05515	605
Hefflin, Robert E.	131 4B 6529	80
Helmick, Carol L	79-08807	624
Hensley, Robert	78-6826	204
Henthorne, Samuel G	77-7327	22
Hetland, Harold L	80-01244	758
Hewitt, Floyd	79-7248	189
Hickey, Elmer	B 96609	640
Hickey, Elmer	B 96609	696
Higgins, Dorothy	78-1883	326
Hileman, Roleoth M	80-00345	702
Hills, Jane	79-4468	490
Holcomb, Marcelyn J.	79-5517	394
Holdridge, Vernon L	79-10260	595
Holland, Douglas	C 219964	395
Holmes, Joe Jr.	81-0034M	596
Holstrom, Paul E.	78-6918	70
Hood, Jefferson	B53-137900	126
Hopson, William E.	77-5580=E & 78-6309	172
Hosley, Richard L.	78-5897	505
Howard, Arden	79-01446	713
Howell, Herbert B.	a 843336	241
Howerton, Randy	79-09713	728
Howerton, Randy	79-09713	728
Hubble, Walter E	79-10883	703
Hull, Joyce Dean	78-6919	519
Hunsaker, Ellis	80-03070	729
Hunsaker, Ellis	80-03070	729
Hunt, Joe	80-0453	431
Hunt, Lola M.	79-187	64
Hunter, Gary/Leroy, Michael	79-4980 et al	561
Hunter, Gary/Leroy, Michael	79-4980, et. al.	434
Hyde, James	80-4990 80-3037	641
Ice, Bernece	80-02548	665
Iles, Lorena	79-04405	666
Ivie, Kenneth	80-04398	606
Jackson, Carl A.	78-9059	173
Jacobs, Thomas A	80-00313	616
Jaeger, Jacque C.	78-8151, et. al.	363
Jarvis, Norman R	D 15013	33
Jarvis, Norman R.	D 15013	462
Jenkins, Jo Elaine	79-6439	129
Johansen, Paul	81-0071M	617
Johnson, Ardis Elaine	C 431424	396

NAME	WCB NUMBER	PAGE
Johnson, Carl	81-0065M	625
Johnson, Dennis	D 122753	579
Johnson, Dorothy	ZC 474699	296
Johnson, Joseph R.	78-9443	463
Johnson, Shirley B.	79-7925	491
Johnson, Wallace E.	3W-10-9357	498
Jones, Betty L.	79-2703	308
Jones, Herbert	79-09690	687
Jones, Leo V.	C 164188	53
Jones, Loretta A.	79-3272	268
Kantor, Morton J.	79-6220	268
Kaser, Steven	80-11, 282, 81-71 & 81-228	520
Kaser, Steven	80-11282, et. al.	432
Keen, Tom O.	U 11807	408
Keith, Aldine	21C100369	70
Keith, Aldine	21C100369	397
Keith, Aldine	21C100369	146
Keith, Elsie Aldine	81-0081M	667
Kelley, Donna P	79-07701 79-07232	715
Kemery, Dennis C.	79-3851	54
Kezar, Patricia	C 604-13464	270
Kintz, Dale D	78-9244	25
Kirby, Patrick C.	78-2398 & 79-8171E	292
Klinebough, Robert H	79-8769	11
Klum, robert	79-03854	668
Klum, Robert	79-03854	668
Knight, Ella Jean	79-2853	142
Knight, Ella Jean	79-2863	107
Knowles, Thomas R	79-02158	738
Knowles, Thomas R	80-11229	674
Knowles, Thomas R	80-11229	674
Koppert, Joseph J.	80-4432	508
Kraft, Karen	80-3698	597
Krueger, George	C 183362	537
LaBella, Evelyn M	79-08172 et al.	738
Lane, Robert	79-3963	398
Lane, William A.	C 395077	293
Langan, Dennis J.	80-0008M	410
Langford, Bonnie	79-5139	424
Lapping, Archie D.	DC 397390	81
Lapping, Archie D.	DC 397390	528
Laron, Ole	79-07895	551
Larsen, Kathy	80-00797	730
Larsen, Kathy	80-00797	607
Larsen, Kathy	80-00797	730

NAME	WCB NUMBER	PAGE
Laughlin, John	79-5749 & 79-6615	328
Lavin, James P	79-07425	626
Lawhead, Stephen L	81-0066M	697
Lawrence, Marvin	79-1298	298
LeDoux, Martin J.	80-848	411
LeFrancois, David R.	79-3596	174
Leone, Richard L.	79-5641	425
Leroy, Michael/Hunter, Gary	79-4980, et. al.	362
Lewis, Gerald	C 428161	175
Lindsley, Stanley	81-0064M	618
Logan, Alberly	79-10,152-E	627
Logan, Lucille Worthington	79-4474	118
Lopez, Mary	80-748	553
Loscar, Dolores	79-6777	480
Love, Betty	80-05200	652
Lovell, Hazel Stanton	80-11, 084	520
Lowden, Curtis A	79-10,215	642
Larson, Ole E.	79-7895	404
Lucas, Gordon H	79-5869	143
Lyon, Fred W.	H-10009	130
Mabe, William	B53-151050	234
Mabou, Marion	78-5681 & 79-5698	235
Machin, Dale T.	B 830 C 411074	72
Magen, Viola H.	42 CC 146562 RG	1
Magwood, Laura L.	78-7053	340
Mahoney, Faye	741 C 517858	371
Marley, John	79-10, 276	235
Marley, John H.	79-10276	372
Martin, Betty	C 269088	579
Martin, Betty	C 269088	34
Martin, Lavelle G	81-0028M	675
Martin, Lavelle G	81-0028M	675
Mason, James	79-09367	730
Mathews, Iona	79-10, 278	372
May, William C.	79-7317	440
McClellan, Ella	80-02143	675
McClellan, Ella	80-02143	675
McCollam, Larry E.	79-6267	56
McCool, James R	C 300516	697
McCool, James R.	C 300516	96
McCullom, Timothy	79-10,172 79-10,173	26
McDonald, George Eddie	79-6222	374
McGehee, Lawrence	78-3031	376
McGehee, Lawrence L	78-03031	609
McGinnis, Juanita Legore	C 224899	428

NAME	WCB NUMBER	PAGE
McHugh, Tyler G.	79-10, 770	413
McKamey, Delwin O	79-05870	610
McKenzie, Orval	80-03321	677
McKenzie, Orval	80-03321	677
McKinnis, Lawrence K.	KC 295681	73
McMahon, Betty Jean	81-0059M	590
McPhail, Richard	80-03204	744
Meador, James	79-8719	190
Meddleton, David T	79-01139	733
Medleton, David T	79-01139	733
Meeker, Joe	78-10097	645
Melcher, Jim	81-0041	564
Meyers, Donald	C 294661 & C 357427	299
Miller, Edward O.	131-760507	499
Miller, Marvean	78-5125	414
Mills, Chester	SC 237789	341
Mitchell, David L.	79-8868	481
Mitchell, Lester	79-612	121
Mitchell, Phyllis L.	79-4817	82
Mitchell, Teresa	79-00986 80-05057	611
Mizar, John D.	A 872730	528
Moore, Jack	79-6527 et al.	66
Moore, Tom	79-8496	499
Moore, Tom	79-08496	564
Moore, Tom	79-8496	580
Moore, Tom	79-08496	721
Morris, Robert M	80-00077 80-00853	629
Morton, Dianna M.	80-1538	529
Morton, Dianna M.	80-1538	481
Moyer, Phillip	78-6419	207
Moyer, Phillip	78-6419	295
Mozzillo, Kathi	80-1512 & 80-2711	435
Muehlhausen, Gary L.	80-4436	343
Muehlhausen, Gary L.	79-717	310
Muir, Nelson L.	C 275625	529
Mumblo, Gary L	79-10,454	551
Mundell, Harry E	79-06561	716
Murphy, Launzo	79-10893	510
Myers, Marie B.	79-8193, et. al.	237
Myers, Marie B.	79-8193, et. al.	329
Nahorney, Frank	81-008M	580
Nash, Robert	C 368493	414
Nations, Michael D	78-7877	553
Neal, Victor L.	80-7000	131
Negus, Fred	80-325	565

NAME	WCB NUMBER	PAGE
Nelson, Roy D	78-05969	677
Nelson, Roy D	78-05969	677
Nelson, Roy D	78-05969	581
Neville, Dennis C.	C 431581	58
Noice, Betty	78-5522	436
Nordling, Gary	451219	583
Nuse, Karl	05X 020005	484
Ohler, Charles	80-7236	271
Olds, Norman	79-4700	416
Orman, Thomas D	77-02741	710
Ott, Donald L.	133 CB 6928 226	132
Oxford, James J.	C 306803	243
Ozan, Fred	I-021596	521
Ozan, Fred	I-021596	399
Paddock, Richard R.	79-10, 799	530
Painter, Bill E	80-5271	583
Painter, Bill E.	80-5271	501
Palandri, Lino B.	79-10, 364	429
Palmer, Jimmie Troy	79-10564	759
Pankratz, Patricia	C 391545	465
Parker, Robin A.	78-4868	537
Parrott, Robert C	C 407286	2
Parsons, Lawrence W.	05 014003	272
Partridge, Lorene	78-07510	598
Patterson, Steve	79-10, 402	630
Payne, Larry R.	79-6300	310
Payne, Larry R.	79-6300	146
Payne, Larry R.	79-6300	295
Payne, Ruth B.	79-1781	191
Pederson, Rose E	79-08369	646
Pemble, Patricia	77-2866 & 77-7847	176
Peters, Fred	81-1062	565
Peterson, Harold O.	79-7627	273
Peterson, Marvin	79-5443	599
Peterson, Marvin	79-05443	717
Peyton, Gary	481441	244
Phipps, Ivan Lee	D 68696	466
Pieffer, Ray C.	C 54410	492
Plane, George	77-07336	691
Plummer, Charles L	81-0084M	678
Plummer, Jeanette J.	79-3291	176
Poelwijk, James A	76768	11
Poole, William W.	79-7566	133
Porter, Ronald J.	79-4865	484
Potterf, Adelma	79-10, 403	275

NAME

WCB NUMBER

PAGE

Powers, James E.	434677	531
Powers, Vone	81-0009M G01384	531
Prater, Bonnie B.	78-10,286	147
Prowell, Vince W.	79-2666	34
Putman, James	77-4996	108
Quarles, Tommy	81-0029M	618
Quinterous, Jessie	81-0030M	698
Rabern, Rick	79-10069	584
Radmacher, Elmer	80-1722 & 80-1723	330
Raifsnider, James F	79-9409 et al	554
Ramis, Yaku	79-7273	327
Randall, Nathan S.	KA963813	101
Rasmussen, Velma	77-6293	276
Rattay, Bringfried	C 339129	177
Rattay, Bringfried	C 339129	619
Rautio, Arni	79-05270	717
Raz, Theodore D.	C28273	197
Raz, Theodore D.	C28273	102
Reeves, Jerry	78-8739	418
Rentaria, Alex A.	79-5446	122
Reynolds, Geraldine	79-7286	91
Reynolds, Lance P.	79-3058-E	521
Rice, Clifford	78-08643	718
Riddle, Terry	79-08182	755
Ringer, Edward A.	79-2422	124
Rios, Elsie	80-5174	148
Riske, Donald	79-07395	569
Riske, Timothy	80-7993	178
Robertson, Joe E.	79-9379	149
Robertson, Joe E.	79-9379 & 80-10, 062	430
Rogers, Bettie L.	79-6167	35
Rogers, David M.	76-3717	441
Rogers, Ronald E.	79-7321 81-0032M	532
Rosa, Mary L.	80-1116	287
Rose, Mitchell	c 192037	277
Rose, Mitchell	C 192037	208
Rose, Mitchell a.	DC 192037	300
Rosin, Oscar	B 1788	135
Rudolfi, Thomas A	80-02390	704
Rupp, Barbara	80-1803	556
Rupp, Barbara	80-1803	523
Ryan, Laurence	76-3080	301
San Miguel, Henry L	80-2274	547
Sanchez, Romelia Gonzalez	887-CN 17170 S	2
Sapp, Larry G.	AC 137566	291

NAME	WCB NUMBER	PAGE
Saunders, Robert	79-6793	538
Savage, Bill W.	79-8705	311
Schaecher, William T.	79-2059	466
Schallberger, Mabel J.	C 103538	421
Scofield, Dale	78-3310 & 78-7638	444
Scott, Douglas K	80-04610	705
Seehawer, Lyle	2001562005	102
Seibel, Buernell L.	78-3234	241
Sexton, Gerald C.	79-7034	179
Shackelford, Venda J.	80-01854 80-01855	706
Shackelford, Venda	80-1854 & 80-1855	523
Shackleford, Edward J.	79-4285	469
Shaw, Maxine E.	79-1310	343
Sheilds, Ruby (Barbara)	79-6795	136
Shipman, William Mrs	79-07371	722
Siems, Arlene	79-582	158
Silveira, Patricia Horner	79-3567	208
Simila, Maurice E	78-7333	584
Simmonds, William C.	79-10, 537 & 80-613	180
Simmons, John	79-4898	501
Simmons, Lenford G.	360-051-2024	400
Smith, Charles R.	79-3919	278
Smith, Clifford W.	C 382943	485
Smith, Gavin L.	79-3191	109
Smith, Johnny R.	77-1889 & 78-1678	446
Smith, Kenneth H.	79-4208	110
Smith, Roman C.	79-8147	302
Smith, Tony	KC 405304	471
Smith, Walter C.	A 922605	401
Snethen, Jerry	ZD 44348	330
Socia, Michael	PC 473316	533
Socia, Michael W.	C 473316	303
Sonnenfeld, David Allen	79-10411	678
Sosa, Oslidia	79-8823	27
Soulder, Steve	C 417587	211
Spillers, Richard M	79-9562	12
Spooner, Carlton	81-0060M	585
Spurgeon, Ralph	B 142666	471
Spurgeon, Ralph E.	B 142666	289
Stangl, Edward	81-0036M C 305780	533
Steele, Lisle R.	RC 162857	279
Stevens, Dennis E.	C 230071 & C 383707	452
Stevens, Edwin	81-0039M C 435926	534
Stevens, Phillip B	80-04999	620
Stevens, Phillip B	80-4999	557

NAME	WCB NUMBER	PAGE
Stewart, Victor	78-3110	472
Stose, Gerald	79-2960 & 79-6387	181
Stose, Glenn R	79-2960 79-6387	558
Stose, Glenn R.	79-2960 & 79-6387	486
Stotesbury, Brian R.	79-8662	182
Stratton, Carl	81-0021M	600
Streeter, Willie Jr.	78-3268	314
Sullivan, Jean P.	C 375513	345
Summers, Peter A.	79-7200	110
Sutton, Thomas	79-10, 944	331
Syrop, Jay	79-4634	544
Tarter, Darrel P	GC 446817	631
Taylor, Reba jean	77-7548	487
Teal, William	80-00517	631
Teal, William A	80-00517	706
Tila, Raimo K	81-0057M	698
Timonen, Theodore L.	79-5185	162
Torhan, Michael	795835	524
Torhan, Michael	795835	452
Tracey, Mary S	80-02703	647
Trempel, Pete	79-08618	711
Truesdale, Judy Kay	C 479259	304
Truesdale, Thomas	79-6171	539
Tucker, Carrolle J.	79-4454	111
Turley, Gordon D.	79-10, 150	211
Turnbull, James D	80-1327	542
Turnbull, James D	80-01327	680
Turner, Joyce	79-8784	346
Tyler, Delores M	79-4245	3
Vain, William D	80-01464	707
Vance, Larry	C604-05652	40
Vetter, Opal Lillian	C 191526	280
Vitro, Donald R.	79-4954	163
Vogt, Elaine J	80-2667	559
Wade, Jack J	79-9073	601
Wadley, Stanley	79-5118	69
Wagner, Betty J	79-06956	719
Walker, Barbara J.	80-3295	483
Walker, Freeman F	79-10808	731
Walker, Freeman F	79-10808	731
Wallace, Eva S.	78-2024	316
Walley, Stanley	78-3903	29
Walls, Bill G.	B53-157860	454
Ward, Kenneth L.	79-7134	150
Ward, Kenneth L.	79-7134	197

NAME	WCB NUMBER	PAGE
Waring, Kenneth V.	133CB629352	405
Waring, Kenneth V.	133CB629352	347
Warnack, Susan	80-1911	542
Washington, Billy	79-8422	150
Wassing, Witold	79-6083	92
Watson, Lois	79-8470	218
Watson, Ronald	79-1319	138
Weather, Basil L.	C 332143	58
Webster, Sharon S.	79-10, 543	219
Wecker, John R	79-09628	586
Wentz, Kenneth	A 42CC77681	40
Williams, Charles	B 830 C 390456	140
Willson, Gerald O.	D 53-151204	493
Wilson, David A	81-0055M	586
Wilson, Norman L.	AC 408279	86
Wilson, Norman L.	YC 408279	494
Wilson, Norman L.	D 408270	183
Wise, Vivian	78-7484	570
Wofford, Earl Ansel	D 113902	571
Woodfin, Ardean	79-9332	281
Woodford, Henry J	79-9192	587
Woodman, Donald E.	78-5283	348
Woosley, George	80-00867	653
Woosley, George	80-867	545
Wright, Larry	80-04394	634
Wright, Larry D	C 252060	713
Wytttenberg, Arnold F	81-0050M	694
Yarberry, Roger D.	KC 254011	436
Yates, Thomas G	TD 90516	681
Young, Helen J.	49292	87
Young, Iris	FC 373434	475
Young, Iris F.	FC 373434	422
Young, Iris F.	FC 373434	402
Zozosky, Edward	79-7251	483
Zozosky, Edward	79-7251	572
Zucher, Darryl S.	C 414621	88

VOLUME 30

ORS CITATIONS

ORS 147.015(5)	-----	185
ORS 147.155(5)	-----	185
ORS 162.085(1)	-----	627
ORS 167.207	-----	185
ORS 174.110	-----	189
ORS 174.115	-----	189
ORS 174.120	-----	150
ORS 187.010	-----	150
ORS 656.005(8)	-----	323
ORS 656.005(31)	-----	686
ORS 656.005(31)	-----	710
ORS 656.029	-----	686
ORS 656.206	-----	273
ORS 656.206	-----	208
ORS 656.206(1)(a)	-----	565
ORS 656.206(1)(a)	-----	141
ORS 656.206(a)(2)(1971)	-----	429
ORS 656.206(2)	-----	446
ORS 656.206(3)	-----	182
ORS 656.206(3)	-----	565
ORS 656.214(5)	-----	722
ORS 656.214(f) & (g)	-----	108
ORS 656.226	-----	189
ORS 656.245	-----	590
ORS 656.245	-----	479
ORS 656.245	-----	22
ORS 656.245	-----	372
ORS 656.245	-----	413
ORS 656.245	-----	133
ORS 656.245	-----	278
ORS 656.245	-----	542
ORS 656.245	-----	719
ORS 656.262	-----	378
ORS 656.262(4)(5)	-----	648
ORS 656.265(4)	-----	505
ORS 656.262(4)	-----	738
ORS 656.262(4) & (8)	-----	547
ORS 656.262(4)	-----	211
ORS 656.265(4)(6)	-----	547
ORS 656.262(5)	-----	738
ORS 656.262(5)	-----	374
ORS 656.262(5)	-----	738
ORS 656.262(6)	-----	738
ORS 656.262(8)	-----	656
ORS 656.262(8)	-----	723
ORS 656.262(8)	-----	394
ORS 656.262(8)	-----	668
ORS 656.262(8)	-----	372
ORS 656.262(8)	-----	374

VOLUME 30

ORS CITATIONS

ORS 656.262(8)	219
ORS 656.262(10)	624
ORS 656.265	505
ORS 656.268	378
ORS 656.268	536
ORS 656.268(5)	515
ORS 656.272(4) (b) & (c)	66
ORS 656.273	746
ORS 656.273	372
ORS 656.272(3)	590
ORS 656.273(3)	744
ORS 656.273(3)	691
ORS 656.273(4)	556
ORS 656.273(6)	548
ORS 656.273(6)	723
ORS 656.273(7)	691
ORS 656.278	639
ORS 656.278	70
ORS 656.278	674
ORS 656.278	372
ORS 656.278	713
ORS 656.283	172
ORS 656.283	668
ORS 656.289(1)	642
ORS 565.289(3)	391
ORS 656.289(3)	436
ORS 656.289(3)	523
ORS 656.289(4)	389
ORS 656.295(2)	556
ORS 656.295(5)	589
ORS 656.295(5)	495
ORS 656.295(5)	549
ORS 656.295(5)	336
ORS 656.298(5)	559
ORS 656.307	394
ORS 656.307	538
ORS 656.307(1)	746
ORS 656.313	620
ORS 656.313	189
ORS 656.319(1)	89
ORS 656.319(1) (a)	746
ORS 656.319(1) (a) & (b)	642
ORS 656.319(1) (b)	715
ORS 656.319(2)	172
ORS 656.325	311
ORS 656.382	378
ORS 656.382(1)	668
ORS 656.382(1)	219
ORS 656.382(2)	441
ORS 656.386(1)	757
ORS 656.386(1)	441

VOLUME 30

ORS CITATIONS

ORS 656.388	32
ORS 656.388(1)	532
ORS 656.388(2)	757
ORS 656.388(4)	757
ORS 656.389(3)	353
ORS 656.419	150
ORS 656.419(3)	150
ORS 656.427	150
ORS 656.504	150
ORS 656.506	561
ORS 656.552	150
ORS 656.740	150
ORS 656.745	56
ORS 656.802(1) (a)	571
ORS 656.707	34
ORS 656.807(1)	211
ORS 8.070(1)	434
ORS 8.310	561
ORS 8.340	434

VOLUME 30

ADMINISTRATIVE RULE CITATIONS

OAR 436-54-281-283-----	654
OAR 436-83-700(5)-----	319
OAR 436-47-075-----	662
OAR 436-83-700(2)-----	391
OAR 436-65-535(3)-----	423
OAR 436-83-120-----	642
OAR 436-83-480(2)(6)-----	715
OAR 438-22-304-----	580
OAR 436-61-052(2)-----	721
OAR 436-61130(1)(e)-----	565
OAR436-65-565-----	108
OAR436-83-700(2)-----	556
OAR435-83-520-----	219
OAR438-47-040(1)-----	633
OAR438-47-010(2)-----	559
OAR438-47-040(1)-----	677
OAR438-47-010(2)-----	581
OAR83-47-020-----	723

U.S. CASES

<u>Weinberger v. Wiesenfeld</u> , 420 U.S. 636 (1975)-----	189
--	-----

VOLUME 30

CASE CITATIONS

Anderson v. West Union Village Square, 43 Or. App. 295 (1979)-----	472
Audas v. SAIF, 43 Or. App. 813 (1979)-----	675
Austin v. SAIF, 48 Or. App. 7 (1980)-----	530
Beaudry v. Winchester Plywood Co., 255 Or. 503 (1970)-----	571
Beaudry v. Winchester Plywood Co., 255 Or. 503 (1970)-----	211
Bentley v. SAIF, 38 Or. App. 473 (1979)-----	584
Bentley v. SAIF, 38 Or. App. 480 (1979)-----	330
Bock v. Bend School District #1, 252 Or. 53 (1968)-----	189
Bracke v. Baza'r, Inc., 51 Or. App. 627 (1981)-----	746
Brown v. EBI Co., 289 Or. 455 (1980).289-----	746
Brown v. EBI Co., 289 Or. 455 (1980)-----	715
Brown v. EBI Co., 289 Or. 455 (1980)-----	642
Brown v. EBI Co., 289 Or. 895 (1980)-----	441
Burnett v. SAIF, 29 Or. App. 415 (1977)-----	627
Butcher v. SAIF, 45 Or. App. 313 (1980)-----	565
Calder v. Hughes & Ladd, 23 Or. App. 66 (1975)-----	642
Candee v. SAIF, 40 Or. App. 567 (1979)-----	597
Clayton v. SCD, 253 Or. 397 (1969)-----	389
Coombs v. SAIF, 39 Or. 293 (1979)-----	431
Deaton v. SAIF, 13 Or. App. 298 (1973)-----	429
Dykes v. SAIF, 47 Or. App. 187 (1980)-----	710
Ford v. SAIF, 7 Or. App 549 (1979)-----	508
Ford v. SAIF, 7 Or. App. 549 (1979)-----	611
Frasure v. Agripac, 41 Or. App 7 (1979)-----	480
Frasure v. Agripac, 290 Or. 96, (1981)-----	469
Frasure v. Agripac, 41 Or. App. 997 (1979)-----	655
Frasure v. Agripac, 290 Or. 99 (1980)-----	627
Gettman v. SAIF, 289 Or. 609 (1980)-----	565
Gibson v. SAIF, 288 Or. 45 (1979)-----	513
Gibson v. SAIF, 288 Or. 45 (1979)-----	176
Hackney v. Tillamook Growers, 39 Or. App. 655 (1979)-----	591
Hamlin v. Roseburg Lumber Co., 30 Or. App. 615 (1977)-----	530
Hammons v. Perini, 43 Or. App. 299 (1979)-----	530
Hanna v. McGrew Bros. Saw Mill, 44 Or. App. 189 (1980)-----	642
Henry v. SAIF, 39 Or. App. 795 (1979)-----	626
Henry v. SAIF, 39 Or. App 795 (1979)-----	211
Hewes v. SAIF, 36 Or. App. 91 (1979)-----	374
Hutcheson v. Weyerhaeuser, 288 Or. 51 (1979)-----	544
Inkley v. Forest Fiber Products Co., 288 Or. 337 (1980)----	610
Inkley v. Forest Fiber Products Co., 288 Or. 337 (1980)----	738
Jacobsen v. SAIF, 36 Or. App. 789 (1978)-----	472
Jackson v. SAIF, 7 Or. App. 109 (1971)-----	200
James v. SAIF, 290 Or. 343 (1981)-----	738
James v. SAIF, 290 Or. 343 (1980)-----	678
James v. SAIF, 290 Or. 343 (1981)-----	650
James v. SAIF, 44 Or. App. 405 (1980)-----	191
James v. SAIF, 44 Or. App 405 (1980)-----	35
Jones & Emanuel Hospital, 280 Or. 147 (1977)-----	191
Joseph v. Lowery, 261 Or. 545 (1972)-----	620
Knoetzel v. SAIF, 37 Or. App 627 (1978)-----	197

VOLUME 30

CASE CITATIONS

<u>Lindeman v. SIAC, 183 Or. 245 (1948)</u>	-----611
<u>In Re Magadalen Wolfe, Linn County Circuit Court #38669</u>	
<u>(9/17/79)</u>	----- 66
<u>Marek v. Portland Jeep, Inc., 21 Or. App. 386 (1975)</u>	-----191
<u>McNett v. Roy-Ladd Construction Co., 46 Or. App. 601</u>	
<u>(1980)</u>	-----173
<u>McPherson v. Employment Div., 285 Or. 541 (1973)</u>	-----746
<u>Miller v. Granik Construction, 28 Or. App. 473 (1977)</u>	-----569
<u>Minor v. Delta Truck Lines, 43 Or. App. 29 (1979)</u>	-----242
<u>Minor v. Delta Truck Lines, 43 Or. App. 29 (1979)</u>	-----163
<u>Nethamer v. SAIF, 16 Or. App. 402 (1974)</u>	-----744
<u>O'Connell v. SAIF, 19 Or. App. 735 (1974)</u>	-----591
<u>Paresi v. SAIF, 44 Or. App. 689 (1980)</u>	-----191
<u>Paresi v. SAIF, 44 Or. App. 689 (1980)</u>	----- 35
<u>Pattitucci v. Boise Cascade Corp., 8 Or. App. 503 (1972)</u>	-- 35
<u>Phillips v. Peco Mfg. Co., 32 Or. App. 589 (1978)</u>	-----200
<u>Pumpelly v. SAIF, 50 Or. App. 303 (1981)</u>	-----627
<u>Raines v. Edward Hines Lumber Co., 36 Or. App. 715 (1978)</u>	--647
<u>Robinson v. Omark Industries, 40 Or. App. 263 (1980)</u>	-----561
<u>Rogers v. SAIF, 289 Or. 633 (1980)</u>	-----703
<u>Rogers v. SAIF, 289 Or. 633 (1980)</u>	-----678
<u>Rogers v. SAIF, 289 Or. 633 (1980)</u>	-----754
<u>Rogers v. SAIF, 289 Or. 633 (1980)</u>	-----591
<u>Rogers v. SAIF, 289 Or. 633 (1980)</u>	-----226
<u>Ruitta v. Mayflower Farms, 19 Or. App. 275 (1974)</u>	-----191
<u>Riutta v. Mayflower Farms, 19 Or. App. 278 (1974)</u>	-----505
<u>Ryf v. Hoffman Const. Co., 245 Or. 624 (1970)</u>	-----611
<u>Saltmarsh v. SAIF, 35 Or. App. 763 (1978)</u>	-----642
<u>Schultz v. SAIF, 252 Or. 211 (1968)</u>	-----639
<u>Seidl v. Dick Niles, Inc., 18 Or. App. 332 (1974)</u>	-----591
<u>Silsby v. SAIF, 39 Or. App. 555 (1979)</u>	-----723
<u>In Re Silsby, 39 Or. App. 555 (1979)</u>	-----219
<u>Simons v. SWF Plywood, 26 Or. App. 137 (1976)</u>	-----591
<u>Smith v. Ed's Pancake House, 27 Or. App. 361 (1976)</u>	-----165
<u>State v. Johnson/Imel, 16 Or. App. 560 (1974)</u>	-----642
<u>Surratt v. Gunderson Bros., 259 Or. 65 (1971)</u>	-----489
<u>Templeton v. Pope and Talbot, Inc., 7 Or. App. 119 (1971)</u>	--491
<u>Uris v. SAIF, 247 Or. 420 (1967)</u>	-----530
<u>Vandre v. Weyerhaeuser Co., 42 Or. App. 705 (1979)</u>	----- 82
<u>Volk v. Birdseye Division, 16 Or. App. 349 (1973)</u>	-----302
<u>Walker v. Comp. Dept., 248 Or. 195 (1967)</u>	-----611
<u>Weller v. Union Carbide, 288 Or. 27 (1979)</u>	-----666
<u>Weller v. Union Carbide, Corp., 288 Or. 27 (1979)</u>	-----389
<u>Weller v. Union Carbide, Corp., 288 Or. 27 (1979)</u>	-----587
<u>Weller v. Union Carbide, Corp., 288 Or. 27 (1979)</u>	-----606
<u>Weller v. Union Carbide, Corp., 288 Or. 27 (1979)</u>	-----513
<u>Weller v. Union Carbide, Corp., 288 Or. 27 (1979)</u>	-----530
<u>Weller v. Union Carbide, Corp., 288 Or. 27 (1979)</u>	-----458
<u>Weller v. Union Carbide, Corp., 288 Or. 27 (1979)</u>	-----284
<u>Weller v. Union Carbide, Corp., 288 Or. 27 (1979)</u>	-----491

VOLUME 30

CASE CITATIONS

<u>Weller v. Union Carbide, Corp.,</u>	288 Or. 27 (1979)	-----340
<u>Weller v. Union Carbide, Corp.,</u>	288 Or. 27 (1979)	-----211
<u>Weller v. Union Carbide, Corp.,</u>	288 Or. 27 (1979)	-----191
<u>Whitlock v. SIAC,</u>	233 Or. 166 (1962)	-----686
<u>Widener v. LaPac Corp.,</u>	40 Or. App 3 (1979)	-----505
<u>Wilburn v. SAIF,</u>	43 Or. App. 611 (1979)	-----35
<u>Wilson v. SAIF,</u>	3 Or. App. 573 (1980)	-----350
<u>Wilson v. SAIF,</u>	3 Or. App. 573 (1980)	-----505
<u>Wilson v. Weyerhaeuser,</u>	30 Or. App. 403 (1977)	-----723
<u>Wilson v. Weyerhaeuser,</u>	30 Or. App. 403 (1978)	-----276
<u>Woodman v. Georgia Pacific Corp.,</u>	289 Or. 619 (1980)	-----343

VOLUME 30

MEMORANDUM OPINIONS
NOT PUBLISHED IN THIS VOLUME

WCB Numbers given for your convenience in ordering
from the Worker's Compensation Board

E. Anderson: Affirmed: 35% low back-----79-3648
R. Angell: Affirmed: denial of ankle claim-----80-00294
J. Amundson: Affirmed: denial for untimeliness-----78-05914
E. Bancroft: Affirmed: remanding of 1979 back claim to
carrier-----79-2972
Trine Banda: Affirmed: remanding of back claim to
carrier-----79-1274
D. Barth Affirmed: Denial of occupational disease-----78-8780
L. Batchelor: Affirmed: 10% back-----79-9863
D. Battles: Affirmed: 5% hip and 10% back-shoulder-----77-5670
78-1312
M. Beers: Affirmed: 65% hand-----78-3752
G. Bienert: Affirmed: remanding of herniated disc claim
to carrier-----79-8671
E. Biggerstaff: Affirmed: denial of pulmonary claim-----80-539
T. Bird: Affirmed: Low back PTD-----77-941-E
L. Birge: Affirmed: chiropractic services only-----79-04069
S. Bisset: Affirmed: remanding of 1978 back claim to
carrier-----79-112
R. Blair: Affirmed: extent of PD for back sprain-----78-9425
E. Bomberger: Affirmed: remanding of back-shoulder-neck,
etc., claim to one carrier, and low back-leg-pelvis
to 2nd carrier-----77-270
79-2269
I. Bonneville: Affirmed: 70% unscheduled and denial of
thrombo-phlebitis (cerebral insufficiency)-----78-1968
Billy Boren: Affirmed: TTD and clarified attorney's fee-79-03211
K. Bott: Affirmed: 75% back-----79-8203
E. Bowman: Affirmed: denial of aggravation on back
claim-----78-9357
W. Bradshaw: Affirmed: denial-----79-08945
R. Brigden: Affirmed: denial of rib-chest muscle claim--79-7730
F. Britton: Affirmed: denial of neck-shoulder claim
and knee claim-----78-9701
J. Brock: Affirmed: remanding of low back aggravation to
carrier-----78-5345
E. Brockett: Affirmed: denial-----79-08053
D. Bronson: Affirmed: 50% low back-----79-9797
D. Brooks: Affirmed: remanding of claim to carrier-----78-9806
M. Brown: Affirmed: 30% leg-----79-9097
M. Brown: Affirmed: acceptance of claim and penalty-----80-01685
P. Brown: Affirmed: denial of TTD-----80-06305
P. Buelow: Affirmed: remanding of shoulder aggravation
claim to one carrier, denied responsibility of 2nd
carrier-----78-8364
W. Bullock: Affirmed: 25% low back-----78-03841
C. Burdick: Affirmed: Dismissal with prejudice-----80-04351
79-09099

N. Burgess: Affirmed: no PPD for should claim-----79-9424
 L. Burce: Affirmed: denial-----79-7683
 79-7684
 J. Burril: Affirmed: remanding of back claim to present
 carrier-----79-4140
 D. Bush: Affirmed: 35% unscheduled-----79-8635
 E. Bush: Affirmed: denial of back claim-----79-6471
 C. Callison: Affirmed: denial of neck-back aggravation--79-8991
 O. Calvin: Affirmed: acceptance of claim-----80-01592
 D. Campbell: Affirmed: responsibility of one carrier:
 over another in shoulder-neck-elbow claim-----79-8008
 79-10,499
 K. Canaday: Affirmed: denial of back claim-----79-5159
 79-3749
 J. Cannon: Affirmed: remanding of shoulder claim to
 carrier-----79-8155
 J. Capello: Affirmed: 35% back-----79-6244
 C. Carlson: Affirmed: remanding of back claim to
 carrier and denied PPD-----79-8391
 K. Carpenter: Affirmed: 25% penalty instead of total
 medical on neck claim-----79-9774
 A.R. Carter: Affirmed: award for multiple sclerosis-----79-8304
 J. Carter: Affirmed: 35% back-----79-9831
 W. Cawrse: Affirmed: 30% foot-----79-2806
 K. Chapman: Affirmed: denial of TTD-----79-4840
 L. Chester: Affirmed: denial-----79-08084
 E. Chetwood: Affirmed: previous low back award and
 denial of PTD-----78-4214
 79-4293
 L. Chiapelli: Affirmed: 20% low back-----79-07513
 G. Christensen: Affirmed: dismissal and denial of new
 injury-----80-01485
 80-03308
 C. Clark: Affirmed: denial of aggravation-----79-4340
 J. Clifton: Affirmed: denial of aggravation on back
 claim-----79-5669
 W. Cole: Affirmed: TTD and elimination of PPD on back
 claim-----79-10,374
 B. Collier: Affirmed: denial of request to invalidate
 overpayment-----79-5804
 F. Conn: Affirmed: 5% shoulder-----79-8012
 E. J. Conner: Affirmed: 50% arm and denial of neck-
 shoulder-----79-7687
 J. Conradi: Affirmed: denial of TTD-----79-05789
 C. Cook: Affirmed: denial of back claim-----79-8013
 D. Coombs: Affirmed: PTD-----79-4780
 M. Cooper: Affirmed: denial of occupational disease----79-8266
 W D. Cooper: Affirmed: remanding of back-hip aggravation
 to original carrier-----80-1816
 79-4433
 W. Copeland: Affirmed: 15% neck-----79-5632
 W. Copeland: Affirmed: denial and that employer was
 complying-----79-8560
 J. Corbett: Affirmed: denial of back aggravation-----80-2707
 P. Corbett: Affirmed: extent of PPD-----79-3260
 G. Craner: Affirmed: 81% foot-----78-9563
 H. Crandell: Affirmed: remanding of myocardial infarction
 to carrier-----79-07115

P. Daris: Affirmed: TTD and denial of continuing responsibility
for meningione-----79-10704

D Darrow: Affirmed: 64% back-----79-1492

B. Davis: Affirmed: remanding of claim to carrier-----80-01692

D. Davis: Affirmed: 55% leg and 48% back-----79-9038

L. Davis: Affirmed: 10% back-----79-7412

L. Day: Affirmed: denial of eye-spine aggravation
claim-----79-9455

J. Deblaay: Affirmed: denial of aggravation-----79-4076

K. Decker: Affirmed: 10%-----79-6593

J. Del Togno-Armanasco: Affirmed: denial of back claim--80-226

S Denney: Affirmed: denial of thoracic claim and carpal
tunnel syndrome-----79-10,594

J. Dickover: Affirmed: denial of occupational disease
hearing loss-----79-3753

J. Digregorio: Affirmed: denial-----79-6105

A. Dixon: Affirmed: denial of aggravation-----79-11,069

Eric Dobbs: Affirmed: 5% head, neck, back, and
psychological-----79-10,631

V. C. Dockstrader: Affirmed: 80% back-----79-429

H. Dowhaniuk: Affirmed: 60% low back-----79-10875

R. Dreveskracht: Affirmed: denial of aggravation-----80-1490
80-1491

L. Ducat: Affirmed: 5% low back-----78-9006

K. Dubson: Affirmed: denial-----78-07525

D. Dvorak: Affirmed: denial of aggravation-----80-1380

T. Dyche: Affirmed: new injury rather than aggravation--78-9769
79-7080

J. Dye: Affirmed: denial-----80-01469

E. Eby: Affirmed: 40% unscheduled-----80-1243

E Edge: Affirmed: 15% low back-----79-4080

E. Efimoff: Affirmed: 20% shoulder-----79-9643

V. Eggleston: Affirmed: 50% back-----79-9104

B. Elder: Affirmed: 48% unscheduled-----78-08788

L. Ellis: Affirmed: 30% back-----79-9608

M. Else: Affirmed: 65% back-----79-8059

L. Emmons: Affirmed: PTD for back-chest-----78-02904

S. Epps: Affirmed: denial for untimeliness-----79-4646

R. Eskildsen: affirmed: remanding of back claim to
carrier-----80-2720

C. Evans: Affirmed: remanding of calim to carrier-----79-4736

G. Farfan: Affirmed: 80% back-leg-----79-8127

T. Fake: Affirmed: 10% low back and penalties-----80-01492
80-01493
80-05489

J. Faulk: Affirmed: new injury rather than
aggravation-----77-3712
74-4505

A. Fisher: Affirmed: remanding of back claim to
employer and placement of claimant in vocational
rehabilitation-----80-232

D. Fisher: Affirmed: dismissal due to claimant's failure
to respond to show cause order-----78-8290

L. J. Flud: Affirmed: back PTD-----80-242

L. Fore: Affirmed: denial of shoulder claim-----79-1885

S. Forgacs: Affirmed: PTD-----79-09869

P. Foster: Affirmed: remanding of back claim to
carrier-----79-8952

K. Freeman: Affirmed: denial of aggravation for arm-
shoulder claim-----79-11,118
79-8760

P. Freeman: Affirmed: denial of low back-----79-6349

G. Frisby: Affirmed: denial-----80-03620

F. Fries: Affirmed: denial of aggravation claim on 1976
wrist injury-----79-9563
79-9564

C. Fromherz: Affirmed: TTD only on back claim-----79-08640

G. Fueston: Affirmed: reversal of denial of surgical
procedure-----79-05077

M. Fuller: Affirmed: Remanding of psychiatric claim to
carrier-----79-04463

W. Furman: Affirmed: denial of TTD-----77-2354

F. Gabriel: Affirmed: 75% pulmonary-----77-8013E

V. Galabov: Affirmed: denial-----79-00080

J. Ganis: Affirmed: 25% low back-----79-5028

H. Garber: Affirmed: denial of 1967 back claim-----79-2696

C. Garcia: Affirmed: 15% neck-shoulder-----79-9431

I. Garcia: Affirmed: denial of PPD-----79-5167

C. Gard: Affirmed: remanding of claim to carrier-----79-9504

R. Gay: Affirmed: denial-----80-3941

C. Gibboney: Affirmed: denial-----79-09551
79-09790
79-09789

M. Gifford: Affirmed: denial of TTD for back claim-----80-209

J. Giger: Affirmed: remanding of leg aggravation
claim to employer-----78-9716

D. Good: Affirmed: 15% low back-----80-06308

I. Gormley: Affirmed: denial of hip-leg-back claim-----79-3456

H. Graham: Affirmed: denial of hearing loss and
reversal of 10% hand-----79-09082
78-09903

M. Grant: Affirmed: remanding of allergy claim to
employer-----79-8838

D. Graves: Affirmed: 10%-----79-4089

R. A. Gray: Affirmed: denial of TTD and PPD-----79-1887

D. Grove: Affirmed: denial of occupational disease-----79-6214

R. Gygi: Affirmed: remanding of occupational disease
claim to carrier-----79-9683

P. Halbach: Affirmed: denial of aggravation on 1977
back claim-----79-7270

M. D. Hale: Affirmed: no PPD-----80-00651

D. Hall: Affirmed: 10% forearm-----78-10,188

J. Hall: Affirmed: denial of aggravation on arm-
shoulder claim-----79-6530

R. Hall: Affirmed: 10% neck-----79-07782

H. Hamilton: Affirmed: Employer's responsibility-----79-6586
79-6961

R. Hamlin: Affirmed: denial of varicose vein surgery---79-10517

A. Hanes: Affirmed: 40% lowback and denial of leg
claim-----80-1155

J. Hardesty: Affirmed: 20% neck-shoulder-----79-6993

T. Hare: Affirmed: denial of low back aggravation
claim-----79-8642

J. Harp: Affirmed: 50% low back-----79-6009

J. Harris: Affirmed: 10% leg-----80-00930

D. Hart: Affirmed: remanding of back claim to carrier
as new injury-----79-8019
79-9018

E. Hart: Affirmed: denial of back-neck aggravation-----78-9618

R. Hartman: Affirmed: 20% mouth-nose claim-----80-3157

R. Hawkins: Affirmed: dismissal for failure to appear---79-9876

T. Haynes: Affirmed: denial of low back-----79-7557

T. Hendricks: Affirmed: denial of injury and aggravation-79-11,108
79-6886

O. Herman: Affirmed: remanding of claim to carrier-----79-4231

E. Herrin: Affirmed: denial of shoulder claim-----80-273

T. Higgins: Affirmed: denial of head claim-----79-1810

H. Hill: Affirmed: denial of PPD-----80-02126

D. Holbert: Affirmed: remanding of prematurely closed
back claim to carrier-----79-7742

S. Holmgren: Affirmed: dismissal due to untimely
filing-----79-10,436

E. Hook: Affirmed: 30% low back-----79-5637

H. Horner: Affirmed: remanding of occupational disease
claim to employer-----79-09738

J. Hubbard: Affirmed: denial of penalties and attorney's
fee on back claim-----79-1891

W. Huber: Affirmed: denial of low back disease-----79-5277

L. Hunt: Affirmed: denial of aggravation-----79-5400

R. Huntley: Affirmed: 10% low back-----79-8221

B. Hussey: Affirmed: non-compliance of employer-----78-7112

I. Ingram: Affirmed: 35% back and 10% left hand-----78-3253
79-9795

R. Ingram: Affirmed: denial of time loss for wrist
claim-----79-7850

A. Jackson: Affirmed: denial of aggravation-----76-759

E. Jackson: Affirmed: 20% low back-----79-4234

W. Jackson: Affirmed: 80% unscheduled-----78-5024

W. James: Affirmed: no PPD for back-----78-8705
78-8796

C. (Scott) Jefferys: Affirmed: no PPD for ankle claim---79-8922

V. Jesme: Affirmed: 75% forearm and 60% leg-----79-1517

T. Jester: Affirmed: 15% back and chiropractic care---79-5819
79-10,297

D. Jewell: Affirmed: no PPD for back-leg-----79-3523
79-7136

D. Johnson: Affirmed: denial of back aggravation-----79-2615

E. Johnson: Affirmed: denial of isegodout and remanding
of bilateral impingement and bursitis to
employer-----79-1956

I. Johnson: Affirmed: 30% unscheduled-----79-09310

L. Johnson: Affirmed: denial of myocardial infarction---79-6487

R. Johnson: Affirmed: PTD for back claim-----79-530

C. Johnston: Affirmed: denial of medical treatment for
back claim-----79-9400

C. Jones: Affirmed: 25% low back-----79-3849

H. Jones: Affirmed: denial of reopening for pain center
treatment-----79-9113

J. Jones: Affirmed: PPD for back claim-----78-6727

J. Jones: Affirmed: 50% leg-----78-7251

L.R. Jones: Affirmed: denial of further PPD for leg
claim-----79-4351

C. E. Jorgensen: Affirmed: recalculation of pay, 25%
shoulder, and 25% arm-----79-2616

R. Kalani: Affirmed: TTD and no PPD for back claim-----79-2202

T. Karp: Affirmed: 5% neck and offsets for overpayments--79-11073

O.P. Kelley: Affirmed: remanding of asthma claim to
employer-----79-8887

K. Kephart: Affirmed: remanding of occupational disease
claim to carrier-----79-5963

B. Kilborn: Affirmed: PTD-----79-06221

R. Kile: Affirmed: 30% back-----79-9339

T. Kim: Affirmed: time loss only and partial denial of
chest claim-----78-9622

J. Kincaid: Affirmed: remanding of back claim to carrier-80-72

C. Knight: Affirmed: remanding of foot claim to carrier--79-8863

F. Knoblauch: Affirmed: denial of occupational disease
(hearing-speech loss)-----79-4160

K. Koenemann: Affirmed: 10% foot-----79-9741

RKoffler: Affirmed: dismissal due to carrier's
acceptance of claim, and denial of attorney's fee---79-7274

R. Kokoruda: Affirmed: TTD and no PPD-----79-9509

E. Kophelm: Affirmed: 50% unscheduled-----78-10,328

T. Kyzer: Affirmed: remanding of 1958 claim to carrier---79-707

C. Ladd: Affirmed: remanding of heart claim to carrier---79-1265
79-8478

D. Ladd: Affirmed: 10% unscheduled and denials of
aggravation, occupational disease, and non-
industrial injury-----78-3851

I. Lamb: Affirmed: remanding of 1978 back claim to
carrier-----79-3770

I. Lamb: Affirmed: 5% unscheduled-----80-03950

W. Lane: Affirmed: denial owing to untimely filing-----80-01047

P. Langa: Affirmed: 15% right forearm-----79-06296

D. Lathrop: Affirmed: remanding of back claim to
employer-----79-7705
79-7706

L. Ledford: Affirmed: denial-----80-04433

L. Lee: Affirmed: acceptance by carrier-----79-02748

L. Leischner, Sr: Affirmed: PTD-----79-04163

E. Lenox: Affirmed: denial of chicken pox-----77-1507

R. Lescalet: Affirmed: 35% leg-----79-8226

K. Leslie: Affirmed: 60% psychological and 25% neck-----79-4683
79-11,107

J. Lewis: Affirmed: termination of claim-----79-11,009

B. Lewis: Affirmed: 20% low back-----79-04305
79-08383

R. Lewis: Affirmed: denial of back claim-----80-00799

L. Lewitzke: Affirmed: denial of reopening TTD and PPD---80-04121

J. Lilly: Affirmed: 12.5% shoulder-----79-4855

M. Lines: Affirmed: denial of heart, high blood pressure
claim-----77-7218

E. Lizotte: Affirmed: remanding of hernia claim to
carrier-----79-7666

N. Loftis: Affirmed: denial of back claim-----79-6776

C. Lohse: Affirmed: 60% foot and 10% low back-----79-1664

M. Lopez: Affirmed : PTD-----80-748

P. Lopiparo: Affirmed: remanding of claim to carrier----79-5659
79-2635

D. Loucks: Affirmed: TTD and 5% unscheduled for 1979
back claim-----79-7161

J. Lowery: Affirmed: PPD for hip-leg claim-----79-9052

G. Lucas: Affirmed: 20% foot-----79-5869

D. Mainwaring: Affirmed: denial of 1979 occupational
disease stress claim-----79-2496

L. Marino: Affirmed: remanding of wrist claim to
carrier-----79-9468

J. Marley: Affirmed: medical treatment-----79-10276

R. Marquez: Affirmed: 5% unscheduled cervical-----78-3191

V. Mattison: Affirmed: 35% left shoulder and 15% left
forearm-----79-06779
79-06780

M. Mattson: Affirmed: 5% back-----80-750

L. Mayes: Affirmed: denial of aggravation of heart
disease and diabetes-----79-8327

D. McCall: Affirmed: 20% shoulder-----80-1767

J. McClure: Affirmed: denial of psychological condition--80-03991

D. McDonald: Affirmed: denial-----79-03935

E. McDonald: Affirmed: denial of hernia claim-----78-3258

G. McDonald: Affirmed: 15% unscheduled-----79-8330

J. McKay: Affirmed: 15% unscheduled-----79-09176

E. McJunkin: Affirmed: 25% low back-----79-8189

G. Merkle: Affirmed: denial of TTD and dismissal-----80-01895

M. Methvin: Affirmed: denial due to untimeliness-----80-1315

H. Michalke: Affirmed: 5% left arm-----80-02265

J. Miller: Affirmed: denial of heart attack claim-----77-598

M. W. Mills: Affirmed: denial-----79-8888

K. Mitchell: Affirmed: denial of foot-ankle claim-----79-5915

E. Moore: Affirmed: dismissal for failure to respond
so show cause-----78-6875

G. Moore: Affirmed: denials by two carriers and 15%
forearm-----79-11,081
80-221

M. Moore: Affirmed: 10% unscheduled and TTD for
psychological-----78-8243

S. Moore: Affirmed: no PPD-----80-00279

J. Morgan: Affirmed: denial of occupational disease-----79-1174

C. Morris: Affirmed: partial denial of angina pectoris
and full denial of myocardial infarction-----78-09540

S. Mowdy: Affirmed: remanding of claim to carrier-----80-5355

G. Muehlhausen: Affirmed: reopening of back claim-----79-717

L. Muela: Affirmed: PTD for back-knee and penalties for
untimely payments-----78-6716-E

R. Mueller: Affirmed: remanding of claim to carrier-----79-6065

A. I. Muna: Affirmed: 15% leg-----79-5099

W. Muncrief: Affirmed: PTD for shoulder claim-----79-1019

R. Muscatell: Affirmed: dismissal for failure to show
cause-----79-5753

W. Nettleton: Affirmed: remanding of claim to original
carrier-----79-10,035
79-9696

J. Neumiller: Affirmed: PTD and accepted 1979 knee injury
as result of 1969 injury-----79-2462

C. Newell: Affirmed: 208% back and 22.5% each leg-----79-1965

D. Newhouse: Affirmed: denial of neck-shoulder-----80-132

R. Newton: Affirmed: remanding of detached retina claim
to carrier-----79-06451

B. Newton: Affirmed: remanding of back claim as new injury
to carrier-----80-80
80-2935

M. Oates: Affirmed: TTD on forearm claim-----80-01061

L. Ownby: Affirmed: no PPD for back claim-----78-9027

J. Paine: Affirmed: 10% low back-----79-3666

L. Paquin: Affirmed: denial of back claims for new
injury and aggravation-----78-2916
78-2917

L. Parish: Affirmed: acceptance-----79-05144

G. Parker: Affirmed: remanding of claim to carrier
plus penalty-----77-4127

H. Parmelee: Affirmed: 105% leg-----79-4106

C. Pavelek/Forbes: Affirmed: TTD on back claim-----79-10,222

C. Peoples: Affirmed: denial-----77-5253

E. Perdue: Affirmed: denial of aggravation for back
claim-----79-6785

R. Perez: Affirmed: denial of 1979 shoulder claim-----79-10,939

J. Peters: Affirmed: denial of aggravation on back claim-----78-8196

H. Peterson: Affirmed: 25% groin-----79-5105

W. J. Peterson: Affirmed: TTD dates and denial of
certain medical-----79-10,531

R. Phibbs: Affirmed: 5% arm and denial of back-neck-----79-7348

W. I. Philippi, Jr: Affirmed: 5% low back and denial of
depression-----78-3374

D. Phillips: Affirmed: denial of neck-arm claim-----79-7528

G. Phillips: Affirmed: denial of 1979 back claim-----80-945

T. Phillips: Affirmed: denial of aggravation for back
claim-----79-5146

W. Pickle: Affirmed: 30% left eye-----79-09555

J. Pierce: Affirmed: 60% unscheduled-----79-10532

P. Pinson: Affirmed: remanding of 1979 back claim to
carrier-----79-9769

C. Poole: Affirmed: 20% back-----80-01131

D. Porter: Affirmed: 7.5% low back-----79-00771

R. Potter: Affirmed: denial of fees and penalties-----80-00989

F. Powell: Affirmed: remanding of ankle claim to
carrier-----80-03189

N. Powell: Affirmed: back-leg PTD-----78-2272

B. Prater: Affirmed: PTD for back claim-----78-10,286

R. Rabern: Affirmed: remanding of hernia claim to
carrier-----79-10069

E. Radmacher: Affirmed: remanding of shoulder claim to one
carrier and denial by another-----80-1722
80-1723

A. Randis: Affirmed 10% low back-----79-05044

A. Randolph: Affirmed: denial of reopening of 1978 back
claim-----79-1740

T. Rathbone: Affirmed: denial of back claim-----79-2368

M. Ratliff: Affirmed: 30% low back-----79-7394

D. Reynolds: Affirmed: 15% hip and 5% eye-----79-8239

T. Reynolds, Jr: Affirmed: denial of reopening-----79-06277

D. L. Richard: Affirmed: denial by carrier to pay
penalty-----80-350

J. Richards: Affirmed: TTD for 1979 back claim-----79-9855

J. Riehl: Affirmed: denial-----79-8777

L. Riggs: Affirmed: PTD for low back-----79-155

G. Robinette: Affirmed: denial of low back aggravation---79-09229

- 815 -

