PROPERTY OF
WORKMEN'S COMPENSATION BOARD
SALEM, OREGON

VAN NATTA'S WORKERS' COMPENSATION REPORTER

VOLUME 32

A compilation of the decisions of the Oregon Workers' Compensation Board and the opinions of the Oregon Supreme Court and Court of Appeals relating to workers' compensation law

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JOSE CARBAJAL, CLAIMANT
Nathan Heath, Claimant's Attorney
Dennis VavRosky, Defense Attorney
Request for Review by Claimant
Cross Request by Employer

WCB 79-03751
July 6, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Neal's order which granted an additional 20% for a total of 25% unscheduled permanent partial disability and temporary total disability from November 29, 1979 to March 13, 1980. Claimant contends the partial disability awarded is inadequate. The employer/carrier cross-appeals contending the partial disability awarded is excessive and there is no basis for the temporary total disability awarded. We agree with the employer/carrier and thus modify the Referee's order.

Claimant, a farm worker, compensably injured his right shoulder in 1974. The claim was closed, reopened for surgery and closed a second time by a Determination Order dated July 20, 1978 which awarded temporary total disability and 5% unscheduled partial disability.

We agree that the Determination Order is inadequate. Claimant's treating physician rated his physical impairment at 10%. Claimant has a GED and some community college but has only worked at manual farm labor. Although claimant can do moderate work, his injury forecloses him from doing the most remunerative form of work he had done before, bucking sacks of onions onto a truck.

On the other hand, the Referee's award is excessive. It significantly exceeds the extent of physical impairment and is not justified by the social/vocational evidence. Claimant's education suggests numerous job opportunities besides just farm labor. It is apparently a matter of claimant's choice that his prior work experience has been only farm labor. And even in the area of farm labor, claimant can still perform all the kinds of work he has done before with the exception of bucking onions.

Compared to other similar cases, the Board concludes that unscheduled permanent partial disability from loss of wage earning capacity is 15%.

We find no basis in the record for the Referee's award of temporary total disability. There is no medical documentation that claimant was unable to work during the relevant period. Dr. Gneuchtel states only that claimant is partially disabled from engaging in some of his normal work activities. This is not total disability.

ORDER

The Referee's order dated September 9, 1980 is modified.

Claimant is awarded 15% unscheduled permanent partial disability; this award is in lieu of all others. The Referee's order that claimant be paid temporary total disability from November 29, 1979 to March 13, 1980 is reversed.

ROZELLA C. GATEWOOD, CLAIMANT
Peter Hansen, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by SAIF

WCB 80-06989
July 6, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Wolff's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which she is entitled. The Referee also assessed a penalty against SAIF in an amount equal to 15% of the unpaid medical bills and time loss compensation between May 1, 1980 and September 19, 1980.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 16, 1980 is affirmed.

WILLIAM M. GOODSBY
Paul Bocci, Defense Attorney
Request for Review by Claimant
Cross Request by Employer

WCB 80-04202
July 6, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review and the employer cross requests review of Referee Nichols' order which affirmed the Determination Order's award of temporary disability, affirmed the employer's denial to reopen the claim and awarded claimant 16° for 5% unscheduled permanent partial disability for the injury to his low back.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 31, 1980 is affirmed.

DONAL C. HOVATER, Claimant
Jerry Gastineau, Claimant's Attorney
Roger Luedtke, Defense Attorney
Request for Review by Claimant

WCB 80-03121 & 80-03122
July 6, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Wolff's order which affirmed the two Determination Orders whereby claimant was granted temporary total disability compensation only and no award of permanent partial disability.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 28, 1980 is affirmed.

DELMAR C. JOHNSON, CLAIMANT
Leslie Bush, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney
Request for Review by Claimant

WCB 79-09216
July 6, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Leahy's order which affirmed the carrier's denial of his claim for an alleged injury of July 11, 1979.

The Board, after de novo review, affirms and adopts the order of the Referee.

We note the discrepancies between the Referee's account of the vacation "cruise" and what actually took place. We do not feel, however, that this significantly changes the matter in claimant's favor. Claimant has failed, by a preponderance of the evidence, to prove his case.

ORDER

The Referee's order dated August 26, 1980 and the supplemental order dated December 15, 1980 are affirmed.

BETTY J. KANNA, CLAIMANT
David Hittle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-07794
July 6, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Braverman's order which affirmed the SAIF Corporation's denial of claimant's alleged back condition.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 23, 1980 is affirmed.

ELIZABETH KOLANDER, CLAIMANT
Nick Nylander, Claimant's Attorney
Frank Moscato, Defense Attorney
Request for Review by Employer

WCB 80-03870
July 6, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Daron's order which awarded claimant a total of 35% unscheduled permanent partial disability. The employer contends the extent of claimant's disability is minimal and the award is excessive. We agree.

The 24-year-old claimant compensably injured her low back July 9, 1979 loading veneer into a dryer. The claim was closed by a Determination Order which awarded 5% unscheduled permanent partial disability. Dr. Stainsby, neurologist, rates claimant's impairment as minimal. Claimant has two years of college but has limited work experience. Claimant, as the Referee put it, "unrealistically" applied for jobs since the injury which require skills she testified she does not have. In sum, we find claimant has significant aptitudes and adaptability for reemployment and only minimal physical disability.

Considering all relevent factors and comparing claimant's case with similar cases, the Board finds claimant to be 15% disabled.

ORDER

The Referee's order dated November 7, 1980 is modified.

It is ordered that claimant is awarded 48° for 15% unscheduled permanent partial disability. This award is in lieu of all previous awards.

Claimant's attorney is awarded 25% of the increased compensation awarded by this order over that awarded by the Determination Order.

The remainder of the Referee's order is affirmed.

JOHN L. LaMARSH, CLAIMANT
Roger Wallingford, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-05800
July 6, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Braverman's order which granted him an award of 24° for 7.5% unscheduled right shoulder, neck, upper and lower back disability. Claimant contends this award is inadequate.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 7, 1981 is affirmed.

CHARLES McGHEE, CLAIMANT
Harold W. Adams, Claimant's Attorney
Roger Warren, Defense Attorney
Request for Review by Employer

WCB 78-09025
July 6, 1981

Reviewed by Board Members Barnes and McCallister.

The employer/carrier seeks Board review of Referee Foster's order which set aside the denial of an aggravation claim, ordered payment of temporary total disability and assessed a penalty. (The claimant appealed and the employer/carrier cross-appealed. Claimant's appeal was dismissed by the Board March 9, 1981. The cross-appeal is therefore the only matter before the Board.) We affirm the ordered temporary total disability and the penalty; we reverse the Referee's acceptance of the aggravation claim.

The 47-year-old claimant compensably injured his low back, involving his left knee, November 13, 1974. The claim was closed by Determination Order dated May 10, 1976, awarding temporary total disability only.

Claimant quit work June 9, 1978 contending that driving a rigid suspension dump truck aggravated his back condition. Claimant did not seek medical attention until July 31, 1978 when he appeared at Dr. Melgard's office complaining of back, leg and ankle pain from having fallen down four or five days earlier. Claimant reported his left leg went out on him and he fell down some stairs. Dr. Melgard reported claimant had a broken ankle and his back condition was symptomatic. Claimant was hospitalized in traction August 1, 1978 to August 5, 1978 and a cast was put on his ankle.

The request for claim reopening was made by Dr. Melgard August 2, 1978. The carrier did not respond until October 9, 1978 when it issued a denial. Claimant was not paid temporary total disability during the interim. The Board agrees with the Referee that temporary total disability should have been paid from August 2, 1978 to October 9, 1978. The Board further agrees that a 20% penalty is warranted because of the failure to pay interim compensation and the failure to deny in a timely manner.

Turning to the question of claimant's aggravation claim, there are two components to it--a worsening of claimant's back condition from his 1974 injury, and his broken ankle supposedly caused by leg weakness caused by the back condition. In resolving these conditions, the Referee apparently did not regard claimant's credibility as a part of the decisional process in this case. Rather, the Referee focused only on medical evidence: "The only medical evidence we have in this case is Dr. Melgard's." However, claimant's credibility is here important because a high percentage of Dr. Melgard's reports are only a statement of the history he obtained from claimant. See Evelyn LaBella, WCB Case Nos. 79-06120, 79-06121, 79-08172 and 79-08940 (Order on Review, April 24, 1981) at page 6: "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."

In assessing claimant's credibility, we find major discrepancies in the record. A chronology of events is in order.

November 13, 1974: Claimant's original injury.

Sometime in 1976: Claimant testifies his truck was hit by a tractor and "like to broke my neck."

Sometime in 1977: Claimant fell six feet onto a gravel surface but filed no claim and sought no medical attention.

March 28, 1977: Claimant is cited for driving under the influence of intoxicants (DUI).

April 16, 1977: Claimant has one car accident, breaking four ribs. DUI citation with a blood/alcohol content of .303, more than three times the legal limit.

April 1978: Claimant went to work driving dump truck.

June 9, 1978: Claimant quit work, claiming too much pain.

June 10, 1978: Claimant is again cited for DUI.

July 26-27, 1978: Claimant fell down some stairs, giving rise to this claim.

July 31, 1978: Claimant went to Dr. Melgard and an aggravation claim was filed August 2, 1978.

Claimant testified under oath he had no alcohol problem. This is inconsistent with three convictions for driving under the influence in a little more than two years. Claimant testified he worked from April 1978 to June 9, 1978 driving a dump truck. Claimant told doctor Melgard he had been driving the truck for a year. In fact, claimant did not work from October 1977 to April 1978. Claimant testified that his girlfriend drove him the evening he fell down the stairs. He told Dr. Melgard he walked. Claimant testified he had not been in any tavern fights. Later in testimony he admits he had been in "little scrapes" in taverns. In fact, one medical report found nine nasal fractures.

Dr. Harwood's report stated, "When the patient entered the examining room, he had a slight 'limp' favoring the left leg. He was observed after departing the building without a limp."

The Board finds too many discrepancies in claimant's testimony to make him a credible witness. Therefore, medical opinions based on claimant's history are not persuasive.

We look only at the objective medical evidence to determine if there was a worsening of claimant's back condition or if claimant's fall and ankle injury were caused by his back condition. No medical evidence documents give away weakness in claimant's leg as a result of his 1974 back injury. If any weakness existed, claimant did not mention it to any doctor between his injury in 1974 and his July 26-27, 1978 fall that gave rise to this claim. The give-away-weakness theory depends entirely on claimant's credibility, about which we have doubts. Given claimant's several drunk driving convictions, there is another possible explanation for falling down. The Board is not persuaded that claimant's fall and resulting ankle injury were caused by claimant's 1974 back injury.

On the question of whether claimant's back condition has worsened, a comparison of medical reports dated February 4, 1975, February 27, 1976 and July 7, 1979 reveals that objective examination results are substantially the same in all reports. To the extent that more recent reports show an overall worsened condition, for example, Dr. Harwood's restriction of claimant to light work, this is based in large part on claimant's ankle injury from his fall, which we have found to be noncompensable. We find no objective medical evidence that establishes claimant's back condition has worsened.

ORDER

The Referee's order dated July 28, 1980 is affirmed in part and reversed in part.

That part of the Referee's order directing payment of temporary total disability and a 20% penalty is affirmed. That part of the Referee's order finding that claimant's back condition has worsened and his leg injury is compensable is reversed.

DOROTHY L. PETERSON, CLAIMANT
Stephen Frank, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-06703
July 6, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Williams' order which awarded 64° for 20% unscheduled permanent partial disability for claimant's right shoulder and neck condition.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 19, 1980 is affirmed.

LYLE E. PETTY, CLAIMANT
Harold W. Adams, Claimant's Attorney
Mary T. Danford, Defense Attorney
Request for Review by Claimant

WCB 80-07089
July 6, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Danner's order which denied the relief requested by claimant. The issue on appeal is claimant's entitlement to further compensation for temporary total disability alleging he was not medically stationary.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 10, 1980 is affirmed.

ELMER W. PETZ, CLAIMANT
J. David Kryger, Claimant's Attorney
Paul Bocci, Defense Attorney
Request for Review by Employer

WCB 79-01374
July 6, 1981

Reviewed by the Board en banc.

The employer seeks Board review of Referee Nichols' order which granted claimant an award of permanent total disability "since the Opinion and Order which was issued in 1975."

Claimant suffered an industrial injury in September 1969 while employed as a millwright. The injury was diagnosed as acute lumbosacral strain. Claimant suffered a second injury on September 19, 1971 and has not returned to gainful employment since.

Over the years the claim has been reopened several times with the last Determination Order giving claimant a total award of 75% unscheduled disability. Claimant appealed the last Determination Order and, after a hearing in 1975, Referee Johnson, by an order dated April 14, 1975 granted claimant an award for permanent total disability. In 1979 the employer petitioned to have claimant's permanent total disability award reevaluated. The Board, by an Own Motion Determination dated February 2, 1979, found claimant was not permanently and totally disabled and granted him an award of 80% unscheduled disability in lieu of prior awards. This case was before the Referee on claimant's request for a hearing on the Board's Own Motion Determination. The Referee, in finding claimant permanently totally disabled since 1975, was in effect saying the Board's 1979 Own Motion Determination was erroneous. We disagree.

In December 1978 Dr. Specht reported that he examined claimant and found his gait and station were normal and found no deformities of the lumbar spine. Claimant told Dr. Specht he was willing to return to work if guaranteed his income would not be less than his compensation and social security benefits. Dr. Specht found claimant was not permanently and totally disabled and was capable of vocational rehabilitation. Claimant was restricted to work requiring no bending, stooping or lifting over 35 pounds. Dr. Specht was provided with the films taken of claimant which were introduced at the hearing and still found claimant was not permanently and totally disabled.

Dr. Kovachevich, on April 2, 1980, reported that claimant could not return to full-time heavy manual labor. Dr. Tsai, on July 10, 1980, found claimant could not return to gainful employment. The films presented show claimant assisting in various labor endeavors in the construction of his new house.

Claimant is 54 years of age with a seventh grade education with extra schooling in diesel and welding. Most of his work has been as a millwright, but he has also been an auto mechanic, machinist and truck driver.

Claimant testified he can only sit 1/2 hour, walk one mile on soft ground and only one block on hard surfaces. He goes hunting and fishing four or five times a year. He testified that on bad days he lies down four to six hours. The films showing claimant constructing a house must have been taken on a good day.

The Board concludes, based on a preponderance of the evidence presented, that claimant is not permanently and totally disabled. The Referee calls Dr. Tsai the claimant's treating physician, but Dr. Tsai had not treated claimant for seven years. Claimant, in essence, has no active treating physician and is receiving no medical treatment.

The award of 80% unscheduled disability is hereby reinstated.

IT IS SO ORDERED.

JOHN O. PRUITT, CLAIMANT
J. David Kryger, Claimant's Attorney
Gary D. Hull, Defense Attorney
Request for Review by Claimant

WCB 80-02939
July 6, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Nichols' order which awarded 10% loss of the use of the leg for knee injuries sustained in July of 1979 in lieu of the 5% loss awarded by the Determination Order dated March 24, 1980. The claimant contends this award is inadequate.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 18, 1980 is affirmed.

MAX N. SANCHEZ, CLAIMANT
January Roeschlaub, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-01996
July 6, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Wolff's order which affirmed a Determination Order which awarded claimant temporary total disability and 20% unscheduled disability. The claimant contends the 20% award is insufficient.

The Board adopts the Referee's statement of fact. Those facts, however, lead us to a different conclusion. Claimant is 53 years of age, has worked only custodial and manual labor, has a fourth grade education and cannot read or write English. These factors combined with claimant's disability from his injury preclude him from a great deal of the labor market. All facts considered, the Board finds claimant to be 35% disabled.

ORDER

The Referee's order dated December 4, 1980 is modified.

Claimant is awarded 35% unscheduled permanent partial disability. This award is in lieu of all others.

Claimant's attorney is granted a sum equal to 25% of the increased compensation awarded by this order.

LOUIS SULLIVAN, CLAIMANT
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-03739
July 6, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Seifert's order which affirmed the SAIF's denial of April 13, 1979 which denied responsibility for claimant's alleged injury of August 17, 1978.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated July 11, 1980 is affirmed.

GARY WINNER, CLAIMANT
John Hiltz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-03791
July 6, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Braverman's order which affirmed SAIF's denial of a claim for aggravation. The issue on appeal is the validity of the insurer's February 14, 1980 denial and compensability of the claim.

Claimant contends that he suffered a worsening of his compensable March 30, 1978 back injury on or about November 6, 1979. The SAIF Corporation denied the claim on the stated grounds that claimant failed to keep two medical appointments for an independent medical exam by the Orthopaedic Consultants.

The Referee found, and the Board agrees, that the medical evidence does not support a finding that claimant's lumbosacral strain of March 20, 1978 was anything more than a temporary condition; that claimant's current condition appears, by a preponderance of the evidence, to be a progression of an underlying discogenic disease which manifested itself as early as 1969; and that claimant's condition was not precipitated, accelerated or materially caused by the March 20, 1978 event.

The Board concludes, therefore, that the Referee's order affirming SAIF's denial should be affirmed.

ORDER

The Referee's order dated October 2, 1980 is affirmed.

DWIGHT G. AMBROSE, CLAIMANT
Gary Susak, Claimant's Attorney
G. Howard Cliff, Defense Attorney
Request for Review by Employer

WCB 80-00486
July 7, 1981

Reviewed by Board Members Barnes and McCallister.

The employer/carrier requests Board review of Referee Ail's order which granted claimant an award of 75% scheduled permanent partial disability compensation of his right hand. The employer contends this award is excessive.

The claimant injured his right hand March 16, 1979 when it was caught in a roller. He suffered a degloving type injury to the back of the hand and fingers. Dr. Gill on April 20, 1979 described the injury as:

> "...a serious, extensive avulsing type injury of the dorsum of the right hand from the carpal level distally to the bases of the index, long, ring and small fingers."

(The first problem the Board faces is to determine whether the claimant's thumb was injured and whether the thumb is properly to be considered in the evaluation of permanent partial disability of the hand.) Dr. Gill further reported:

> "The thumb and wrist appears normal." (Emphasis Added.)

Dr. Gill recommended a regime of treatment:

> "...in terms of getting active motion of the metacarpal and interphalangeal joints of his fingers." (Emphasis Added.)

One inference to be drawn from Dr. Gill's report is that the thumb was not involved in the injury, at least not at the time he examined claimant.

However, the record is subsequently confused by Dr. Stephens, the treating physician, by a chart note dated August 20, 1979:

> "He can functionally straighten the fingers and thumb up to open his palm almost to a normal range. He lacks probably 20% of ability to fully extend all fingers and thumb to grasp." (Emphasis Added.)

Dr. Stephens goes on to later report factors of impairment using a range of motion chart which includes range of motion measurements on the thumb. The record is silent whether the Evaluation Division considered the thumb in their disability evaluation. A Determination Order was issued December 20, 1979 awarding claimant "67.5° for 45% loss of your right hand."

The claimant requested a hearing claiming the 45% disability awarded by the Determination Order to be inadequate, basing his contention primarily on loss of motion and sensitivity to cold. The Referee increased the award to 75% loss of the right hand. The Referee reasoned that the 30% increase was indicated because:

> "It appears from the medical evidence that impairment based on limitation of motion alone is 47% of the right hand. I found claimant a forthright and credible witness who testified that he also suffered diminished strength and grip, loss of dexterity, cold sensitivity and disabling pain." (Emphasis Added.)

Using Dr. Stephen's range of motion measurements, the Board finds, after applying OAR 436-65, the impairment of the hand based on limitation of motion alone is 39% if the thumb is included and 32% if the thumb is not included. The Board believes a reasonable inference can be drawn from all the evidence that the thumb impairment should be included regardless of whether the Evaluation Division did so. We find the claimant's impairment based on limitation of motion is 39%.

The next question is what is the extent of disability. Since the impairment based on loss of motion alone is 39%, we infer that the Evaluation Division in applying OAR 436-65, did consider other factors because the Determination Order awarded 45% disability. We see nothing in the record which persuades us that the disability awarded by the Determination Order is an impairment rating based solely on range of motion; we are convinced the award granted by the Determination Order properly reflects application of OAR 463-65 and did take factors other than range of motion into consideration. We, therefore, reverse the Referee and reinstate the Determination Order.

Parenthetically, we note the 47% impairment figure based on limitation of motion relied on by the Referee and the parties most likely resulted from either a misapplication of or a disregard for OAR 463-65-532(1). This rule provides:

> "(1) When two or more joints within a radical are involved, combine the impairment values."

If one adds the impairment values extracted from Dr. Stephens' report, the result is 47%, thus the inclusion of that erroneous calculation in the Referee's assessment of disability.

ORDER

The Referee's order dated July 16, 1980 is reversed, and the Determination Order is reinstated.

CLIFFORD CRAWFORD, CLAIMANT
David Vandenberg, Jr., Claimant's Attorney
Delbert Brenneman, Defense Attorney
Request for Review by Claimant

WCB 79-02692
July 7, 1981

Reviewed by the Board en banc.

Claimant seeks Board review of Referee Wolff's order which affirmed the carrier's denial of March 13, 1979. Claimant contends his worsened prostatitis condition is compensable.

We first note that the Referee mistakenly stated that the issue in this case was whether claimant's job activities caused claimant's prostatitis condition. The sole issue before us is whether claimant's work was a material factor contributing to the aggravation of claimant's prostatitis.

We agree with the parties that this is basically a Weller situation. Weller v. Union Carbide Corporation, 288 Or 27 (1979). We also agree that of the four criteria to be met in Weller, only the first two are in dispute. It is claimant's burden to prove that "(1) his work activity and conditions (2) caused a worsening of his underlying disease..." There is quite a bit of dispute whether the vibration of the heavy equipment claimant operated at work was the cause of his worsened condition or his off-the-job activities which included dirt bike riding, motorcycle riding, water skiing and karate. We find that the preponderance of the evidence would place the cause of claimant's worsened condition on his motorcycle and dirt bike riding. However, even if we found his work activities did cause the worsening, we find that claimant has failed to meet the criteria in subsection (2) of Weller. Claimant must show that his work caused a worsening of his underlying disease. To show that his symptoms have worsened is not sufficient. Dr. Rustin, in his deposition, indicated only claimant's symptoms were increased. Dr. Wayland did not feel claimant's job could produce such symptoms. There is no doctor that said specifically that claimant's underlying condition was worsened. Our conclusion is that claimant has failed to show his worsened condition was materially contributed to by his work activities and also that the evidence does show this "condition" is merely an increase in symptoms. See also Thompson v. SAIF, 51 Or App 395 (1981).

ORDER

The Referee's order dated November 14, 1980 is affirmed.

LAURA J. DAVIDSON, CLAIMANT
Lawrence Rew, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-00266
Jul7 7, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Gemmell's order which remanded claimant's scabies claim to it for acceptance and the payment of compensation as required by law.

This is a companion case to Melissa L. Maier, WCB Case No. 80-00277, decided by the Board this date. The facts are the same; the result will be the same.

ORDER

The Referee's order dated December 1, 1980 is reversed, and the denial issued by the SAIF Corporation is reinstated.

RICHARD DOYLE, CLAIMANT
Noreen Saltveit, Claimant's Attorney
Michael Hoffman, Defense Attorney
Request for Review by Employer

WCB 80-06890
July 7, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Gemmell's order which remanded claimant's claim for reopening and the payment of compensation commencing August 1, 1980 until closure and referred claimant to the Field Services Division for re-evaluation of his eligibility for vocational assistance.

Claimant, 31 years of age, was a machinist for Edwards Building Supply, and on July 13, 1979 his right index finger was crushed. He was hospitalized and underwent surgery by Dr. Struckman for open reduction and pin fixation.

Dr. Button examined and reported on July 20, 1979 that claimant had suffered a severe crush injury. Dr. Button released claimant for light duty work on August 13, 1979. On September 5, 1979 Dr. Button reported that claimant had returned to work and was doing satisfactorily.

On October 19, 1979 Dr. Button reported that claimant had been laid off because of lack of work but had been doing heavy work satisfactorily. Claimant had not found a job yet, and the doctor recommended job placement. He rated impairment at 67% of the finger or 17% of the right hand. The claim was closed by a Determination Order of April 11, 1980 granting claimant 18° for 75% loss of the right index finger.

Claimant searched for employment to no avail so went to Reno and got a job for seven months as a cashier at minimum wage. He then returned to Oregon.

Claimant became depressed, and his attorney sent him for evaluation by Dr. Moss, a psychiatrist who examined him on August 1, 1980. Dr. Moss felt claimant was suffering from anxiety reaction and depression, but it was unreasonable to say this was totally caused by the injury; he had pre-existing difficulties. The doctor did feel claimant was in need of psychiatric treatment in the form of medication and psychotherapy. The doctor requested claim reopening.

On September 22, 1980, Field Services Division wrote to claimant's attorney advising that claimant was ineligible for their services because he had returned to work on August 13, 1979 and was then laid off in October 1979 for reasons unrelated to his industrial injury. Claimant then returned to work for two days in November 1979 and worked no longer for fear of "messing up" his pending application for unemployment compensation.

The carrier had claimant examined by Dr. Quan on October 9, 1980. His diagnosis was anxiety disorder chronic, moderately severe. Dr. Quan felt that claimant's level of anxiety was worse when he could not find work. The doctor felt claimant's psychological difficulties did not preclude him from performing gainful employment. On October 15, 1980 Dr. Moss reported that at the time of his first examination of claimant, it would have been difficult for him to hold gainful employment, but he felt claimant was now employable and retraining could begin.

The Referee reopened the claim as of Dr. Moss' initial examination on August 1, 1980. We reverse. Claimant returned to his regular occupation on August 13, 1979 and worked, according to Dr. Button, without difficulty until the employer had a general layoff which affected claimant because of his lack of seniority. This layoff was in no way related to claimant's industrial injury and, in fact, the evidence indicates that claimant was performing satisfactorily. Without this layoff one can only presume that claimant would still be employed at his regular occupation for this employer.

This layoff, however, forced claimant to seek employment in a depressed labor market. Claimant then moved to Reno and was employed as a cashier for seven months until he returned to Oregon for family reasons. Again he has been unable to find employment here.

The carrier has never denied the payment of claimant's psychological therapy by Dr. Moss and, therefore, we conclude that it is willing to accept these therapy sessions under the provisions of ORS 656.245. Claimant, however, is not entitled to have his claim reopened because the evidence does not provide any basis for finding claimant's unemployment status related to his industrial injury. On the issue of reevaluation of claimant's eligibility for Field Services assistance, we reverse as the evidence does not prove claimant incapable of returning to his regular employment.

ORDER

The Referee's order dated November 13, 1980 is reversed.

Claimant is only entitled to continued psychotherapy sessions and treatment by Dr. Moss under the provisions of ORS 656.245.

MELISSA L. MAIER, CLAIMANT
Lawrence Rew, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-00277
July 7, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Gemmell's order which disapproved its denial of compensability and remanded the claim for scabies to it for acceptance and the payment of compensation as provided by law.

The Board adopts the findings of fact as recited by the Referee.

The Referee, in reaching her conclusion, found "the ultimate question in this case is a factual and not a medical one." We disagree in part. Although the diagnosis of scabies is not in contention, there must be proof by expert medical opinion on whether or not the diagnosed condition was causally connected to the work place or environment. Uris v. SCD, 247 Or 420 (1967).

The medical evidence indicates that SAIF's consultant, Dr. Much, reported scabies usually is transmitted by skin to skin contact over prolonged periods. He did feel it was possible to get scabies from wearing the clothing of an infected person but did not feel that fleeting contact would be sufficient. Dr. Woodward agreed with Dr. Much that the more frequent way of spreading scabies was by prolonged human contact but indicated it was known to spread also by more casual means. Dr. Nguyen, a physician at the hospital where claimant worked, examined the residents of the ward where claimant worked and found that on October 2, 1979 there was no scabies present. This was almost two months after the claimant's symptoms arose.

We find the most telling and persuasive evidence is the testimony of Dr. Miller, a ward physician, who had experience with scabies when he was employed as a public health officer. Dr. Miller's opinion was that there was no causal relationship between claimant's scabies and her work at the hospital. He testified that scabies was a frequent illness in "this community." This testimony gives rise to the potential for exposure both on and off the job.

Another telling part of Dr. Miller's testimony is his explanation that without medical treatment scabies will go away in six to twelve months. Yet, Dr. Nguyen inspected the hospital residents in less than two months after the claimant contacted the scabies, and he found nothing. Dr. Miller convincingly testified that if any resident had scabies, it would have been found by the staff who bathed them as the staff was always showing the physicians inconsequential rashes.

This claim is for an occupational disease. In James v. SAIF, 290 Or 343 (1981), the Supreme Court ruled that to be compensable, an occupational disease must be caused by circumstances "to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment." ORS 656.802(1)(a). Dr. Miller testified that the condition of scabies was "frequent" in that community. Therefore the condition was something that the claimant may have been exposed to both on and off the job. There is no evidence that any resident or staff member to whom claimant was "exposed" at work caused scabies to spread to claimant.

ORDER

The Referee's order dated December 1, 1980 is reversed.

The denial issued by SAIF is reinstated.

WILLIS L. PADDOCK, CLAIMANT
Jeffrey Mutnick, Claimant's Attorney
Steve Reinisch, Defense Attorney
Request for Review by Claimant

WCB 80-01901
July 7, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of Referee Nichols' order which affirmed the employer/carrier's denial of responsibility on the ground claimant had a new intervening injury.

The Board affirms and adopts the Referee's order with two additional reasons why we agree the denial should be affirmed.

We find the claim not compensable based on the examinations and chart notes presented in the deposition of Dr. Arbeene. This evidence establishes that from March 1979 up to the incident of January 4, 1980 claimant was not suffering from muscle spasms, at least not when examined by this doctor. Further, claimant's credibility is questioned as he gave two histories of the January 4, 1980 incident. This conflict of histories was verified by Dr. Arbeene in his deposition:

> "I had my misgivings about that, and I'm glad you brought it up because I haven't felt very comfortable with that ever since it occurred. Basically, he told the admitting physician on the evening of his admission and he told me the next day when I first evaluated him that he slipped and fell."
>
> * * *
>
> "...and then two or three days later, after he had been in the hospital for that period, he asked me over to the bedside, and he wanted to basically expand upon how he came to slip and fall, and he began to tell me about having spasms in his neck and losing his balance and falling..."

The Board concludes that claimant has failed to carry his burden of proof that the fall on January 4, 1980 was causally linked to his industrial injury. The denial is affirmed.

ORDER

The Referee's order dated December 5, 1980 is affirmed.

SUSAN PARRIES, CLAIMANT
Lawrence Wobbrock, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06240
July 7, 1981

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Menashe's order which set aside its denial and remanded this claim to it for acceptance and payment of benefits. The issue is whether claimant's injury arose out of and in the course of employment. The more specific dispute seems to be (in the absence of briefs from the parties) whether when claimant fell in the lobby of a multi-tenant office building on her way to her employer's office she was on the employer's "premises."

We agree with and adopt the following from the Referee's order:

> "Claimant argues she was on the employer's premises citing the following language from Larson's discussion of what constituted the employer's premises:
>
> > "When the place of employment is a building, it is not necessary that the employer own or lease the place where the injury occurred. It is sufficient if he has some kind of right of passage, vestibules, hallways, walkways, driveways or passage ways through which the employer has something equivalent to an easement." 1 Larson, Workmen's Compensation Law, Section 15.41.
>
> "In Rohrs v. SAIF, 27 Or App 505 (1976) the Court of Appeals set out the lobby and elevator exception quoted above and underground tunnel between the building where she worked and the public garage where her car was parked. Claimant was not required to park in that lot as an incident of employment. The Court stated:

"There is nothing in the record to indicate that the employer in this case had a "right of passage" akin to an easement in the garage greater than that accorded to the general public. The rule cited by Larson is intended to cover common areas and cannot be stretched to cover the area involved in this case."

"The employer's office was on the fifth floor. The lobby and adjacent elevators provided the customary, usual and most practical way of getting to the office. It certainly was contemplated, expected and in fact required that claimant would have to use the lobby of this private office building to get to work. Claimant was traveling on a necessary path to reach her work and the injury occurred in a common area. I conclude the injury occurred on the employer's premises."

ORDER

The Referee's order dated November 13, 1980 is affirmed.

Claimant's attorney is awarded $50 for services rendered in connection with this Board review, payable by the SAIF Corporation.

I respectfully dissent from the majority opinion as follows:

The facts are not in dispute, and those pertinent to determining compensability are: (1) The claimant was on her way to work following a usual means of ingress to the offices of her employer located in a multi-tenant office building; (2) while in the building but not yet "at work," the claimant fell and dislocated her left knee cap; and (3) the cause(s) of the fall is unknown.

In Rogers v. SAIF, 289 Or App 633, the Supreme Court restated the principle that the determination of compensability should be "...consistent with and would be advanced by an inquiry into the nature and extent of the connection of the injury and the employment." The Court went on to state, "...the ultimate inquiry is the same: Is the relationship between the injury and the employment sufficient that the injury should be compensable?"

In this case, I find that the relationship between the injury and the employment is not sufficient to find it compensable. The claimant at the time of the injury was arguably on the employer's "extended" premises, but the mere presence of the employee on the premises does not determine compensability--there must be a relationship to employment. I find the relationship here to be obscure, at best. Secondly, the cause of the injury is unknown and, again, mere presence on the employer's premises, even extended premises, does not create in, and of itself the necessary causal link to employment.

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

Robert L. McCallister

Robert L. McCallister
Board Member

JUNE PYLE, CLAIMANT
Robert Grant, Attorney
SAIF Corp Legal, Defense Attorney
Order of Remand

WCB 80-05114
July 7, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Danner's order which ruled that the SAIF Corporation was not responsible for payment of certain medical expenses on the ground that the 1979 amendments to ORS 656.313 were retroactive. The Board recently reached the opposite result in Robert V. Condon, WCB Case No. 80-05218 (March 26, 1981).

ORDER

The Referee's order dated December 30, 1980 is reversed, and this case is remanded to the Referee for further proceedings consistant with Robert V. Condon, WCB Case No. 80-05218 (March 26, 1981).

WALTER SEXTON, CLAIMANT
Glenn Ramirez, Claimant's Attorney
Daryll Klein, Defense Attorney
Request for Review by Employer

WCB 80-05509
July 7, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Braverman's order which set aside the carrier's denial of an aggravation claim. We reverse.

There is no Determination Order in the record, but the parties apparently agree that a Determination Order was issued on claimant's back claim on April 17, 1979. Thus the question is whether claimant's back condition compensably worsened between April 17, 1979 and the December 10, 1980 hearing.

The medical evidence establishes that claimant's condition did not worsen in this short period of time. Dr. Laubengayer's January 9, 1979 report, upon which the Determination Order was apparently based, stated:

"The examination demonstrates limitation of back motion in all directions. Mr. Sexton is able to bend forward and bring his fingertips within about eight inches of the floor, but this is quite slow and obviously causes him some back pain. Lateral bending is about 50 percent of normal, and back extension is about 50 percent of normal. The motor examination is normal and Mr. Sexton is able to raise up and walk on his tiptoes and raise up and walk on his heels. Leg lengths are equal and leg and thigh diameters are equal. The Babinski reflexes are physiologic. Deep tendon reflexes are absent bilaterally at the knees and ankles, even with augmentation. Straight-leg-raising on the right is mildly positive at 80 degrees with low back pain, but no radicular pain. Straight-leg-raising on the left is negative. The sensory examination is entirely normal.

Patrick's test with the right hip in external rotation produces a moderate amount of low back discomfort on the right side. Patrick's test on the left side is negative. There is tenderness over the greater trochanters bilaterally; however, this is only moderate. There is mild tenderness over the midsection of the right sciatic nerve. There is no sciatic notch tenderness on the right or left side. There is mild to moderate tenderness in the gluteal musculature bilaterally. There is marked tenderness over the lower lumbar area from about L-3 down onto the sacrum in the midline. There is also marked tenderness in the paravertebral musculature on the right side of the back from about L-2 down onto the sacrum. There is spasm of the muscles of the right paravertebral group in the lumbar region.

Dr. Laubengayer's March 26, 1980 report, upon which the aggravation claim is based, is almost word-for-word identical:

"The examination of the back demonstrates a list to the left side on standing. The patient can bend forward and bring his fingertips down to about the level of his knees. Lateral bending to either side is markedly limited. Back extension is also almost zero and is quite painful. Motor examination continues to be normal, and Mr. Sexton is able to raise up on his tiptoes and raise up on his heels. Leg lengths are equal and thigh diameters are equal. The Babinski reflexes are physiologic.

> Deep tendon reflexes are absent bilaterally at the knees and ankles, even with augmentation. Straight-leg-raising on the right is positive at about 60 degrees with low back pain and no radicular pain. Straight-leg-raising on the left is positive at about 80 degrees with low back pain and no radicular pain. The Lasegue's test is negative bilaterally. The sensory examination is entirely normal. Patrick's test with the right hip in external rotation produces a moderate amount of back discomfort on the right side. Patrick's test on the left side is mildly positive with similar pain. There is no tenderness over the greater trochanters of either side. There is no tenderness over the sciatic nerves or sciatic notches. There is marked tenderness of the low back in the paravertebral musculature on the right side. There is also muscle spasm of the right side of the back. There is some tenderness over the spinous processes and mild tenderness over the muscles of the left side of the low back.

It appears that claimant is attempting to use this "aggravation" claim as a means of collaterally attacking the Determination Order entered in this case on April 17, 1979. This is forbidden. Deaton v. SAIF, 33 Or App 261 (1978). If claimant was dissatisfied with his award of April 17, 1979 he should have appealed from the that Determination Order. He did not do so and he cannot now use his "aggravation" claim to question the propriety of that Determination Order.

ORDER

The Referee's order dated December 23, 1980 is reversed and the carrier's denial of claimant's aggravation claim is reinstated.

ALICE STONEMAN, CLAIMANT
Lawrence Rew, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-00286
July 7, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Gemmell's order which remanded claimant's scabies claim to it for acceptance and the payment of compensation as required by law.

This is a companion case to Melissa L. Maier, WCB Case No. 80-00277, decided by the Board this date. The facts are the same; the result will be the same.

ORDER

The Referee's order dated December 1, 1980 is reversed, and the denial issued by the SAIF Corporation is reinstated.

ZELDA M. BAHLER, CLAIMANT
L. Leslie Bush, Claimant's Attorney
David O. Horne, Attorney
Gary D. Hull, Attorney
Lang, Klein et al, Attorneys
Order of Abatement

WCB 79-06095
July 13, 1981

A Request for Reconsideration of the Board's Order on Review dated June 15, 1981 has been received from claimant's attorney in the above-entitled matter.

In order to give the Board time to fully consider this request, that Order on Review should be abated. The employer/carrier is hereby granted 20 days to file a response.

IT IS SO ORDERED.

GUILLERMO BENAVIDEZ, CLAIMANT
Rolf Olson, Attorney
Paul Bocci, Defense Attorney
Order on Reconsideration

WCB 79-10201
July 13, 1981

The employer has moved for reconsideration of the attorney fee award in our May 5, 1981 Order on Review.

Upon reconsideration, we strike the last paragraph of our May 5, 1981 order and substitute the following therefore:

> Claimant's attorney is granted 25% of the increase in the award for permanent partial disability granted by the Board's order as and for a reasonable attorney fee, not to exceed a total of $2,000 in attorney fees under both the Referee's order and this Board order.

Except as modified by this Order on Reconsideration, the Board's May 5, 1981 Order on Review is hereby republished.

IT IS SO ORDERED.

VALENTIN S. BEROV, CLAIMANT
Rita Radich, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-00169
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's order which affirmed the carrier's denial of his claim for aggravation.

The Board, after de novo review, affirms and adopts the order of the Referee.

Two errors on page two of the Referee's order should be corrected. In line 10, "15% loss of the left leg" should be changed to show that the award was actually given for the right leg (the incorrect Determination Order was corrected by an earlier Opinion and Order). In the first full paragraph, line 3, "16°" should be changed to read "7.5°."

ORDER

The Referee's order dated October 20, 1980 is affirmed.

MICHAEL BROWN, CLAIMANT
Samuel Hall, Jr., Claimant's Attorney
Thomas McDermott, Defense Attorney
Request for Review by Carrier
Cross Request by Claimant

WCB 79-10780
July 13, 1981

Reviewed by Board Members Barnes and McCallister.

The carrier has requested Board review of Referee Baker's order which set aside its denial of November 14, 1979 and found the right shoulder condition and surgery to be compensable. The claimant cross-requested review of that portion of the Referee's order which denied claimant penalties and attorney fees for the carrier's "continuing denial."

The claimant injured his right shoulder on August 12, 1978. Dr. Freudenberg, the treating physician (an orthopedist), reported his diagnostic impression August 28, 1978:

> "This patient probably had a subluxation injury to his right shoulder rather than a rotator cuff injury per se and could very well have an anterior tear probably off the glenoid."

The claim was accepted as a disabling injury and was closed by a Determination Order June 28, 1979 which provided for temporary total disability through November 19, 1978. The claimant had returned to work November 20, 1978 at his regular occupation as a diesel mechanic. Dr. Freudenberg's report of May 7, 1979 upon which the Determination Order was based contains the following language:

> "The patient states today that he has no pain at all in the shoulder in his regular occupation as a diesel mechanic. He has been playing softball for the past four weeks and has noted pain in the shoulder with throwing activities. He cannot throw with the same velocity that he once could but so far this is his only complaint. He has not had any episodes of dislocation or any feelings of the shoulder going in and out." (emphasis added.)

In the same report Dr. Freudenberg opines claimant's right shoulder condition is medically stationary with "minimal impairment" and adds the following comment:

> "I would anticipate though that his shoulder is more susceptible to recurrent subluxation and/or dislocation type injury... The patient is, of course, more vulnerable to repeat subluxation or dislocation with less trauma than would otherwise be necessary for this injury in a normal shoulder." (emphasis added.)

On July 29, 1979 the claimant suffered a second dislocation of his right shoulder while water skiing. The claimant was examined by Dr. Smith, orthopedist, July 30, 1979, the day following the water skiing accident. Dr. Smith is listed on the Millicoma Orthopaedic Clinic, P.C. letterhead with Dr. Freudenberg. Dr. Smith reported:

> "Mr. Brown was doing well until yesterday. He was then water skiing. He developed some slack in his rope while he was holding on with his right hand and then suddenly the rope jerked." (emphasis added.)

Dr. Smith's diagnostic impression was:.."Probable anterior dislocation of right shoulder, reduced." He goes on to report: "Mr. Brown's old chart was reviewed. He had a shoulder injury in August 1978 which was treated by Dr. Freudenberg. The impression was that he had a subluxation and possibly an anterior capsular tear of the glenoid. He did well following conservative treatment. An arthrogram was unremarkable. Mr. Brown tells me that the pain he had with his recent injury was not as bad as the pain he had with the initial one. He also tells me that his yesterdays injury was quite a forceful one. I feel that there is a very good likelihood that this represents a second dislocation of the shoulder." (emphasis added.)

On October 19, 1979 the claimant returned to Dr. Freudenberg who reported, "Chronically dislocating right shoulder. These appear to be anterior dislocations," and commented:

> "The patient reports five episodes of dislocations of his right shoulder over the course of this past summer. The first occurred while water skiing on July 29, 1979. Since that time it has gone out multiple times." (emphasis added.)

Dr. Freudenberg opined:

> "I feel his claim should be reopened. His anterior dislocations are, in my opinion, definitely related to his injury sustained in August 1978. We will send a letter to EBI regarding reopening his claim and schedule the patient for a repair of his chronically dislocating right shoulder."

The surgery was done November 6, 1979 by Dr. Freudenberg with operative findings:

> "The anterior margin of the glenoid showed irregularity in the articular cartilage. The capsule and labrium, however, were not lifted and the capsule was simply stretched out. No loose bodies were identified. There was no palpable _____ (sic) lesion on the humerus." (emphasis added.)

The carrier denied reopening "due to the fact that you have had a new incident while water skiing on July 29, 1979."

In a report to the carrier dated November 15, 1979, Dr. Freudenberg states in part:

> "...his injury occurred on August 12, 1978...Subsequent to that injury he had five episodes of dislocations of his right shoulder. His first episode was while playing racquetball. This did not involve any unusual activity. He was simply striking at the ball with an overhand slam...He dislocated his shoulder also while water skiing simply being pulled out of the water with no undue violence there either. Mr. Brown's condition has worsened without any significant intervening incidents." (emphasis added.)

In a report dated February 11, 1980 directed to claimant's attorney, Dr. Freudenberg states:

> "However, he was not in the fortunate 10% who heals after this program and proceeded to have dislocations with relatively minor trauma. (emphasis added.)

The Referee set aside the carrier's denial and ordered the carrier to accept the worsened condition as compensable stating, "There is no medical opinion that the water skiing incident contributed independently to the condition requiring surgery." The Referee relied on the opinion of the treating physician Dr. Freudenberg. We disagree.

We do not find Dr. Freudenberg's opinion on causation persuasive. Dr. Freudenberg sets up the circumstances which could result in right shoulder dislocations subsequent to claimant's industrial injury--any minor trauma. We believe the ball throwing and raquetball incidents are the type of instigating "minor traumas" he contemplated. Dr. Freudenberg's description of how the water skiing dislocation occurred is also consistent with the minor trauma theory. However, we are persuaded the waterskiing accident occurred as described by Dr. Smith in a history taken from the claimant the day after that occurrence. We find that history more likely true than the later history recited by Dr. Freudenberg. Therefore, the July 29, 1979 incident was not a minor trauma but was, as claimant described it to Dr. Smith, "quite a forceful one." We find this event broke the chain of causation and was an independent contributing cause of the subsequent medical events relating to claimant's right shoulder.

The Board finds it more than coincidence that the medical record reveals no right shoulder dislocations as speculated by Dr. Freudenberg after claimant returned to work and before the water skiing accident. Rather, the claimant had made a good recovery from the industrial injury and that the water skiing accident was the triggering event which led to the subsequent dislocations precipitated by minor trauma as had been predicted by Dr. Freudenberg in his closing report and again predicted by Dr. Smith after the water skiing accident as a possible consequence of the water skiing injury.

We do not agree with the Referee's statement that:

> "To apply the independent contribution test to a subsequent off-job incident would be to do violence to the fundamental principle that a material contribution of the work activity is sufficient for compensability."

We hold that the independent contributing cause test does apply to fact situations as found in this case. We find Dr. Smith's report is legally sufficient to support application of the independent cause test. The skiing accident broke the chain of industrial causation and the injury arising out of the water skiing accident started the chain of events which led to the surgery. The carrier's denial is approved.

The Referee's order dated November 26, 1980 is reversed.

SHERRI CESSNUN, CLAIMANT
Rick McCormick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

80-02242 & 80-03891
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of that portion of Referee Nichols' order which affirmed the SAIF Corporation's denial of compensability for a right knee condition.

The Board affirms and adopts the Referee's order. The claimant, in her brief, states that where medical opinions as to causation are in conflict, particular weight should be given to a treating physician who examined and operated on claimant, citing Blair v. SAIF, 21 Or App 229 (1975). Hammons v. Perini, 43 Or App 299 (1979) is more relevant here.

ORDER

The Referee's order dated December 19, 1980 is affirmed.

JOSEPHINE SMITH CORWIN, CLAIMANT
Gerald Martin, Claimant's Attorney
Marcus Ward, Defense Attorney
Request for Review by Claimant

WCB 79-08050
July 13, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Danner's order which upheld SAIF's denial of compensability.

The Board corrects a date in the Referee's order. In the first line of the second full paragraph on page 2, "April 8" is corrected to read "August 8." As so corrected, the Board affirms and adopts the Referee's order.

Claimant's brief argues it is impossible to understand how the Referee could have arrived at a conclusion contrary to all the medical evidence. As we interpret the Referee's order, his conclusion is based on an implicit finding that claimant was not credible. We adopt the Referee's order with that understanding of its foundation.

ORDER

The Referee's order dated May 21, 1980 is affirmed.

WILLIAM DEAN, CLAIMANT
Rolf Olson, Claimant's Attorney
Daniel Meyers, Defense Attorney
Order Denying Reconsideration

WCB 80-02825
July 13, 1981

Claimant has moved for reconsideration of our June 25, 1981 Order of Remand.

Claimant first "requests the right to appeal" and complains that our Order did not include notice of appeal rights. Whether a Board order is appealable or not depends on the relevant statutes as interpreted by the Court of Appeals; it does not depend upon whether a Board order includes notice of appeal rights. In other words, a Board order that is not statutorily appealable does not become appealable because of erroneous notice of appeal rights, and conversely, a Board order that is statutorily appealable does not cease to be such because it does not include notice of appeal rights. Under the relevant statutes, claimant either does or does not have the right to appeal; there is nothing this Board can do to grant such a "request."

Claimant next contends we erred in vacating the Referee's order, arguing: "The award of compensation should stand until such time as it is reversed, based upon proven facts." We disagree. Our authority to remand depends upon a determination "that a case has been improperly, incompletely or otherwise insufficiently developed or heard by the referee." ORS 656.295(5). We are not persuaded that a decision we have found was based on an incomplete record "should stand" pending rehearing. However, by copy of this order, we direct the Presiding Referee to cooperate with the parties in getting a rehearing scheduled on an expedited basis should claimant so desire.

Claimant's remaining contentions were all considered by the Board at the time we issued our June 25, 1981 Order of Remand. Claimant's motion for reconsideration is denied.

IT IS SO ORDERED.

JAMES J. ELDRED, Claimant
Michael L. Mowrey, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-06049
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Seifert's order which affirmed the Determination Order of June 26, 1978 which awarded 40% unscheduled disability for claimant's compensable 1977 injuries.

Claimant suffered back, hip and leg injuries when, on July 22, 1977, he was struck by a log while standing on a loading dock. His condition was first diagnosed by Dr. M. P. Renaud on July 26, 1977 as contusion to the pre-sacral region. August 1977 x-rays confirmed a 25% compression fracture of L-1. When hospitalized on August 29, 1977 Dr. Thomas R. Brandes, a consulting internist, suspected nerve root compression. Conservative treatment consisting of a transcutaneous nerve stimulator and a back brace were prescribed for what Dr. Brandes called multiple compression fractures to claimant's back. A February 3, 1978 examination revealed degenerative spondylosis.

In June of 1978, Dr. Mario J. Campagna found a compression fracture with severe nerve root compression, L3 left, and L4 bilaterally, secondary to protruded L3 and L4 discs. He also reported that there was evidence of severe cervical and lumbar spondylosis indicating that claimant would be readmitted at a later date for surgical correction of the problem. Dr. William E. Matthews, who saw claimant in consultation with Dr. Campagna, expressed the opinion that without surgery claimant was totally disabled.

The claim was closed by Determination Order dated June 26, 1978 which awarded temporary total disability benefits from July 28, 1977 through May 8, 1978, less time worked, and awarded 40% unscheduled disability for claimant's injury to the low back and left hip.

Examination on April 2, 1979 and July 17, 1979 by Dr. Campagna revealed no appreciable change in claimant's condition. Dr. Campagna recommended continued care through the Veterans' Hospital which had prescribed muscle relaxants. Reporting on July 17, 1979 that claimant was not taking any medication, Dr. Campagna added the contradictory note that Dr. Renaud was treating claimant with Tylenol and Valium.

On August 10, 1979 claimant consulted an osteopathic physician and surgeon in Central Point, Dr. Max Flowers. Dr. Flowers' report stated:

> "Physical examination shows marked limitation of motion in the lumbar area with pain beginning at approximately L-1, particularly on the left side, and also pain in the left hip area with marked restriction in lifting his left leg and from paraesthesia of the left leg. The lumbar x-rays revealed multiple degenerative disc disease and an old compression fracture of L-1 and contrast material in the subarachnoid space. The left hip was normal.
>
> "My diagnosis is Degenerative Disc Disease Lumbar Area, Post Laminectomy Syndrome and Secondary Myositis...I feel that a period of concervative (sic) therapy should be tried for three to six months, and if no relief is noted then he will be referred to a neurosurgeon or an orthopedist."

In late October, 1979 Dr. Nicolas D. Yamodis, neurologist, reported:

> "The pain course is generally low back pain which radiates to both hips, left greater than right. It is a constant ache like a sharp knife. When bending, he has some numbness and tingling of his left leg as well as some weakness in his left leg. Coordination and gait problems are noted due to the left leg weakness. Coughing and sneezing exacerbate his low back pain. He notes no position of comfort. Position of discomfort is bending, twisting and staying in any one position too long."

On June 30, Dr. Campagna performed a decompressive lumbar laminectomy. Radiology reports dated July 1, 1978 indicated hypertrophic alterations of the lumbar spine. Dr. Campagna's final diagnosis at the time claimant was discharged from the hospital was an extruded L3 disc left, cauda equina compression. On August 4, 1978 Dr. Campagna noted that claimant's back condition was steadily improving.

However, on August 12, 1978, Dr. C. D. Potter, who specializes in orthopedic and fracture surgery, examined claimant due to what he termed "unrelenting pain" centered in the upper lumbar spine. Dr. Potter reported:

> "Because of the amount of discomfort he is having and the signs of L5 nerve root involvement on the left side with a weak EHL and decreased sensation on the dorsum of the foot, I obtained a single lateral x-ray of the lumbar spine. On that x-ray a new compression fracture is seen of L1 vertebra as compared to the old x-rays 3/18/77 in which that compression fracture is not present.
>
> "We have to assume the patient sustained a compression fracture of the L1 vertebra in his on-the-job accident and in addition to that he has also sustained nerve root irritation of the L5 nerve root, left side. I feel we have documented the patient's cause for pain..."

Nonetheless, Dr. Campagna concluded on August 16, 1978 that if it were not for other problems claimant would be able to return to work on October 1, 1978. Those "other problems" were not elaborated upon. On November 6, 1978 Dr. Campagna noted the compression fracture of L1, as well as severe lumbar spondylosis throughout the lumbar spine. Rating the claimant's disability as "moderate," he recommended that the claim be closed. Presumably on the basis of Dr. Campagna's November 16, 1978 report, the claim was again closed by Determination Order dated December 22, 1978 awarding additional time loss benefits from May 9, 1978 through November 6, 1978. No additional compensation for permanent partial disability was granted.

Dr. Yamodis confirmed earlier medical impressions of progressive degenerative cervical and lumbar disc and joint disease with spondylosis, cervical myelopathy, and presume scarring of nerve roots in the lumbosacral area, secondary to Pantopaque extravasation. Dr. Yamodis reported to Dr. Flowers:

> "I doubt that any further surgery would be of significant help to this individual. A diagnostic myelogram is not recommended since surgery would not be of benefit to this patient in the long run. As a matter of fact, surgery and further decompressing might exacerbate his symptoms and might, in all likelihood, turn him into a back cripple..."

Dr. Flowers, in November of 1979, reported:

> My present feeling is that Mr. Eldred is totally disabled from significant manual labor, and since there is no definite recommendations or further treatment I would recommend that he be placed on total and permanent disability and be able to have palliative treatment when indicated."

Again, on December 4, 1979, Dr. Flowers expressed his opinion that claimant was totally and completely disabled:

> "I believe that Mr. Eldred is totally and completely disabled permanently and that his case should be closed with the stipulation that he continue to receive palliative treatments and medication which relieve him somewhat."

Following their March 1980 examination, the Orthopaedic Consultants diagnosed claimant's condition as "old healed fracture of L-1...moderately severe degenerative joint disease of the lumbar spine...postoperative decompressive laminectomy, 1978...spinal stenosis..." Their report of examination stated:

> "James Eldred is a fifty-eight year old white male who was generally in good health until July 22, 1977...
>
> "...There is no other history of previous spine difficulty...
>
> "He has two chief complaints: (1) Constant back and hip pain, and (2) trouble walking. The back pain is localized to the mid lumbar and upper buttocks areas bilaterally. The pain will occasionally radiate down the posterior left leg following exertion. His pain is made worse by walking, and he is limited to about two blocks. He is also bothered by prolonged sitting, being limited to thirty to forty-five minutes before getting up and moving around. He can stand stationary for only a few minutes before his pain increases severely...
>
> "His legs feel generally weak, usually after walking. However, he does not have foot drop and he can get up from a chair without difficulty. He has a constant numbness and coldness in his feet and occasionally wears two pairs of socks..."

The Orthopaedic Consultants concluded that claimant's total impairment of function with regard to the low back was in the moderately severe range and that the total impairment related to this injury was considered moderate.

Claimant's work experience for the past 30 years has been limited to mill work. He is 58 years old, has an eighth grade education, and is restricted to light work only. The Referee has noted that there are numerous jobs in the claimant's local area that a person with claimant's limitations can perform, such as electronics inspectors and assemblers. It is unlikely, however, that claimant would be considered for such positions due to his limited education, work experience and age.

Although offered reemployment as a watchman for his previous employer, which offer was refused, the Board has serious doubts whether his physical condition would permit him to perform the patrolling duties required on a regular, full-time basis. Unfortunately, claimant has neither sought work nor vocational rehabilitation nor has he applied at an employment office. There is a clear indication that claimant considers himself to be retired.

In view of all the above factors and the extent of claimant's physical impairment which includes his pre-existing loss of hearing and his 1974 colostomy, the Board concludes that claimant should be awarded a permanent disability rating of 75% unscheduled disability for injury to his low back, hip and leg.

ORDER

The Referee's order dated October 15, 1980 is modified. Claimant is hereby awarded 75% unscheduled permanent partial disability in lieu of the Referee's award of 40% unscheduled permanent partial disability.

Claimant's attorney is hereby awarded attorney's fees in the sum of 25% of the additional compensation awarded, not to exceed $1,500.

EDDIE FLOYD, CLAIMANT
Jeff Gerner, Claimant's Attorney
Paul Bocci, Defense Attorney
Request for Review by Claimant

WCB 80-05063
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Baker's order which affirmed the denial of May 30, 1980. Claimant contends he suffered a compensable injury on March 29, 1980.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 26, 1980 is affirmed.

RICHARD GARCIA, CLAIMANT
J. David Kryger, Claimant's Attorney
David Horne, Defense Attorney
Request for Review by Claimant

WCB 80-01587
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee McCullough's order which affirmed the Determination Order of April 26, 1979 whereby claimant was awarded temporary total disability compensation only. Claimant contends he is entitled to an award of permanent partial disability.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 30, 1980 is affirmed.

ROSCOE GEMMELL, CLAIMANT
David Hittle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-03690
July 13, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review and the claimant seeks cross review of Referee Braverman's order.

This case is a procedural nightmare. In 1962 claimant sustained a compensable left knee injury. In 1977 claimant sustained a compensable back, shoulder and left hip injury. Most of the procedural complications arise from the Referee having blended together issues relating to the 1962 injury with issues relating to the 1977 injury into a hopeless marble cake. That is especially troublesome because, claimant's aggravation rights having expired on the 1962 injury, issues relating to it are solely within the Board's own motion jurisdiction and the Referee had no authority to order relief in connection with the 1962 injury. On the other hand, the Referee did have authority to order relief in connection with the 1977 injury. The Board's present problem is to try to separate the parts of the marble cake.

I. Left Knee Condition.

Claimant underwent two left knee arthroplasties, one in March 1979 and another in December 1979. The first issue is whether claimant's 1979 left knee condition was proven to be compensably related to his 1962 injury, his 1977 injury, both or neither. The Referee concluded that claimant's 1979 knee condition was not proven to be related to his 1977 injury and, if compensable at all, was related to his 1962 injury which was a matter for the Board's own motion jurisdiction.

We agree--again. By Own Motion Order dated May 11, 1979 and Own Motion Determination dated October 22, 1980, the Board previously found claimant's 1979 knee condition compensably related to his 1962 injury. Those orders were made without benefit of a record as complete as this one is. Nothing in the present record, however, persuades us our prior orders were erroneous, especially considering the Referee's express finding in this proceeding that claimant's testimony about knee involvement in his 1977 injury was not credible.

The Board has previously determined that claimant's 1979 knee condition was related to his 1962 injury and granted own motion relief. That matter is closed.

II. Psychological Condition.

Claimant received treatment for psychological conditions during 1979. The next issue is whether this treatment and any associated disability was proven to be compensably related to his 1962 injury, his 1977 injury, both or neither. On this issue the Referee seriously confused his authority and the Board's own motion authority. The Referee concluded that claimant's "psychiatric problems are assignable to the...1962 industrial accident" and ordered "that SAIF accept such condition as being compensable and related to claimant's left knee problems flowing from his 1962 work related accident for the purposes of paying all benefits under the Workers' Compensation Act." The Referee had no authority in 1980 to order payment of anything in connection with a 1962 injury; the Referee could only make a recommendation that the Board grant own motion relief.

This Board may have contributed to this confusing situation because our December 27, 1979 order stated "the Referee has jurisdiction to decide this case on its merits." Regardless of what that may have meant at the time and in context, we are now certain that we cannot by order create Referee jurisdiction that does not exist by statute. See SAIF v. Broadway Cab Co., ___ Or App ___ (June 15, 1981).

Treating the Referee's order that claimant's 1979 psychiatric condition is compensably related to his 1962 injury as a recommendation to that effect, we disagree. Claimant had a psychiatric condition that required treatment during 1979. But the preponderance of medical evidence does not persuasively establish medical causation linked to either claimant's 1962 injury or his 1977 injury.

III. Temporary Total Disability.

The Referee ordered payment of temporary total disability from September 30, 1977 through March 26, 1979 "as part of the benefits due from his...1977 accepted industrial accident." The final issue is whether this order was correct.

It is hard to understand how this order could have been procedurally correct. Claimant's 1977 injury was closed as non-disabling and no appeal was taken. This case was before the Referee on claimant's amended request for hearing on SAIF's denials that claimant's 1979 knee surgery and psychological treatment were compensably related to his 1977 injury. It would seem that the Referee was thus limited to ruling on whether the knee surgery and psychological treatment should have been accepted as consequences of the 1977 injury and had no business getting into claimant's entitlement to temporary total disability. Moreover, once the Referee ruled that the knee surgery and psychological treatment were not consequences of the 1977 injury, there was even less basis for ruling on claimant's entitlement to temporary total disability.

Even assuming this issue was properly before the Referee, he was wrong on the merits. On September 15, 1977 claimant signed a notice of intent to retire at the end of that month. He was injured two days later, September 17. He did not miss any time from work because of the injury; rather, he worked until his retirement date.

The first medical report suggesting any possible entitlement to post-retirement time loss payments is from Dr. Gordon, an osteopathic physician, and is dated October 19, 1979--more than 25 months after claimant's injury. We recently expressed skepticism about this kind of long-after-the-fact medical "verification" of inability to work. Evelyn LaBella (Order on Review, April 24, 1981). We remain skeptical in this case.

The other basis for the Referee's award of eighteen months of time loss was claimant's testimony at the hearing. As previously noted, the Referee expressly found claimant's testimony about knee involvement in his 1977 injury to be not credible. Yet the Referee accepted claimant's testimony about his post-retirement time loss with no explanation except "his testimony...is consistent with one's experiences in life, and sounds credible."

The Board does not find claimant credible. His testimony was thoroughly and repeatedly contradicted by documentary evidence. He impeached himself with inconsistent statements on the witness stand. Claimant has not proven entitlement to the temporary total disability ordered by the Referee.

ORDER

The Referee's orders dated July 29, 1980 and August 29, 1980 are modified. The Referee's conclusion that claimant's 1979 knee condition was not a compensable consequence of his 1977 injury is affirmed. The balance of the Referee's orders is reversed.

BRADLEY A. HACKBART, CLAIMANT
Jan Baisch, Claimant's Attorney
David Horne, Defense Attorney
Request for Review by Claimant

WCB 80-05146
July 13, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Mannix's order which affirmed the carrier's denial of May 28, 1980. Claimant contends that his right knee condition is compensable.

ORDER

The Referee's order dated December 29, 1980 is affirmed.

GUY L. HATCH, CLAIMANT
Oscar R. Nealy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-04767
July 13, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee McSwain's order which set aside its denial of compensation for claimant's knee injury.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee.

ORDER

The order of the Referee, dated December 31, 1980, is affirmed.

Claimant's attorney is granted the sum of $150 for his services at this Board review, payable by the SAIF Corporation.

HUBERT HICKS, CLAIMANT
Michael Najewicz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06993
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Ail's order which remanded claimant's aggravation claim for acceptance and payment of compensation due and ordered a penalty for unreasonable delay in paying the temporary total disability.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 17, 1980 is approved.

Claimant's attorney is granted the sum of $250 for his services at this Board review, payable by the SAIF Corporation.

AFTON IRELAND, CLAIMANT
Brian Welch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-05495
July 13, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Gemmell's order which set aside its denial of responsibility for claimant's heart condition. We reverse.

We agree with the Referee's findings about the stressful nature of claimant's job, both generally and specifically during the three months before she was hospitalized on October 31, 1979.

Medical causation is another question, unusually complicated here because the doctors do not even agree on whether claimant suffered a myocardial infarction. Reports are in the record from Drs. Olson, Fujihara, Turner, Tawakol and Kloster. The first four of these doctors treated or examined claimant within two weeks of her hospitalization; Dr. Kloster submitted a report after reviewing the medical records. Although the doctors expressed a variety of preliminary and tentative diagnoses shortly after claimant's hospitalization, once all the tests had been done, only Dr. Tawakol continued to express the opinion that claimant had suffered a myocardial infarction.

The test results were as follows. An angiogram revealed one totally occluded artery and one artery diffusely diseased with 90% lesion. This documents arteriosclerotic heart disease which is consistent in and of itself (i.e., without any infarction) with all claimant's symptoms. During claimant's hospitalization, her serum enzyme studies, including CK-MB which is cardiac specific, were all negative--indicating there had been no infarction. A pyrophostate radioisotope scan, a test specifically to diagnose infarction, was done the day after claimant was hospitalized; the results were negative.

Possibly the most telling "test result" is the report on claimant's cardiovascular surgery. Dr. Tawakol performed a triple by-pass operation on claimant. The pre-operative diagnosis was unstable angina, pre-infarction angina and severe coronary artery disease. The post-operative diagnosis was unstable angina and coronary artery disease in three arteries. There is no mention of a myocardial infarction.

Against this rather overwhelming clinical evidence that claimant did not suffer an infaction, Dr. Tawakol's contrary opinion stands basically unexplained and undocumented. Dr. Tawakol could have, but did not expressly, rely on EKG results showing inferior lateral T waves. But while cardiac enzymes remain normal, as they did in claimant's case, this is at best ambiguous. Dr. Kloster stated he was at a loss to understand how a diagnosis of myocardial infaction could be made, other than by possible reliance on EKG results showing inferior Q waves; Dr. Kloster then proceeds to cogently explain why this is not of diagnostic significance.

To repeat a truism, claimant here has the burden of proof. The Referee found claimant had sustained that burden solely because Dr. Tawakol's opinion was favorable and he was the "treating physician." Assuming for sake of discussion that label is really applicable, Hammons v. Perini Corp., 43 Or App 299 (1979), holds that no extra weight is to be given to the opinion of a "treating physician" when the ultimate medical question depends on expert analysis. The ultimate medical question here depends on expert analysis. Dr. Tawakol offers basically no medical analysis, only a bald conclusion. Dr. Kloster and others of a contrary view offer the expert analysis of angiogram results, serum enzyme studies, a radioisotope scan and surgery reports.

The Board concludes claimant has not proven she suffered an infaction. While that conclusion is sufficient to dispose of this case, we volunteer the additional observation that claimant's hospitalization and surgery were most likely due to her coronary artery disease and there is no basis in this record for finding that disease compensable. See Thompson v. SAIF, 51 Or App 395 (1981).

ORDER

The Referee's order dated November 7, 1980 is reversed, and the SAIF Corporation's denial is affirmed.

BILLY J. KRATZMEYER, CLAIMANT
Michael Strooband, Claimant's Attorney
John Klor, Defense Attorney
Request for Review by Claimant

WCB 80-04934
July 13, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Nichols' order which affirmed the employer/carrier's denial of his claim for additional medical services.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 5, 1981 is affirmed.

JERRY LEE LANE, CLAIMANT
Dwayne Murray, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-05587
July 13, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of that portion of Referee Wolff's order which awarded claimant temporary total disability from April 7, 1980 to June 24, 1980.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 5, 1980 is affirmed.

Claimant's attorney is granted the sum of $100 for his services at this Board review, payable by the SAIF Corporation.

RICHARD J. LINDSEY, CLAIMANT
Thomas Caruso, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-08519
July 13, 1981

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Braverman's order which set aside an order of the Compliance Division of the Workers' Compensation Department. That order had suspended claimant's temporary total disability payments from August 22, 1980 to September 9, 1980 on the ground that claimant had obstructed a medical examination that SAIF had scheduled.

The dispositive issue is factual: Did claimant obstruct Dr. Langston's examination? Claimant testified he did not and the Referee believed him. SAIF presented no evidence. The Board agrees with and adopts the Referee's factual conclusions.

The Referee also perceived a legal issue:

> "I now wish to reaffirm my position as stated in John D. O'Neal, (sic) WCB Case No. 79-6714, opinion of December 11, 1979; affirmed by the Workers' Compensation Board on the merrits (sic) on June 10, 1980. In that Opinion I stated that ORS 656.325(1) was unconstitutional as it violated the claimant's Fourteenth Amendment rights under the United States Constitution in that this section preports (sic) to permit suspension of benefits without a pretermination hearing."

The Board's order on review in John D. O'Neil stated that the Referee had no authority to rule on constitutional issues. The same comment is here applicable. But see Sidney A. Stone, WCB Case No. 79-08878 (Order on Review, May 26, 1981), dissenting opinion by Chairman Barnes.

ORDER

The Referee's order dated November 25, 1980 is affirmed. Claimant's attorney is awarded the sum of $250 for services rendered in connection with this Board review.

BEVERLY MANGUN, CLAIMANT
Jeff Mutnick, Claimant's Attorney
Jerry McCallister, Defense Attorney
Request for Review by Employer

WCB 80-02981
July 13, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of that portion of Referee Ail's order which remanded the claim to it for adjustment and payment of compensation for temporary total disability based on regular employment of seven days a week.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 5, 1980 is affirmed.

Claimant's attorney is granted the sum of $350 for his services at this Board review, payable by the employer/carrier.

LAVELLE G. MARTIN, CLAIMANT
Elden M. Rosenthal, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order to Show Cause

Own Motion 81-0029M
July 13, 1981

Claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim. The Board found the evidence insufficient to make a determination and on April 6, 1981 referred the case to the Hearings Division to hold a hearing.

On April 9, 1981 the Hearings Division sent a letter and application to schedule to claimant's attorney. That letter indicated that if he was not ready to proceed, he was to submit a status report within 60 days from the date of that letter. To date, no application to set has been submitted nor has any status report been received.

Therefore, claimant is ordered to show cause, if any, filed with the Workers' Compensation Board, 555 13th Street, N.E., Salem, Oregon 97310 within thirty days of this Order why the above entitled case should not be dismissed as abandoned.

CAROLYN NORDSTROM, CLAIMANT
Don Atchison, Claimant's Attorney
Dennis Reese, Defense Attorney
Request for Review by Employer

WCB 80-03187
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of the Referee's order awarding 50% unscheduled permanent partial disability for the claimant's low back strain suffered on her job on February 23, 1979.

While working as a sample assembler for a window-covering manufacturer, claimant sustained a lumbar strain as a result of prolonged bending. Claimant's duties involved labeling material swatches and placing them in binders which were then placed on shelves. Claimant was 70 years old at the time of her injury, having worked in the venetian blind and drapery business since 1944. A former employer had forced her to retire at the age of 65 because of a company policy. Soon thereafter she was hired by Robert Hicks who had started a new company.

Prior to her February 1979 back injury, claimant worked full-time at $3.50 an hour. She now earns $4.50 an hour at the same job but can only work four to five hours a day due to her physical condition. Claimant has two years of high school education and has no working experience in any other type of work.

Claimant's injury was diagnosed by Dr. George McNeill who examined her on behalf of the employer as lumbosacral strain superimposed on degenerative arthrosis. On September 19, 1979, Dr. McNeill reported:

> "I think Mrs. Nordstrom is doing pretty well for a 70 year old lady. She is managing now to work four hours per day and I think this is quite good, all considered. I think she has probably reached a point where she is medically stationary in that she will gradually, very slowly improve..."
>
> "With regard to your question as to how much of this is geriatric, she injured herself in February and I have recently seen several young men who injured their backs prior to this and are seemingly having more difficulty. I would think that some of her difficulties are due to her degenerative arthrosis of the spine, but I do not think she will suffer any permanent disability as a result of her low back strain."

In February of 1980, claimant's condition temporarily worsened as reported by Dr. Howard J. Geist, her treating physician. On August 5, 1980, Dr. Geist reported:

> "She has, from time to time, tried to work more than a four hour day, but has had to give this up because of back pain. Consequently, I don't think she will return to full-time work in the foreseeable future. To be sure, a portion of this may be on the basis of simple aging, but she had been working full-time up until the time she was hurt."

Claimant must now wear a back brace and use a cane to support herself as a result of her back problem. She takes about eight Excedrin a day for back pain. She also takes Peritrate for a pre-existing heart condition, coronary artery disease, and Ritalin for a marked tendency to fall asleep. On April 7, 1980 she tripped and fell while getting off a bus, but there is no indication that she suffered any permanent residuals as a result of that incident.

The Board concludes, after de novo review, that the Referee's award of 50% unscheduled permanent partial disability is excessive in view of the extent of physical impairment caused by claimant's back injury. Taking claimant's age, work experience, education and other factors into consideration, as authorized by statute, the Board concludes that claimant is entitled to an award of 35% unscheduled permanent partial disability as a result of her low back injury.

ORDER

The Referee's order dated December 18, 1980 is modified. Claimant is hereby awarded 35% of the maximum allowable by law for the unscheduled permanent partial low back disability.

PATRICK F. OROPALLO, CLAIMANT
Robert Chapman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF
Reviewed by Board Members McCallister and Lewis.

WCB 80-06867
July 13, 1981

The SAIF Corporation seeks Board review of Referee Seifert's order which remanded claimant's claim for medical services under ORS 656.245 to it for payment of those services. SAIF contends claimant's current condition is not causally related to his industrial injury of August 1977.

The Board, after de novo review, affirms and adopts the order of the Referee.

An error on page two of the Referee's order should be corrected. In the twelfth line of that page, "April 1970" should be changed to read "April 1980."

ORDER

The Referee's order dated December 12, 1980 is affirmed.

Claimant's attorney is granted the sum of $350 for his services at this Board review, payable by the SAIF Corporation.

TOMMY G. PAYNE, CLAIMANT
Harold Adams, Claimant's Attorney
Ridgway K. Foley, Defense Attorney
Request for Review by Claimant

WCB 79-08743
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Mannix's order which affirmed the denial of compensability of claimant's gout condition.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee.

ORDER

The order of the Referee, dated December 24, 1980, is affirmed.

MICHAEL D. PEDERSON, CLAIMANT
Benton Flaxel, Claimant's Attorney
Paul Roess, Defense Attorney
Order of Remand

WCB 79-10812
July 13, 1981

By an Opinion and Order of the Referee and an Order on Review by the Board, claimant's aggravation claim was denied. This case was appealed to the Court of Appeals who issued an order affirming the Referee and the Board on January 26, 1981.

Thereafter, the Court, on reconsideration, issued its opinion of March 23, 1981 wherein the Court reversed and remanded. A Judgment and Mandate was issued on May 13, 1981 wherein the Court returned the cause below for further proceedings pursuant to law and opinion.

This case is hereby remanded to the Referee pursuant to the Judgment and Mandate of the Court of Appeals.

IT IS SO ORDERED.

DANIEL PRASZEK, CLAIMANT
Jim Nelson, Claimant's Attorney
Brian Pocock, Defense Attorney
Request for Review by Claimant

WCB 80-05036
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Nichols' order which affirmed the employer/carrier's denial of compensability.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 17, 1980 is affirmed.

WILLIAM J. RIPP, CLAIMANT
Keith Swanson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-01426
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Foster's order remanding claimant's back condition for acceptance and payment of compensation.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 13, 1981 is affirmed.

Claimant's attorney is granted the sum of $350 for his services at this Board review, payable by the SAIF Corporation.

STAN ROBSON, CLAIMANT
Wes Franklin, Claimant's Attorney
Roger Warren, Defense Attorney
Request for Review by Employer

WCB 79-09524
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee St. Martin's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which claimant is entitled.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated September 16, 1980 is affirmed.

Claimant's attorney is granted the sum of $400 for his services at this Board review, payable by the employer/carrier.

MATT N. SCHULD, CLAIMANT
Larry Bruun, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-03545
July 13, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of that portion of Referee Seifert's order which upheld the SAIf Corporation's denial of an aggravation claim. We reverse.

Claimant compensably injured his right shoulder, right arm and neck July 23, 1979. The claim was accepted by SAIF and no time was lost. Claimant testified that September 21, 1979 he handled a large board at work and that the following morning (Saturday) he had a great deal of pain in his shoulder. Claimant missed work September 24, 1979 to October 12, 1979.

SAIF denied claimant's aggravation claim for the September 21 incident on the ground that claimant re-injured his "back" while roofing his barn September 23, 1979. It would thus seem that the issue of an off-work intervening injury was the only one before the Referee. See OAR 436-83-120 which requires: "The notice of denial shall specify the factual and legal reasons for denial..." However, the Referee upheld SAIF's denial on a completely different ground: "The medical evidence indicates that claimant's worsening condition and any medical treatment or disability arising therefrom is not an aggravation of his industrial injury in July 1979 as contemplated in ORS 656.273, but a natural progression of his underlying osteoarthritis."

The facts relevant to what the issue started to be are: Claimant testified he did not roof the barn though he planned to and he did not injure himself at all that weekend, nor did he tell anyone he had injured himself. Claimant's wife testified that she knew of no off-work injury. Claimant's supervisor testified that when claimant did not come to work September 24, 1979, he called claimant's son who told him that claimant hurt his back roofing the barn. A SAIF investigator testified he saw a new metal roof on claimant's barn from a great distance from an airplane, almost a year after the alleged roofing incident. The Referee made no credibility finding.

We accept claimant's testimony. The foreman's hearsay testimony is weak. Claimant's son was not called to testify. SAIF's investigator's report is worthless.

Facts relevant to what the Referee converted the issue into are: Claimant had preexisting osteoarthritis. His July 1979 injury was accepted as a compensable aggravation of this condition. The Referee reasoned that claimant's worsened condition and resultant medical treatment following the September 1979 incident were caused by the natural progression of the underlying disease. Just as a matter of common sense, for claimant's condition to worsen as much as it did as fast as it did hardly seems to be "natural." More importantly, as a matter of medical evidence, Dr. Steele's June 19, 1980 report states "each of the two accidents [i.e., July and September] would represent an aggravation of his preexisting arthritis." Based on this reasoning and evidence, we disagree with the Referee's conclusion.

ORDER

The Referee's order dated November 20, 1980 is modified. The SAIF Corporation's September 5, 1980 denial of claimant's aggravation claim is set aside and that claim is remanded for payment of compensation as provided by law. Claimant's attorney is awarded the sum of $1,800 as and for a reasonable attorney fee for services rendered at the hearings and Board levels in overturning SAIF's denial, payable by the SAIF Corporation. The remainder of the Referee's order is affirmed.

GEORGE T. SHAY, CLAIMANT
Richard Pearce, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-01908
July 13, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Mulder's order which granted claimant an additional award of 30° for 20% loss of the left leg for a total award of 52.5° for 35% loss of the left leg. Claimant contends that he is entitled to a greater award of unscheduled low back disability than the 20% previously granted.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 11, 1980 is affirmed.

CHARLES SHIREY, CLAIMANT
Jerry Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-10771
July 13, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee McSwain's order which set aside the SAIF's denials of responsibility for claimant's neck, shoulder and arm difficulties and, in addition, assessed a 10% penalty.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 9, 1981 is affirmed.

Claimant's attorney is granted the sum of $350 for his services at this Board review, payable by the SAIF Corporation.

WALTER ARMSTRONG, CLAIMANT
Kenneth Bourne, Claimant's Attorney
Scott Kelley, Defense Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-03601 & 80-06022
July 16, 1981

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Pferdner's order denying the compensability of claimant's alleged March 10, 1980 injury.

Compensability, however, was not the issue. Claimant made alternative claims after the March 1980 incident. He filed a claim with Greyhound, which is self-insured, based on the theory that the 1980 incident was an aggravation of a compensable 1977 injury he sustained while working at Greyhound. He also filed a claim with his new employer, Wanigan, insured by the SAIF Corporation, based on the theory that the 1980 incident was a new injury. Greyhound denied on the ground that SAIF was responsible. SAIF denied on the ground that Greyhound was responsible. Thus, both denials were of responsibility, not compensability. And that is the way the case was tried before the Referee with both Greyhound's attorney and SAIF's attorney saying the other was responsible, and neither saying that nothing compensable happened on March 10, 1980.

In this kind of carrier responsibility fight, it would seem that the worker cannot lose. So the Referee's decision must have come as quite a shock. We find it both shocking and erroneous.

We conclude that this claim is compensable as against Wanigan and its carrier, SAIF. We base that conclusion on: Claimant's description of the March 1980 incident while working at Wanigan; Dr. Cherry's report of March 17, 1980; the St. Vincent's Hospital record on admission; and Inkley v. Forest Fiber Products Co., 288 Or 337, 344 (1980).

Even though claimant is technically here prevailing on a denial and a literal reading of ORS 656.386(1) would seem to require us to set a fee for claimant's attorney payable by SAIF, the Board is concerned about the applicability of ORS 656.386(1) in this carrier-responsibility context. Accordingly, we will defer the question of attorney fees until the parties have had an opportunity to file memorandums on their respective positions; said memorandums to be filed within 20 days of the date of this order.

ORDER

The Referee's order dated November 12, 1980 is reversed. The SAIF Corporation's denial is set aside and this claim is remanded to SAIF for payment of benefits in accordance with law. Greyhound's denial is sustained.

CARL L. BOUCHER, CLAIMANT
Donald Wilson, Claimant's Attorney
Paul Bocci, Defense Attorney
Request for Review by Claimant

WCB 79-04796
July 16, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of Referee James' order which affirmed a 5% permanent partial unscheduled disability Determination Order, awarded additional compensation for temporary total disability from March 30, 1979 through September 4, 1979, awarded reimbursement to claimant for all medical treatment provided claimant for his injury up to October 26, 1979, and ordered that claimant be awarded an attorney fee payable out of the additional temporary total disabilty compensation.

The employer has cross-appealed and seeks review of that portion of Referee James' order which affirmed the 5% award of permanent partial unscheduled disability and which awarded additional compensation for temporary total disability.

We affirm and adopt the Referee's order with the following additional comments.

An issue arose at the hearing as to whether an investigator, Kenneth Walker, testified falsely while under oath concerning his part in the investigation of claimant. An acquaintance and former co-worker of Walker, Ray Polly, informed the Referee that Walker lied about his part in the surveillance and filming of the claimant; that, in fact, Walker was not the investigator that took the films of claimant's activities on September 14 and 15, 1979, but that the owner of the investigative service, Jack Yarbrough, told Walker to falsely assert that Walker had taken the films when the films were sought to be introduced by the employer at the claimant's hearing.

The Referee found that the charge of perjury had not been proved and admitted the challenged film into evidence.

Generally, documentary evidence (such as films) may not be admitted into evidence unless it has been authenticated. However, common law or statutory rules of evidence do not bind a Referee; the Referee has discretion as to the manner in which the hearing shall be conducted and the only requirement is that substantial justice be afforded to all parties. ORS 656.283(b).

In this case the claimant has never denied that he was the subject featured in the films even though he had ample opportunity to do so. In his testimony, the claimant even verified the dates that the filmed activity took place and also testified that he talked to the driver of a vehicle used in the investigation at the site of the filmed activity. Therefore, we conclude that the content of the films is relevant, material evidence that is, in fact, a film of claimant engaging in certain woodcutting activities on certain days in September 1979. Substantial justice is afforded all parties by admitting the films into evidence.

ORDER

The Referee's order dated August 13, 1980 is affirmed.

Chairman Barnes, dissenting in part:

A discussion of possible perjury committed in this case is incomplete without any reference to the claimant's testimony.

Claimant testified that because of his injury, he could not bend, lift, etc. The films, which I agree the Referee properly admitted into evidence, conclusively prove the contrary. They show claimant bending over using a chain saw to cut logs, some of which appear to be more than two feet in diameter, into fireplace lengths. They show claimant lifting and loading some of those large fireplace lengths into a pickup truck and trailer. The films also show claimant splitting wood, raising an ax or splitting maul high over his head to do so. The films demonstrate claimant is capable of sustained, strenuous physical activity involving lifting, bending, twisting, cutting, chopping, throwing and walking on uneven surfaces, all of which claimant either testified he was incapable of or tried to convince his doctors were beyond his physical capacities. Based on these films I would hold claimant has suffered no permanent physical impairment because of his injury and has lost no wage earning capacity; I would reverse the 5% unscheduled disability awarded by the Determination Order.

I also disagree with the Board majority on another point not mentioned by the majority. Before the hearing defense counsel wrote the Referee asking for a ruling on the employer's responsibility for certain doctor and hospital bills for care claimant received; that letter stated, "The employer disputes its responsibility for the bills." In other words, this case was in a partial denial status at the time of the hearing. The Referee ordered, and I agree with the Board majority in affirming, that the bills in question should have been paid by the employer. In other words, the hearing result included setting aside a partial denial. ORS 656.386(1) clearly provides that when a worker prevails on a denial, his attorney fee shall be paid by the employer. Yet the Referee only allowed an attorney fee payable from claimant's compensation. I would order that claimant's attorney is entitled to a fee of $400 for services rendered at the hearing in prevailing on the employer's partial denial, payable by the employer.

WAYNE M. EVENDEN, CLAIMANT
Rick McCormick, Claimant's Attorney
Keith Skelton, Defense Attorney
Request for Review by Claimant

WCB 80-00700
July 16, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Daron's order which affirmed the employer/carrier's denial of reimbursement to claimant for a special bed. Claimant contends the bed should be paid for under ORS 656.245 and OAR 436-69-335. We disagree and therefore affirm.

Claimant compensably injured his back and has been awarded 25% unscheduled permanent disability. Claimant purchased a special bed (Niagra-Cyclo-Massage) with his own funds. A physician had not previously ordered the bed for treatment nor prescribed the bed.

OAR 436-69-335 specifically addresses reimbursement of "household furniture such as beds, chairs." The rule states a report clearly justifying need is necessary. Dr. Burr's report praising the bed but stating he did not prescribe it does not document a clearly justified need.

ORDER

The Referee's order dated January 9, 1981 is affirmed.

CINDY L. GALLEA, CLAIMANT
James Francesconi, Claimant's Attorney
Lang, Klein et al, Defense Attorneys
Request for Review by Employer

WCB 80-07747
July 16, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Knapp's order which (1) affirmed the Determination Order of August 18, 1980 which had awarded claimant 5% loss of the use of the right forearm; and (2) granted claimant an award of 48° for 15% unscheduled right shoulder disability.

The Board adopts the Referee's recitation of the facts.

The medical evidence in this case (1) fails to causally relate claimant's right shoulder condition to her claim for a right forearm (wrist) injury; (2) fails to establish that any right shoulder condition is permanent in nature; or (3) that it has caused any impairment or loss of wage earning capacity. The Board, therefore, concludes that the Referee's unscheduled award for the right shoulder condition cannot be sustained.

ORDER

The Referee's order dated November 19, 1980 is modified. That portion of the Referee's order granting claimant an unscheduled disability award is reversed. The remainder of the order is affirmed.

PAUL E. GIROUARD, Claimant
Robert Gardner, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-03579
July 16, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Knapp's order awarding 10% unscheduled permanent partial disability for claimant's left shoulder and neck injury and remanded a claim for aggravation from June 2, 1980. SAIF also appeals the 5% penalty assessment for its failure to furnish medical information within 15 days of the date requested.

SAIF contends that claimant did not sustain permanent disability as the result of his compensable September 14, 1979 injury, and that any worsening of his condition resulted from an intervening non-industrial incident of June 2, 1980. SAIF further contends that a "request" for medical reports is inadequate to require compliance, but that a "demand" for production is needed, apparently arguing that OAR 436-83-460 was not intended to mean what it says.

Assigning as error the Referee's rating of permanent partial disability at the same time a claim for aggravation was approved, it appears that SAIF mistakenly construes the 10% disability award as relating to the aggravation claim, whereas it applies to the extent of claimant's permanent disability at the time the original claim was closed. Claimant contested the April 11, 1980 Determination Order which awarded time-loss only with no award of permanent partial disability. Claimant has the right to have that issue adjudicated now. There is no statute or case law to suggest that an aggravation claim will automatically void a previous Determination Order as premature. Taylor v. SAIF, 40 Or App 437 at 441, rev den (1979).

The Board concurs with the Referee's assessment that the claimant is entitled to an award of 10% unscheduled permanent partial disability, as of March 25, 1980. The Referee's award, however, was purportedly "in lieu of, and not in addition to, the award granted by the Determination Order." That language could imply that the permanent disability award was in lieu of the time loss granted by the Determination Order. The award should be corrected, therefore, to reflect that the permanent partial disability award is in addition to the time loss already granted.

Concerning the subsequent claim for aggravation arising after claimant's initial request for hearing, SAIF argues that the "Massachusetts-Michigan Rule" applies to this case. That rule is stated in 4 Larson, Workmen's Compensation Law, sec. 95.12 (1976). Even assuming that it does apply, the rule establishes that a worsened condition should be treated as an aggravation of the initial injury where the initial injury was followed by a period of continuing symptoms which would tend to indicate that the original condition persists and has culminated in a second period of disability, precipitated by some lift or exertion.

In the instant case, the medical evidence and claimant's credible testimony show that even though claimant saw some improvement after the first injury he remained symptomatic and had, in fact, returned for medical treatment prior to the June 3, 1980 tire-changing incident. There is no medical evidence in the record to support a theory that the second incident had any causal relationship to claimant's worsened condition, even though it may have precipitated it. To the contrary, claimant's physician provides the only expert medical opinion available on the question of medical causation.

It was Dr. Fry's opinion that the June 3, 1980 incident was not a new injury. The same parts of the body were affected as in the initial injury; the same or similar treatment was required. SAIF's argument that no physical therapy had ever been required prior to the June 3 incident is not convincing in view of the fact that physical therapy was first contemplated as early as October 22, 1979 and in view of the medical opinion that no new injury occurred.

SAIF argues that the Referee improperly relied on Christensen v. SAIF, 27 Or App 595 (1976) because in that case the second incident was actually caused by the preexisting compensable condition. Claimant presents a more convincing argument: Had it not been for claimant's bad shoulder, he would not have resorted to standing on the jack handle to try to loosen the lug nuts after finding that he was unable to do so with only one arm. He was unable to use that arm because of his compensable injury to his shoulder.

The Board concludes that the uncontroverted medical evidence establishes that claimant suffers a worsened neck and shoulder condition which is an aggravation of his compensable industrial injury of September 14, 1979. The Board further concludes that the claim for aggravation should be remanded for processing and payment until closed.

As to the penalty issue concerning SAIF's failure to provide medical information upon request, resulting in the necessity to postpone an expedited hearing, the Board agrees with the Referee's opinion:

> "Whether claimant demands, solicits, begs, requests or pleads for the information, does not change the purpose of the rule. The failure to use dictatorial words rather than less overbearing ones should not make the rule less binding. The message was received in comprehensible terms and SAIF should have been responsive to it." Opinion and Order, p. 6.

ORDER

The Referee's order dated December 10, 1980 is modified. Claimant is hereby awarded 10% unscheduled permanent partial disability for his neck and shoulder injury as of the date of claim closure, March 25, 1980, in addition to the time-loss compensation awarded by the Determination Order.

The Referee's order is affirmed in all other respects.

Claimant's attorney is hereby awarded an attorney fee in the sum of $750 for legal services rendered in connection with this appeal, to be paid by the SAIF Corporation.

EARL H. GRIFFIN, Claimant
Frank Susak, Attorney
Request for Review by Claimant

WCB 78-09905
July 16, 1981

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee St. Martin's order which affirmed the July 18, 1979 Determination Order and found claimant was not entitled to an authorized program of vocational rehabilitation. The Referee further determined that the carrier should not be allowed to offset for overpayment of time loss benefits against the award of permanent partial disability.

Claimant sustained a compensable back injury on March 8, 1978 for which he has been granted compensation equal to 16° for 5% unscheduled disability. Claimant is 30 years old with a high school education plus additional schooling at Portland Community College. He has a varied background in laborer type work, cable repair work and in the insurance field. His disability has been rated as mild. The Referee found claimant not to be credible and, therefore, that he failed to meet his burden of proof that his loss of wage earning capacity was any greater than that awarded. He also found that there was no arbitrary refusal by the Field Services Division to assist claimant in a training program. We agree with both these conclusions.

We do not find, however, that the carrier was wrong to offset for overpayment of temporary total disability benefits paid after March 9, 1979. The parties stipulated that claimant received an overpayment of time loss between March 9, 1979 and July 18, 1979 amounting to $3,667.62. They also stipulated that claimant was paid $1,360.00 for his permanent disability award. This amounted to an overpayment of $2,307.62. The Referee found that under the administrative rules in effect at the time of the injury, the carrier could not offset if it failed to request a closure within ten days after being notified that claimant was medically stationary. However, there is no evidence when the carrier requested a closure of claimant's claim. Absent this evidence, we cannot determine that the carrier failed to abide by the rules in effect at the time of the injury and cannot hold, as did the Referee, that the offset should be set aside and held for naught. The action taken by the carrier with respect to its overpayment of benefits to claimant was not proven to be other than proper.

ORDER

The Referee's order dated December 1, 1980 is modified. That portion of the Referee's order which set aside the offset is reversed. The remainder of the order is affirmed.

ARDEN HOWARD, Claimant
Lovejoy & Green, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-01446
July 16, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation (SAIF) seeks Board review of Referee Mulder's order which remanded claimant's claim to it for acceptance and payment of compensation. SAIF contends claimant's myocardial infarction was not the result of his work. The issue is compensability.

Claimant, a 65-year-old emergency medical technician for Lincoln City, experienced chest pains while on duty on October 19, 1978. Sometime that night or in the early morning he suffered a myocardial infarction.

Claimant generally worked three and one-half days on and three and one-half days off. When he was "on duty" he spent the majority of his time at the station waiting for calls. He was on duty four hours on October 17 and 24 hours on October 18 and 19. On October 19, the only ambulance call occurred around 6 p.m.; the patient was considered to be all right and was not transported to the hospital. Claimant later went out for a dinner of hamburgers and french fries. At the time of his onset of pain, claimant was lying on his bed, intermittently watching television, reading the newspaper and reading EKG strips. At approximately 10 p.m. he felt pain in his chest and back and broke out in a cold sweat. He was transported to the hospital by his partner.

Claimant must show medical and legal causation in order to prevail. The medical causation evidence comes from three physicians involved, whose medical opinions divided into two diametrically opposed camps. Dr. Oksenholt, a family practitioner and claimant's treating physician, and Dr. Walden, an internist, opine that the stress claimant experienced on his job was a material contributing factor to the myocardial infarction. Dr. Kloster, a cardiologist, takes the opposite view. Dr. Oksenholt knew claimant on a professional basis since he had been the emergency room physician during the period of time claimant worked as an emergency medical technician. He had treated claimant on occasion in the emergency room, but never in his office. Dr. Walden and Dr. Kloster reviewed the records of claimant's case but did not examined him. Dr. Kloster is a cardiologist and head of the Division of Cardiology at the University of Oregon Health Sciences Center. The Board concludes that, of the three physicians who have expressed opinions, Dr. Kloster has the greatest medical expertise in cardiology.

Dr. Oksenholt is a family doctor and, in the face of opinions from two doctors with greater expertise, we find his conclusions should be given less weight. Neither Dr. Waldren nor Dr. Kloster examined claimant. Both formed their opinions after a review of the written medical evidence. The only possible advantage Dr. Walden had is that he was personally acquainted with claimant. We find Dr. Kloster's expertise sufficiently outweighs that of Dr. Walden to overcome any advantage arising out of the personal acquaintence. We are not persuaded by Dr. Walden's "significant" experience with "heart" cases.

We are persuaded by the findings and conclusions of Dr. Kloster. We find his opinion on causation to be more reasonably explained on a scientific-medical basis than are the opinions of the other physicians. He found the infarction was caused by claimant's pre-existing coronary arteriosclerosis. He felt claimant's family history (both parents died of heart conditions) was a minor risk factor. The fact that claimant smoked up to one and one-half packs of cigarettes a day was a major risk factor. Cholesterol and triglycerides were an uncertain risk. He concluded that claimant's stress could not be identified as a risk factor because there was no evidence that claimant was under any particular stress at work. Based on Dr. Kloster's deposition, we conclude claimant has failed to prove by a preponderance of the evidence that his claim for a myocardial infarction is compensable. The denial is affirmed.

ORDER

The order of the Referee dated November 4, 1980 is reversed.

The SAIF Corporation's denial dated January 12, 1979 is affirmed.

LOUIS LOPEZ, Claimant
Richard Sly, Claimant's Attorney
Ridgway Foley, Jr., Attorney
Request for Review by Employer

WCB 79-08684
July 16, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Mulder's order which ruled this claim for injuries from a physical altercation between claimant and his employer was compensable. The central issue is whether claimant is an excluded nonsubject worker under the causal employee exception of ORS 656.027. We find that he is and therefore reverse the Referee.

A threshold question is burden of proof, especially significant because of numerous ambiguities and gaps in the record. The structure of ORS 656.027--all workers are subject workers except as specifically exempted--suggests that the burden of proving nonsubject worker status should be on the defense. However, in a case that involved the same issues as does this case, the court ruled in Konell v. Konell, 48 Or App 551, 557 (1980), that the burden of proof was on the claimant. We take this to mean that the claimant here has the burden of proving he is other than a nonsubject casual employee; and gaps in the record must be resolved against the claimant.

The employer was remodeling a prospective restaurant he intended to operate. He hired claimant as a laborer on the project on a part-time temporary basis. Claimant worked for the employer, on and off throughout 1976 and into 1977. While the evidence is far from clear, apparently claimant worked an average of about three days a week and an average of about three hours a day. During some or all of this period, claimant was also a full-time student and had a part-time job at a hospital. The incident that gave rise to this claim accurred August 6, 1977. Claimant had returned to work for the employer the prior day, August 5, to "work off" a $30 debt at the rate of $2.75 per hour. Claimant had not worked for the employer for four or five months prior to August 1977.

ORS 656.027 provides in part:

> "All workers are subject to ORS 656.001 to 656.794 except those nonsubject workers described in the following subsections:
>
> * * *
>
> "(3) A worker whose employment is casual and either:
>
> (a) The employment is not in the course of the trade, business or profession of his employer; or

(b) The employment is in the course of the trade, business or profession of a nonsubject employer.

"For the purpose of this subsection, "casual" refers only to employments where the work in any 30-day period, without regard to the number of workers employed, involves a total labor cost of less than $200."

* * *

If claimant's employment was merely "casual," as the Referee concluded, and if claimant's work did not involve the business, trade or profession of his employer, claimant would be excluded as a subject worker under ORS 656.027(3)(a). Even if the work did involve the employer's business, trade or profession, but the employer was otherwise a nonsubject employer under ORS 656.023 (having no other subject workers in the state), claimant would still be excluded as a subject worker under ORS 656.027(3)(b).

"Casual" employment depends on total payroll during a 30-day period. But ORS 656.027 does not define which 30-day period is to be considered. As far as this employer's "payroll" for this claimant when he was injured in August of 1977, we know it was only the $30 debt that was being discharged by claimant's services.

Whether consideration of a different 30-day period and whether employer was otherwise a subject employer (ORS 656.027(3)(b)) depends on the same issue: Whether it was proven that employer had other subject employees? It was not. From this record, we only know that the restaurant remodeling project was underway for about 20 months before claimant was injured and that persons other than employer and claimant had done some of the remodeling work. If these other persons were employer's friends working as volunteers, they were not subject workers. Konell v. Konell, supra. If these other persons were subcontractors with independently established businesses, they were not workers, ORS 656.005(31), and therefore could not be subject workers.

It is impossible on this record to make any finding about whether the other persons who worked on the restaurant remodeling project were employees, volunteers or independent contractors. Stated differently, under our preliminary observation about the burden of proof, claimant has not proven that these other persons were employer's employees. It follows that claimant has not proven his employment was other than casual, that is, has not proven that employer's total payroll was more than $200 during any 30-day period. It also follows that claimant has not proven that his employer had other employees, that is, has not proven that his employer was other than a nonsubject employer. Unable to make these findings, claimant has not proven he is other than a nonsubject employee under ORS 656.027(3)(b).

Two items of evidence merit further comment. The exhibits include a complaint claimant filed and an answer employer filed in a civil action in circuit court. These pleadings established that claimant alleged and employer admitted that had an employer-employee relationship on August 6, 1977. This sheds no light on the subject worker standards of ORS 656.027(3)(b).

Another exhibit is a Workers' Compensation Department narrative report that concludes: "This employer was subject and non-complying..." That conclusion is not supported by the text of the report. The text states that employer had "one" employee, presumably in context meaning this claimant; that claimant only intended to work for two days in August 1977 to discharge his $30 debt; that remodeling work was done by friends of the employer and various contractors who brought their own tools; and that employer reported he had no payroll prior to September 1977. The text of this report simply does not support its conclusion.

ORDER

The Referee's order dated October 2, 1980 is reversed and the denial of this claim is reinstated.

GEORGE McKENZIE, Claimant
David Glenn, Claimant's Attorney
John Klor, Defense Attorney
Request for Review by Claimant

WCB 80-06287
July 16, 1981

Reviewed by the Board en banc.

Claimant seeks Board review of Referee Seifert's order which increased the award of 10% unscheduled low back disability granted by a June 24, 1980 Determination Order to 25% unscheduled permanent partial disability.

While helping another man carry a 400 pound steel beam, claimant, at the age of 60, injured his low back. After receiving conservative treatment, he was released to return to work with limitations of no repetitive lifting of more than 25 pounds and no repetitive stooping or bending at the waist. His physical impairment was rated as mild to moderate with no evidence of a ruptured disc. Claimant wears a back brace most of the time. He complains of electric-type shocks in his back, numbness and muscle spasms.

At the age of 62, claimant took an early retirement, even though his employer had truck driving assignments for him which required no lifting. Claimant contends that he could no longer continue driving truck because of the pain and numbness caused by climbing up into the cab of the truck and the prolonged driving. Claimant completed two terms of high school and has worked as a truck driver for 39 years.

After de novo review, the Board concludes that there is no medical evidence to support claimant's contention that he could no longer continue working as a truck driver. It would appear that claimant voluntarily retired at the age of 62. In view of claimant's age, education, experience and physical limitations, the Board nevertheless concludes that the claimant is entitled to an award of 35% unscheduled permanent partial disability for his low back injury.

ORDER

The Referee's order dated January 8, 1981 is modified. Claimant is hereby awarded 35% unscheduled permanent partial disability in lieu of the previous awards. Claimant's attorney is awarded a sum equal to 25% of the increase granted by this order.

Chairman Barnes, dissenting:-

I would affirm the Referee's order. It is strange to grant a significant award for loss of wage earning capacity to a worker who, because of voluntary retirement, is not interested in being a wage earner.

JOSEPH NEEDHAM, Claimant
John Stone, Claimant's Attorney
SAIF Legal Corp, Defense Attorney
Order on Review

WCB 80-01948
July 16, 1981

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Menashe's order which concluded claimant had lost the use of 75% of his left arm because of the combined effects of a mild traumatic injury and conversion reaction. SAIF contends that there is no permanent loss of use, and if there is, the 75% award is excessive. Claimant contends he should receive an additional unscheduled award for shoulder and psychological disabilities.

We agree with the Referee's statement of the facts and conclusions. The Referee properly treated the psychological component of claimant's hand injury as a scheduled injury under the authority of Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972). That psychological condition manifested itself only in relation to claimant's hand disability. There is no basis for an additional unscheduled award.

ORDER

The Referee's order dated August 21, 1980 is affirmed. Claimant's attorney is awarded $300 for services rendered in connection with this Board review, payable by the SAIF Corporation.

LOYCE D. ROBINSON, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Own Motion Determination

Own Motion 81-0150M
July 16, 1981

The claimant suffered a compensable industrial injury on May 6, 1974, and his claim was initially closed by a Determination Order of August 7, 1974. A second Determination Order was issued on March 4, 1976 wherein claimant was granted 10% unscheduled disability. Claimant requested a hearing, and by an Opinion and Order of December 6, 1976 claimant was granted an additional award of 40% unscheduled disability.

On September 2, 1980, after aggravation rights had expired, claimant was placed in an authorized program of vocational rehabilitation and the claim was reopened. This program was completed on September 26, 1980. On September 22, 1980 a stipulation of the parties was entered into which granted claimant an additional 10% unscheduled disability for a total of 60%.

After completion of the vocational rehabilitation program on September 26, 1980, the Evaluation Division issued a Determination Order under the provisions of ORS 656.268. This issuance of a Determination Order was in error as claimant's aggravation rights expired in August 1979. The claimant requested a hearing on this Determination Order, but prior to a hearing being held a stipulation of the parties was entered into because claimant had been placed in another authorized program of vocational rehabilitation. The stipulation of the parties was dated March 30, 1981 and entitled claimant to litigate all issues raised or raisable by the request for hearing on the Determination Order of October 13, 1980.

The claim has now been submitted for closure since claimant has completed his authorized program as of May 10, 1981. Based on the above the Board finds that the Determination Order dated October 13, 1980 is invalid and is hereby held for naught because claimant's aggravation rights had expired in 1979.

Claimant is hereby granted compensation for temporary total disability from September 2, 1980 through September 26, 1980 and from November 10, 1980 through December 4, 1980 and further from December 22, 1980 through May 10, 1981. Claimant is not entitled to any further award for permanent partial disability.

IT IS SO ORDERED.

VIRGINIA AYER, Claimant
Donald Wilson, Claimant's Attorney
Michael Hoffman, Defense Attorney
Request for Review by Claimant

WCB 79-09912
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee James' order which affirmed the employer/carrier's denial for compensation. The claimant contends a compensable back injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 25, 1980 and Order on Motion for Reconsideration dated August 15, 1980 are affirmed.

RAYMOND L. BALDWIN, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-02005
July 17, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Igarashi's order which affirmed the employer/carrier's denial of compensation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated August 22, 1980 is affirmed.

JIMMIE L. BRANNON, Claimant
Dwayne Murray, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-01135
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Seifert's order which granted him compensation equal to 40% loss of the right leg.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 24, 1980 is affirmed.

PAMELA J. BROWN, Claimant
Allen Murphy, Jr., Claimant's Attorney
Scott Gilman, Defense Attorney
Request for Review by Claimant

WCB 80-10111
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mulder's order which affirmed the denial of benefits dated October 30, 1980.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 10, 1981 is affirmed.

ROBERT CURTIS, Claimant
J. David Kryger, Claimant's Attorney
Gary D. Hull, Defense Attorney
Request for Review by Employer

WCB 80-04108
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee McCullough's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which he is entitled and granted claimant a penalty equal to 25% of the compensation due and owing between March 12, 1980 and April 3, 1980.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 26, 1980 is affirmed.

Claimant's attorney is granted the sum of $500 for his services at this Board review, payable by the employer/carrier.

WILLIAM T. BROWN, Claimant
Donald O. Tarlow, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order on Remand

WCB 78-02247
July 17, 1981

On June 10, 1980 the Board entered its Order on Review modifying the Opinion and Order of Referee Seifert and granting claimant an award of 60% unscheduled disability in lieu of the Referee's award of 30% unscheduled disability. The claimant appealed to the Court of Appeals. The Court issued its Order on March 30, 1981 which reversed and remanded the case to the Board for further consideration on the question of extent of permanent partial disability.

Pursuant to the Judgment and Mandate of the Court issued on June 5, 1981, the Board issues the following order.

Claimant sustained a compensable industrial injury on September 2, 1976 while employed as a cement worker. The condition was diagnosed as an acute lumbosacral strain. He was hospitalized first for conservative care and subsequently, on February 4, 1977, underwent a laminectomy. His claim was closed by a Determination Order on November 16, 1977 which granted him an award of 48° for 15% unscheduled disability. Claimant had continuing complaints, so he began treatment with Dr. Hummel, and his claim was reopened. The claim was again closed by a Determination Order on June 8, 1978 with no additional award for permanent partial disability.

Dr. Abbott first examined claimant in September 1976 and reported on June 12, 1978 that claimant could not perform physical work involving any bending, stooping, lifting or prolonged standing.

In October 1978 claimant was examined for a neuropsychological evaluation. Claimant was found to have a third grade education with below average intelligence. The diagnosis was intractable pain syndrome. Claimant also had cardiac irregularities, general emaciated state and chronic anxiety problems. Claimant was basically "worn out." It was felt that the Pain Clinic would not be of benefit because the physical aspects of the program would exceed claimant's capacity to participate. Vocational impairment due to intrinsic physical impairment was moderate and extrinsic psychological impairment was moderately severe. It was doubtful claimant could return to regular work or do more strenuous work than light work without vocational rehabilitation.

Subsequently a vocational counselor found claimant unemployable. Claimant is 53 years of age. His past work experience is limited to farming, logging, wood cutting and as a cement worker. He is functionally illiterate.

Claimant contends he is permanently and totally disabled, and this Board now agrees. Claimant has not worked since this injury. Based on the medical evidence before us together with the social/vocational factors, it would be futile for claimant to attempt to become employed, and we find he is permanently and totally disabled. See Dock Perkins, WCB Case No. 78-09922 (June 25, 1981).

ORDER

Claimant is hereby granted compensation for permanent total disability effective the date of this order.

RONNY L. DOZIER, Claimant
Gary Allen, Claimant's Attorney
Michael Healey, Defense Attorney
Frank Moscato, Defense Attorney
Request for Review by Employer

WCB 80-02053 & 80-02054
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

Brooks-Scanlon, Inc., a self-insured employer, seeks Board review of Referee Daron's order which found it responsible for claimant's claim as a new injury. This employer contends claimant has actually sustained an aggravation of his September 23, 1976 industrial injury and Employers Insurance of Wausau (Wausau) should assume responsibility.

Claimant sustained a compensable non-disabling injury to his low back on September 23, 1976 while working for Brooks-Willamette Corporation which was insured by Wausau. Claimant did not lose any time from work at that time. He continued to have back problems but was able to continue working. Dr. Ray Miller indicated, on September 12, 1978, that claimant saw him for low back pain and symptoms which were later diagnosed as Parkinson's disease. This latter condition is not related to claimant's work. On December 29, 1978 Wausau denied the condition which was treated by Dr. Miller. Claimant and his attorney took this denial to mean claimant's Parkinson's disease was denied. Eric Miller, the author of the denial, agreed that this was their primary intent. They also were denying a reopening of claimant's back claim.

Claimant began seeing Dr. Benson, a chiropractor, on September 19, 1979. At that time, Dr. Benson related claimant's complaints to his September 1976 injury. On October 10, 1979 Dr. Benson took claimant off work because "...his working is reinflaming his spinal ligaments on a daily basis." He was uncertain if claimant's condition was the result of a new injury (or occupational disease) or an aggravation of the earlier injury. In a later report, Dr. Benson indicated claimant returned to work on December 3, 1979, but because of acute severe pain, he had to be taken off work on December 6. It was Dr. Benson's final opinion that claimant's condition was the result of an occupational disease from the last few years of micro-trauma (from bending, lifting and stooping).

On November 15, 1979, Wausau advised claimant and his attorney that his claim remained in a denied status. The denial had no appeal right appended to it.

Dr. Sulkosky saw claimant on January 18, 1980 at the request of Fred S. James and Company who were handling the claim for Brooks-Scanlon, Inc. He stated claimant had had essentially the same pain pattern since his injury. Occasionally, claimant would experience a toothache-type pain in his back and pain into his left leg which, with certain twisting maneuvers, might go into his right leg. Dr. Sulkosky felt claimant's continued weight gain and poor muscle tone was definitely increasing his low back pain. He found an underlying spondylolysis condition which apparently became symptomatic at the time of claimant's September 1976 injury. Dr. Sulkosky stated:

> "I feel that the only injury the patient had was his original injury in September 1976 and that the natural progression of his condition with weight gain has further aggravated his low back pain. I do not feel that 'specific spinal adjustments' are benefitting the patient and at best they are palliative. I would not recommend further chiropractic manipulations. I do feel that the repetitive bending, lifting, twisting type maneuvers as a clean-up man may aggravate his condition until he does lose weight and feel that he should be wearing a corset while doing his work once we return him to work." (Exhibit 21)

On February 29, 1980, Fred S. James and Company denied claimant's new injury claim.

Dr. Sulkosky, on March 20, 1980 indicated claimant could return to work. He felt claimant should lose weight.

The Referee quite summarily dismissed the aggravation theory in this case. In his order he stated:

> "However, in my opinion, the generally constant level (of severity) of claimant's continuing symptoms over the three-year period after his September 1976 injury weighs against considering the more severe low back problems which claimant began to experience in September-October 1979 as a generally worsening progression of his 1976 compensable injury, that is, it should not be considered an aggravation of his September 1976 injury under ORS 767.273...the continuation of those symptoms were the general residuals of that earlier compensable injury, but that the onset of more severe, but similar, symptoms in September-October 1979 were from a different cause."

Based on the same reasoning which caused the Referee to determine claimant was suffering from a new injury, we find claimant's current condition was actually an aggravation of his earlier injury. The "last injurious exposure rule" (cited from Smith v. Ed's Pancake House, 27 Or App 361 [1976]), 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."

The situation described by the Referee and seen in the record of continuing symptoms over a period of time culminating in a more severe disability, leads to a legal conclusion that claimant is suffering from an aggravation of his September 1976 injury. Claimant also has the requisite medical proof, not only in Dr. Sulkosky's report stated previously, but also in a report of Dr. Benson dated September 21, 1979.

Dr. Benson, on October 10, 1979, raises a new theory. He felt that claimant's condition could be due to an occupational disease from the last few years of micro trauma. However, his opinion was equivocal at best; he was unable to ascertain whether claimant's condition was worsened and due to the September 1976 injury or whether it was an occupational disease. The Referee was persuaded that claimant was suffering from an occupational disease based on this report. We find that claimant has failed to prove that his condition was caused by circumstances to which he was not ordinarily exposed other than during a period of regular actual employment. The testimony is quite clear that claimant's home and work situations alike aggravated his condition. Legally, claimant has failed to prove an occupational disease claim. We are persuaded by Dr. Sulkosky's report that claimant is suffering an aggravation of his September 1976 injury.

Wausau, the carrier we find to be responsible for this claim, denied claimant's aggravation claim on November 15, 1979. Claimant did not request a hearing until March 4, 1980, and Wausau contends claimant's claim is barred due to untimeliness. The denial of November 1979 stated: "At this time, our Workers' Compensation claim remains in a denied status..." A look at the denial issued by Wausau on December 29, 1978 reveals that they were denying conditions treated by Dr. Miller which was claimant's Parkinson's disease. It is not inconceivable that claimant was confused when he received the November 1979 denial. Also, more significantly, the denial of November 15, 1979 did not have any appeal notice appended to it. This fails to comply with the statutory requirement set out in ORS 656.262(5)(b) and OAR 436-83-120. We conclude the denial was not proper, and claimant's request for hearing was made in a timely manner.

We agree with the Referee's finding that penalties are in order against Wausau for its unreasonable refusal to pay compensation. Wausau should also reimburse Brooks-Scanlon for all monies paid to claimant as a result of this claim.

ORDER

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

Claimant's claim is remanded to Employers Insurance of Wausau for acceptance and payment of compensation to which claimant is entitled as a result of his aggravation of the September 1976 industrial injury.

Wausau shall reimburse Brooks-Scanlon for all monies paid to claimant as a result of this claim.

The attorney fee ordered to be paid by Brooks-Scanlon is reversed.

The penalty assessed against Employers Insurance of Wausau is affirmed, as is the $250 attorney fee.

Employers Insurance of Wausau shall pay to claimant's attorney as a reasonable fee the sum of $1,000 for his services before the Hearings Division and the Board.

Claimant's claim for a new injury (occupational disease) is denied.

JERRY L. DRISKELL, Claimant
Charles Duffy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06122
July 17, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Fink's order which remanded claimant's claim to it for acceptance and payment of compensation to which claimant was entitled.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 22, 1981 is affirmed. Claimant's attorney is granted the sum of $500 for his services at this Board review, payable by the SAIF Corporation.

DONALD L. GRABILL, Claimant
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-00061
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Daron's order which affirmed the January 26, 1979 Determination Order's award of 5% unscheduled permanent partial disability, contending claimant was not entitled to an award of permanent disability.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 30, 1980 is affirmed. Claimant's attorney is granted the sum of $500 for his services at this Board review, payable by the SAIF Corporation.

SAMUEL G. HENTHORNE, Claimant
Richard Kropp, Claimant'a Attorney
Roger Luedtke, Defense Attorney
Order on Remand

WCB 77-07327
July 17, 1981

The Court of Appeals issued a Mandate on December 30, 1980 whereby it ordered that the cause was remanded below for further proceedings pursuant to the parties' stipulation. By this Mandate the Board was ordered to reinstate the Referee's order in the above-entitled matter which was dated February 26, 1980.

ORDER

Claimant is hereby granted an award of 80° for 25% unscheduled back disability.

Claimant is further granted compensation for temporary total disability in addition to that granted by the Determination Order for the period August 5, 1977 through November 4, 1977 and the employer/carrier may not offset against this award any amount paid for compensation for temporary total disability occurring from February 28, 1977 and November 5, 1977.

Claimant's attorney is granted, as and for a reasonable attorney fee a sum equal to 25% of the compensation granted by this order.

THOMAS G. HOEFFT, Claimant
John P. Cooney, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-02746
July 17, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Peterson's order which ordered claimant's claim reopened because of an aggravation of his condition.

The Board affirms and adopts the Referee's order with the following additions and qualifications. SAIF's basic contention is that claimant's worsened condition is due to intervening injuries. In part, that contention is answered by Referee Drake's January 3, 1979 order which SAIF will not be permitted to now collaterally attack.

The Referee reasoned: "SAIF has the burden of proof in raising the defense of an intervening injurious exposure..." We agree that an insurer has the burden of going forward on an intervening-injury defense. However, we regard the question of who has the ultimate burden of proof on such an issue to be an open question--and a question we need not here resolve because regardless of where the ultimate burden lies, there was no intervening injury.

ORDER

The Referee's order dated August 29, 1980 is affirmed. Claimant's attorney is awarded the sum of $150 for his services rendered in connection with this Board review, payable by the SAIF Corporation.

LESLIE E. HOLLIBAUGH, Claimant
Edward Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-07306
July 17, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Fink's order which affirmed SAIF's denial of compensation for claimant's thrombophlebitis. No briefs were filed.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 12, 1980 is affirmed.

FRANK M. KING, Claimant
Jeff Gerner, Claimant's Attorney
Dennis VavRosky, Defense Attorney
Request for Review by Claimant

WCB 80-06150
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee St. Martin's order which affirmed the denial of compensability of claimant's claim.

The Board, after de novo review, affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 31, 1980 is affirmed.

BILLEY L. LANGLEY, Claimant
John L. Hilts, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-02523
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Peterson's order which affirmed the SAIF Corporation's denial of claimant's aggravation claim. The claimant contends low back aggravation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated August 21, 1980 is affirmed.

THOMAS LOCASCIO, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 78-09327
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Danner's order affirming the November 24, 1978 Determination Order which granted time loss only and closed the claim as of October 16, 1978. Alleging premature closure, claimant seeks additional time loss and a permanent partial disability award.

Claimant advances a rather novel theory of recovery concerning his claim for time loss benefits for a period of time during which he engaged in all sorts of physical work. The extent of claimant's activities--gardening, auto repair and even house dismantling--makes it difficult to envision a totally, albeit temporarily, disabled claimant. The Board commends claimant for his personal efforts to secure new job skills. It cannot, however, accept the argument that the claimant's vigorous work activities were merely a form of vocational rehabilitation. The Board accepts instead the preponderance of medical evidence which indicates that the claimant has no permanent partial disability and that his condition was medically stationary on and after October 16, 1978.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 18, 1980 is affirmed.

HOWARD MANSKER, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 81-0184M
July 17, 1981.

The Board issued its own Motion Order in the above entitled matter on September 19, 1980, reopening claimant's claim for a worsened condition related to his May 31, 1959 injury.

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 18, 1980 through January 25, 1981, and compensation for temporary partial disability from January 26, 1981 through May 11, 1981 and to an additional award of 25% loss of the right forearm, for a total right forearm award of 40%. It is noted that claimant is being awarded overlapping compensation for temporary total disability for another claim unrelated to this one. The carrier may make whatever offset is necessary.

IT IS SO ORDERED.

LARRY MULVANEY, Claimant
Brian Welch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-02694
July 17, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Leahy's order which awarded claimant 80° for 25% unscheduled permanent partial disability for his low back condition. SAIF contends an award of 10% unscheduled disability would be more appropriate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated September 29, 1980 is affirmed.

Claimant's attorney is granted the sum of $200 for his services at this Board review, payable by the SAIF Corporation.

FRANKLIN J. PACHAL, Claimant
Douglas Green, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-04460
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's order and raises the following issues:

1. Whether SAIF's denial was proper.

2. Whether SAIF's denial was reasonable.

3. Whether the Referee awarded a reasonable amount of attorney's fees and penalties in this matter.

Claimant contends the Referee did not properly consider these issues in his order. We agree.

The claimant injured his low back January 25, 1977 and again September 27, 1977. Both injuries occurred while claimant was employed as a bus driver for Tri-Met. The record contains no medical information regarding the initial examination, diagnosis or treatment. A report from Dr. Duff dated August 18, 1978 is the first medical evidence in the record. In that report Dr. Duff finds claimant medically stationary. A Determination Order issued September 13, 1978 awarding temporary total disability and 10% unscheduled disability from injury to the low back. That Determination Order was reconsidered by Evaluation Division and an Order on Reconsideration issued October 25, 1978 modifying the temporary total disability award but not the permanent partial disability award. A stipulation dated January 11, 1979 increased the permanent partial disability award by 20% unscheduled disability.

May 5, 1980 SAIF advised the claimant that they had received a medical report from Dr. Boyden indicating that there was a possibility that the claim should be considered for reopening based on aggravation. That letter contains the following language:

> "Additional medical information was solicited from Dr. Boyden and it was determined that your current condition has not materially worsened since that when your claim was last closed. It is also documented that your current problems have been aggravated by the employment that you have had since leaving Tri-Met. Therefore we are unable to accept responsibility for medical and time loss benefits as a result of your current disability. Therefore without waiving any other questions of compensability this formal aggravation denial is being issued." (Emphasis Added.)

At the hearing claimant's attorney stated:

> "A denial was issued on May 5, 1980. That denial indicated that there was no worsening of the claim, and therefore they issued the denial. And we requested a hearing on that." (Tr. p. 4/3-6)

On the denial issue, claimant argued at hearing:

> "You don't have to prove that someone is materially worse. The cases say you have to show that a person is not stationary and in need of treatment..." (Tr. p. 4/16-21)

The evidence establishes that claimant is in need of treatment, it does not establish that claimant's condition has worsened since the last arrangement of compensation or that his condition is not medically stationary. The evidence as a whole does not show a worsening of claimant's condition. (ORS 656.273(7)

Therefore, to the extent SAIF's denial letter is a denial under ORS 656.273(7), it is approved, except as follows:

> (1) Claimant is not required to prove a "material" worsening to prove an aggravation has occurred. The language of ORS 656.273(7) is explicit:
>
> "...If the evidence as a whole shows a worsening of the claimant's condition, the claim shall be allowed."

(2) In the letter of denial SAIF raises intervening cause as a reason for denial of "medical and time loss benefits as a result of your current disability." The record does not support SAIF's theory and that portion of SAIF's denial is not approved.

Implicit in this finding is that the claimant is entitled to treatment under ORS 656.245 including that provided by Dr. Boyden. SAIF's denial was reasonable, even that portion of it not approved. In June of 1979 Dr. Duff reports:

> "He has noted no real change in his condition for the better or worse since giving up his bus driving in October of 1978."

and

> "His medical condition has been stationary since his last exam of August 16, 1978."

June 15, 1979 chiropractor Dr. Tuck Kantor reports:

> "It is my impression that Mr. Pachal will need maintenance or palleative care in the form of chiropractic manipulations at regular intervals for at least the next year and possibly for the rest of his life." (Emphasis Added.)

April 25, 198___ Dr. Boyden reported to SAIF:

> "I saw and examined Mr. Franklin Pachal on April 24, 1980 at which time he stated that his back had been paining him more severely for four days, since he bent over to pick up a towel." (Emphasis Added.)

and

> "I do not, however, feel that Mr. Pachal's condition has materially worsened basically from the last medical management."

Considering all the medical information, the denial was not unreasonable.

The only remaining issue on appeal is attorney fees. Claimant takes exception to the Referee's award of $50 attorney's fees in this case. That fee was awarded because claimant prevailed on the mileage issue. We agree the fee is adequate. Claimant's attorney successfully defended against SAIF's attempt to establish that claimant's condition was not related to the initial employment and injury at Tri-Met and the award of attorney fees is proper.

The Board takes notice of the Referee's finding on credibility and believes the modifications in his Order are not inconsistent with that finding.

ORDER

The Referee's order dated December 5, 1980 is modified.

That part of the SAIF Corporation's denial denying that claimant's condition has not worsened is approved. That portion of the denial which denies claim reopening because of any alleged subsequent injury or aggravation not related to the injury of January 25, 1977 and September 27, 1977 at Tri-Met is not approved. SAIF shall pay medical services pursuant to ORS 656.245 including those of Dr. Boyden.

Claimant's attorney is awarded a fee of $1,200 for prevailing on these issues at the Hearing and on Board review.

The remainder of the Referee's order is affirmed.

MARY L. ROSA, Claimant
Keith Swanson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order on Remand

WCB 80-01116
July 17, 1981

The Court of Appeals issued its opinion on April 27, 1981 and reversed the Board's finding and affirmed the Referee's conclusion that claimant was credible and that her claim should be accepted as compensable.

By Judgment and Mandate of the Court of Appeals issued July 1, 1981 the case was remanded for an order based on its opinion of April 27, 1981.

Pursuant to the Judgment and Mandate claimant's claim for a compensable injury sustained on June 21, 1979 is hereby remanded to the SAIF for acceptance and payment of benefits as required by law until closure is authorized pursuant to ORS 656.268.

IT IS SO ORDERED.

BARBARA RUPP,Claimant
Dan DeNorch, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney
Request for Review by Claimant

WCB 80-01803
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Ail's order which affirmed the March 12, 1979 Determination Order which failed to grant her compensation for permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 9, 1981 is affirmed.

ROBERT SANCHEZ, Claimant
John D. Peterson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-00224
July 17, 1981

Reviewed by the Board en banc.

Claimant seeks Board review of Referee James' order which upheld the SAIF Corporation's denial of his claim for carpal tunnel syndrome. We agree with the Referee's conclusion that this claim is not compensable, albeit for different reasons.

Claimant worked for less than 30 days in a filbert processing plant from September 21, 1979 to October 17, 1979. His duties included sweeping with a broom and sacking nuts. After leaving this employment, Dr. Berkeley diagnosed carpal tunnel syndrome, and on November 14, 1979, he performed a bilateral median nerve decompression. Dr. Berkeley reported, "from the history it is evident that this patient's symptoms were job-related." The history referred to is of

> "...complaints of tingling and weakness in the hands, as well as pain in the wrists. The patient has been lifting heavy objects and using brooms as well as bearing weight in his hands and wrists on lifting heavy sulfur pots and so on, whilst working in the last year."

It is unclear from this record what the doctor's reference to "working in the last year" means; it is claimant's contention that his month of work in the filbert processing plant caused his carpal tunnel syndrome.

The Referee concluded that claimant had not sustained his burden of so proving based on the following reasoning: (1) Claimant frequently played handball; (2) "I do not know what the role of handball playing for several months would have in the development of bilateral carpal tunnel syndrome;" (3) because Dr. Berkeley's reports do not mention claimant's handball playing, the doctor's opinion must be based on an incomplete or inaccurate history; and (4) therefore, there is no persuasive evidence that claimant's work activity caused a worsening of the underlying disease itself.

Claimant's brief on appeal dismisses his handball playing as a "smoke screen" because:

> "There is no medical opinion or evidence that this type of sport activity could be a precipitating factor in causing the onset of the symptoms, nor is there any evidence to indicate which activity, assuming that both work and non-work activities could be precipitating causes, was the primary culprit in causing the onset of symptoms of this disease."

We agree with the Referee and claimant that this is an occupational disease claim. We, therefore, disagree with the claimant that "the primary culprit" is of any relevance. ORS 656.802(1)(a) requires that for an occupational disease to be compensable, it must arise from conditions of employment "to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment." It is not enough that work conditions be the "primary culprit;" they must be the sole "culprit." See Thompson v. SAIF, 51 Or App 395 (1981).

Applying that standard, we confront a situation here where the claimant did work activity with his hands and wrists that in Dr. Berkeley's opinion could have caused carpal tunnel syndrome, and the claimant did non-work activity with his hands and wrists (handball) but there is no medical evidence it could have caused carpal tunnel syndrome. We do not find the lack of medical evidence on the latter point dispositive. From reading literally dozens of doctors' reports in carpal-tunnel cases, this Board feels it has some expertise in the etiology of that condition.

Carpal tunnel syndrome usually involves a pre-existing congenital narrowing of the tunnel through which the median nerve passes through the wrist, combined with some additional factor which narrows that tunnel further and compresses or irritates the median nerve causing numbness, a tingling sensation and/or pain. The factor which narrows the carpal tunnel is often unknown and unknowable. That factor can be a disease, such as arthritis, diabetes or an infection, which produces swelling or fluid retention, thereby compressing the median nerve. A significant trauma, particularly of a crushing type, can narrow the carpal tunnel.

The most frequently suggested cause of carpal tunnel syndrome in workers' compensation cases is chronic microtrauma. In this case, we infer that Dr. Berkeley was relying on a chronic microtrauma theory; claimant's lifting and sweeping work activities caused his carpal tunnel syndrome. This Board, based on its expertise gained by reviewing numerous other carpal tunnel cases, believes that the chronic microtrauma of handball playing is much more likely the causal factor rather than claimant's work activity. See ORS 183.450(4) ("Agencies may utilize their expertise, technical competence and specialized knowledge in the evaluation of the evidence presented to them.") But we need not go that far here. All we need to find, and do find, is that the non-work-connected microtrauma of handball playing is as likely the causal factor as the work-connected microtrauma of sweeping and lifting for a month.

Having so found, under Thompson v. SAIF, 51 Or App 395 (1981), this claim is not compensable.

ORDER

The Referee's order dated September 5, 1980 is affirmed.

DINA L. SHERTZER, Claimant
Allan Coons, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by SAIF

WCB 79-07497
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Wolff's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which she was entitled and assessed a penalty against it for unreasonable failure to pay time loss benefits. The employer contends claimant has failed to prove her aggravation claim.

The Board affirms and adopts the order of the Referee.

An error on page one of the Opinion and Order should be corrected. In the seventh full paragraph, line one, "April 1978" should be changed to read April 1979."

ORDER

The Referee's order dated January 13, 1981 is affirmed.

Claimant's attorney is granted the sum of $300 for his services at this Board review, payable by the SAIF Corporation.

DARRELL M. SLATER, Claimant
Gerald Doblie, Claimant's Attorney
Dennis Reese, Defense Attorney
Request for Review by Claimant

WCB 79-09187
July 17, 1981

Reviewed by the Board en banc.

Claimant seeks Board review of Referee Williams' order which awarded an additional 10% unscheduled disability resulting from injury or disease to claimant's neck, in addition to a 20% unscheduled disability award granted by Determination Order dated January 22, 1980. The issue is the extent of permanent partial disability. Claimant asserts that utilization of the Workers' Compensation Department's rules for rating disability produces an award of 80% unscheduled disability.

Claimant filed an 801 form on June 30, 1978, stating that he had strained muscles or ligaments in his left shoulder on or about May 23 or 24, 1978 while delivering bread products to customers. Dr. F. D. Wade, an Orthopedic Specialist, diagnosed the condition as an irritation on the upper and medial border of the scapula. On August 16, 1978, Dr. Gordon McComb indicated that no time loss had been authorized and that claimant's condition was medically stationary.

On March 15, 1979 Dr. James Cruickshank took over claimant's care at which time claimant's chief complaints were neck pain radiating to the left arm, tingling of the fingers of the left hand and weakness of the left upper extremity. On March 19, 1979 myelographic studies indicated prominent bulging annuli at multiple thoracic and lumbar levels. Dr. Ray Friedman, a radiologist, interpreted the myelogram as indicating a large central hypertrophic bar at the C5-6 and C6-7 levels and a small central bar at the C3-4 level. Dr. Cruickshank performed anterior cervical fusions C5 through C7. On May 3, 1979 he noted stable alignment of the cervical spine at C5-6 and C6-7 following surgery, noting at that time considerable degenerative disc disease at the C3-4 level. June 9, 1979 x-rays revealed satisfactory healing of the anterior fusion. However, limited range of mobility was observed above the C4-5 level with chronic degenerative changes and C3-4 disc space narrowing.

Although claimant was released for work as of June 18, 1979, claimant consulted Dr. Gordon McComb on June 18 and again saw Dr. Cruickshank on June 21, 1979. Claimant complained of continuing left shoulder pain radiating into the left arm. Dr. McComb reported that claimant had attempted to return to work on June 18, but that he was unable to work because pain between his shoulder blades, especially on the left, was more or less constant.

Physical therapy brought some temporary relief and was continued through August with an injection for pain on the last day of July. In mid-September, claimant was tried on transcutaneous electric nerve stimulation; by late September he was doing better. In October, however, the left arm pain returned and his head continued to be tilted. Time loss from July 5, 1979 through November 13, 1979 was authorized by Dr. McComb who confirmed that the claimant's problems were job related. X-rays taken on December 17, 1979 showed fusion of a major part of the anterior portions of C5, C6 and C7 as well as a slight narrowing of the intervertebral space at C3-4. Dr. Kurt Straube, the radiologist, stated that the narrowing of the intervertebral space was conceivably related to trauma and/or surgery.

Applying the Department's rules adopted in 1980 which govern rating of claimant's disability, the Board finds that the claimant's total unscheduled impairment is 20%, computed as follows:

Fusion is 3 cervical discs (C-5 through C-7) including expected limitation of motion at those levels.....	7%
Disabling pain associated with the claimant's shoulder.....	10%
	17%
Combined with a narrowing of the intervertebral space between C3 and C4, including further limitation of motion on extension.....	3%
	19%

combined with limitation of lateral flexion, 10% (with 30° flexion retained) related to C3 and C4..... 1%

Total unscheduled impairment..... 20%

Considering the other factors in the rules, the Board computes claimant's total unscheduled disability as follows:

Impairment	+20
Age	+10
Work Experience	-0-
Adaptability (light to light)	-0-
Emotional	-0-
Labor Market	-0-
Mental Capacity	-0-
Education	-10

The factors above are combined, not added, for a total rating of 32% which must then be offset by the claimant's education level, a mitigating factor which equals a -10 rating. The 32 point rating is multiplied by .10 (the mitigation factor), and the result, 3.2, is then subtracted from the 32 points for a resulting disability rating of 28.8%. OAR 436-65-601. By rounding that figure to the nearest five percent, the result produced is 30% unscheduled disability, the same result as the Referee reached.

The Board concludes from the foregoing that claimant is entitled to an award of 30% unscheduled disability for loss of earning capacity due to disability of the upper back.

ORDER

The Referee's order dated July 29, 1980 is affirmed.

Concurring Opinion by Board Member George Lewis:

I concur with the majority decision on the extent of the claimant's disability. I do not agree, however, with the method used by the majority in evaluating that extent. The majority applies department rules governing the method for determining extent of disability which did not become effective until April 1, 1980.

Retroactive application of law--whether enacted by rule or statute--which affects substantive rights or the obligation of contracts is prohibited by law. Administrative rules may be applied retroactively only where they do not affect the substantive rights of the parties. In cases where the extent of disability is at issue, I believe the rules do affect substantive rights and are inconsistent with law, for the reasons expressed in my dissent in Dennis Gardner, WCB Case No. 79-04289 (June 30, 1981).

STANLEY WADLEY, Claimant
Alan B. Holmes, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-07492
July 17, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Johnson's order which affirmed the SAIF Corporation's denial of claimant's aggravation claim for his low back condition.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 30, 1981 is affirmed.

IONA MATHEWS, Claimant
Evohl Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys
Request for Review by SAIF

WCB 80-06675
July 21, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Baker's order which ordered it to pay forthwith the medical service expenses in question notwithstanding pending review. The issue in this case arose from the 1979 amendment to ORS 656.313.

The Board affirms and adopts the order of the Referee. See Robert Condon, WCB Case No. 80-05218 (March 26, 1981).

ORDER

The Referee's order dated February 23, 1981 is affirmed.

CAROL S. ULNESS, Claimant
Hays Patrick Lavis, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney
Request for Review by Claimant

WCB 79-02634 & 79-07106
July 21, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee St. Martin's order which affirmed the denials of claimant's accidental injury and occupational disease claims.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 10, 1980 is affirmed.

ROZELLA C. GATEWOOD, Claimant
Peter Hansen, Claimant's Attorney
Paul L. Roess, Defense Attorney
Request for Review by SAIF

WCB 80-06989
July 23, 1981

The Board's Order on Review dated July 6, 1981 inadvertently omitted a provision for attorney's fee for claimant's attorney for prevailing at the Board review. That order is amended to include the following:

Claimant's attorney is granted the sum of $400 for his services at this Board review, payable by the SAIF Corporation.

IT IS SO ORDERED.

GARY M. HALL, Claimant
Jerry Brown, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-10652
July 23, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Danner's order which reopened claimant's claim on the ground of premature closure and ordered a penalty for the carrier's unreasonable termination of compensation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 12, 1981 is affirmed.

Claimant's attorney is granted $750 for his services at this Board review, payable by the SAIF Corporation.

LEO A. HALL, Claimant
John DeWenter, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Determination

Own Motion 81-0144M
July 23, 1981

Claimant was involved in a compensable accident May 12, 1966. The principal consequence was an injury to his left hip. Over the years since that injury claimant has had four operations: Total hip replacement; two subsequent revisions of the hip replacement; and vascular surgery necessitated by the hip surgery.

This claim has been reopened and closed several times, most recently closed by our Own Motion Determination issued December 30, 1974. Claimant's awards by virtue of these prior actions total 60% loss of use of his left leg and 20% unscheduled disability.

The SAIF Corporation voluntarily reopened the claim on August 19, 1977 for performance of some of the operations described above. 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 2, 1977 to April 13, 1981, less time worked, and additional award of 30% loss of use of the left leg. We agree with the recommendation regarding temporary total disability but disagree with the recommendation regarding permanent partial disability.

Claimant is on the borderline of permanent total disability. He is limited to the most sedentary work with limitations of no lifting over ten pounds, no repetitive squatting, bending, stooping, twisting, nor prolonged walking or standing. Claimant is 53 years old with a tenth grade education. His work experience is almost exclusively in the construction trade from which he is now completely precluded. Claimant, on his own, recently found a job as an auto parts man but was forced to quit because the job involved too much walking.

All that keeps claimant from now being permanently and totally disabled is an extraordinary motivation to return to work. As a very recent (June 5, 1981) report from a private vocational rehabilitation specialist puts it: Claimant "is strongly committed to returning to work...His combined skill level and motivation should qualify him for re-employment within a reasonable amount of time. His motivation level is refreshing and motivating to me." The Board likewise finds claimant's commitment to returning to work refreshing and impressive.

But even the most supreme commitment can only go so far in overcoming claimant's obvious and significant physical impairment. We conclude that claimant's impairment is greater than his prior awards. We conclude that claimant's disability involves both loss of use of his left leg which is a scheduled injury and also unscheduled consequences such as atrophy of the buttocks.

Claimant is entitled to compensation for temporary total disability from August 2, 1977 through April 13, 1981, less time worked. Claimant is awarded an additional scheduled award of 20% loss of function of the left leg. Claimant is awarded an additional unscheduled award of 40% for loss of earning capacity.

Claimant's attorney is granted a sum equal to 25% of the increased compensation not to exceed $200.

IT IS SO ORDERED.

GERD JOHANNESSEN, Claimant
Hayes Patrick Lavis, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-04596
July 23, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Mulder's order which affirmed the SAIF Corporation's partial denial of compensation for claimant's tension headaches. No briefs were filed.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 19, 1980 is affirmed.

ARLIE H. JOHNS, Claimant
Roger Weidner, Claimant's Attorney
Scott M. Kelley, Defense Attorney
Order Denying Approval of Dsiputed Claim Settlement

WCB 80-08634
July 23, 1981

This case is currently pending before the Board on claimant's request for review of Referee Nichols' order of May 5, 1981 upholding the employer's denial of a heart attack claim. The parties have submitted a disputed claim settlement to the Board for approval. Under the terms of this settlement, claimant releases all his rights under the Workers' Compensation Act in return for $20,000. A copy of the disputed claimant settlement is attached to this order.

ORS 656.236(1) prohibits releases: "No release be a worker or his beneficiary of any rights under ORS 656.001 to 656.794 is valid." There is an exception to this general rule stated in ORS 656.289(4):

> "Notwithstanding ORS 656.236, in any case where there is a bona fide dispute over compensability of a claim, the parties may, with the approval of a referee, the board or the court, by agreement make such disposition of the claim as is considered reasonable."

There is a dispute between these parties over compensability of this claim. The question is whether it is a bona fide dispute within the meaning of ORS 656.289(4).

The parties first suggest that we should interpret "bona fide dispute" to mean only a situation in which the parties believe in good faith that there is a bona fide dispute. We disagree. Such an interpretation of ORS 656.289(4) would indirectly create compromise-and-release, which is allowed by the workers' compensation laws of many states, but expressly prohibited in Oregon by ORS 656.236(1). Furthermore, in ORS 656.289(4) the legislature has expressly required approval of a disputed claim

settlement. That statute could be interpreted to mean that approval is limited to the question of reasonableness. However, we conclude given the general prohibition on releases, that the legislature must have intended that the approving authority exercises its own independent judgment about whether a bona fide dispute over compensability exists between the parties.

Against that background, we turn to the specifics of this case. The claimant's case to establish the compensability of his heart attack was based on the favorable medical opinion of Dr. Boicourt. However, Dr. Boicourt's opinion was expressly and significantly qualified by assuming the accuracy of several details in claimant's history about his symptoms and events at work. The defense zeroed in on the accuracy of the history claimant gave Dr. Boicourt. The Referee noted discrepancies in the claimant's history in various medical reports, differences between those reports and claimant's testimony at the hearing and conflicts between claimant's testimony and that of several co-workers about the events at work. The Referee concluded: "There are enough questions raised by the possible changes in the history of this incident to make Dr. Boicourt's opinion less than a reasonable medical probability." In context, we interpret this to mean that the Referee rejected claimant's contentions on credibility grounds.

A bona fide dispute, as we understand it, means there is some legal and/or factual basis for each party's position. Stated differently, a bona fide dispute is one in which a jury question would be presented if tried in the judicial system and neither party would be entitled to judgment as a matter of law.

There was a jury question in this case before it was submitted to the Referee: Whether to believe claimant's version of the events at work despite prior inconsistent statements and contrary testimony. The Referee has, however, now resolved that question on credibility grounds. It is theoretically possible that this Board on de novo review could make a contrary credibility finding; it is theoretically possible that the Court of Appeals on subsequent judicial review could make a contrary credibility finding. But it is the policy of this Board to defer to a Referee's assessment of credibility in a case like this and also the policy of the Court of Appeals, as we understand it. Moreover, and most importantly, there would have to be some significant basis in the record for a credibility finding contrary to that of the Referee. The parties have not identified any such basis in the record.

We conclude that, regardless of the long-shot theoretical possibilities of what might happen upon future Board or judicial review of this case, there is not now a bona fide dispute between the parties within the meaning of ORS 656.289(4). The parties' disputed claim settlement will not be approved.

IT IS SO ORDERED.

ORLEY B. MILLIGAN, Employer
Michael Brian, Attorney
SAIF Corp Legal, Attorney
Request for Review by Employer

WCB 78-02484
July 23, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Nichols' order which affirmed and approved the Proposed and Final Order of the Workers' Compensation Department issued February 27, 1978 which found employer was non-complying.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 27, 1980 is affirmed.

ROBERT J. ROOK, Claimant
Neal Buchanan, Claimant's Attorney
John Klor, Defense Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Employer

WCB 80-06335
July 23, 1981

Reviewed by the Board en banc.

The employer, through its carrier, EBI, seeks Board review of Referee James' order which remanded claimant's claim to it for acceptance and payment of benefits as provided by law.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 30, 1980 is affirmed.

NORMAN SNYDER, Claimant
Jerry Gastineau, Claimant's Attorney
Daryll Klein, Defense Attorney
Request for Review by Claimant

WCB 80-05765
July 23, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Seifert's order which affirmed the denial of temporary total disability benefits for the period of November 27, 1979 through December 4, 1979, June 16, 1980 through June 24, 1980, and July 5, 1980 through July 13, 1980. Claimant also contended penalties were due for unreasonable handling of medical bills.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 8, 1981 is affirmed.

BEVERLY WALSH, Claimant
John McLeod, Claimant's Attorney
Lang, Klein et al, Defense Attorneys
Request for REview by Claimant

WCB 80-00865
July 23, 1981

Reviewed by Board-Members McCallister and Lewis.

The claimant seeks Board review of Referee Mulder's order which affirmed the carrier's denial of her aggravation claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 19, 1980 is affirmed.

GEORGE S. WINSLOW, Claimant
Dan O'Leary, Claimant's Attorney
Bruce Posey, Defense Attorney
Request for Review by Employer

WCB 80-00194
July 23, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Leahy's order which remanded claimant's claim to it for acceptance and payment of compensation to which claimant is entitled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 16, 1980 is affirmed.

Claimant's attorney is granted the sum of $650 for his services at this Board review, payable by the employer/carrier.

GERI BENNETT, Claimant
Mike Ratliff, Claimant's Attorney
Daryll Klein, Defense Attorney
Request for Review by Claimant

WCB 80-05125
July 24, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Braverman's order which (1) affirmed the denial of claimant's lower back aggravation claim; with medical benefits pursuant to ORS 656.245 to be provided to claimant on an as-needed basis; and (2) denied claimant's contention that she suffered an upper back and right shoulder injury connected to her industrial accident of June 26, 1979.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 30, 1981 is affirmed.

FREDERICK E. BROWNE, Claimant
Samuel Imperati, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for REview by Claimant

WCB 80-00878
July 24, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mulder's order which affirmed SAIF's denial of benefits dated January 24, 1980 and denied the request for penalties and attorney fees. Claimant contends that he has proven his aggravation claim, or in the alternative, the issue of extent of permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 14, 1980 is affirmed.

ROBERT DONAIS, Claimant
Richard Sly, Claimant's Attorney
Steven Reinisch, Defense Attorney
Request for REview by Employer

WCB 80-01637
July 24, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Pferdner's order which remanded claimant's claim for aggravation to it for acceptance and payment of compensation to which he is entitled. The employer contends that claimant has failed to show that his 1974 compensable condition has become aggravated.

We concur with the findings and conclusions reached by the Referee. We conclude the claimant has proven his injury related condition has worsened since the last arrangement of compensation. We further conclude the claimant has failed to prove an entitlement to temporary total disability. Not one doctor's report authorized payment of time loss benefits; in fact, several reports indicated that claimant was working. Claimant is not entitled to compensation for temporary total disability, but his claim will be closed under ORS 656.268.

ORDER

The Referee's order dated December 24, 1980 is affirmed.

Claimant's attorney is granted the sum of $350 for his services at this Board review, payable by the employer/carrier.

LORNE R. DREIER, Claimant
George Goodman, Attorney
Request for Review by Claimant

WCB 80-08504
July 24, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's order which found he was not entitled to chiropractic care with the physician of his choice outside the state of Oregon.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 18, 1980 is affirmed.

GEORGE A. EVERTS, Claimant
Robert L. Engle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order on Remand

WCB 79-10988
July 24, 1981

The Court of Appeals issued its opinion in the above entitled matter on April 27, 1981 and reversed the holding of the Referee and the Board and found that claimant's high blood pressure condition was compensable.

By a Judgment and Mandate of July 2, 1981 the Court of Appeals reversed and remanded the cause based on its opinion.

The denial of the SAIF for responsibility of claimant's hypertension condition is reversed, and the claim is remanded to the SAIF for acceptance and payment of compensation as required by law until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is entitled to a fee for services rendered at the hearings and Board levels, assuming such has not already been allowed by the Court of Appeals. We will consider this issue on motion of claimant's attorney.

IT IS SO ORDERED.

JOHN M. HANSELMAN, Claimant
Jan Baisch, Claimant's Attorney
Leslie Mackenzie, Defense Attorney
Order of Dismissal

WCB 80-06418
July 24, 1981

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.

GERTRUDE O. HERBER, Claimant
Nahil Meyers, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-09968
July 24, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Pferdner's order which affirmed the October 22, 1979 Determination Order which granted claimant no additional compensation above the 10% she had already received.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 24, 1980 is affirmed.

FLETCHER MITCHELL, Claimant
Robert Udziela, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Ridgway Foley, Defense Attorney
Request for Review by Claimant

WCB 79-03476 & 79-05455
July 24, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Peterson's order which affirmed the Determination Order of June 27, 1978 on the FMC claim and amended the Determination Order of April 10, 1979 on the Jorgen's claim vacating the award of 10% permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 5, 1980 is affirmed.

WILLIAM T. BROWN, Claimant
Donald O. Tarlow, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Amended Order on Remand

WCB 78-02247
July 28, 1981

The Board issued an Order on Remand in the above entitled matter on July 17, 1981 which granted claimant an award of permanent total disability effective the date of the order. The Board, however, inadvertantly failed to grant claimant's attorney a fee.

Our Order on Remand is hereby corrected to reflect the following:

Claimant's attorney is hereby granted, as and for a reasonable attorney fee the sum of 25% of the increased compensation granted by this order, not to exceed the sum of $2,500.00.

IT IS SO ORDERED.

THOMAS L. MITCHELL, Claimant
Jerome Bischoff, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order of Remand

WCB 78-02298
July 28, 1981

This case is remanded to the Hearings Division to afford the parties the opportunity to present additional evidence in light of the subsequent decision in James v. SAIF, 290 Or 343 (1981), and for entry of a new order.

IT IS SO ORDERED.

CLOVIS AABY, Claimant
Joseph McNaught, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-04913
July 29, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of Referee Menashe's order which awarded claimant 60% unscheduled permanent partial disability for a psychological condition resulting from a compensable loss of the right leg. This award was in addition to an award of 100% loss of a leg granted by a Determination Order. Claimant contends he is permanently and totally disabled.

The Board affirms and adopts with the following comments:

The 54-year-old claimant sustained a traumatic amputation of the right leg June 27, 1977. During recovery claimant was treated for a resulting psychological depressive reaction. Dr. Parvaresh, psychiatrist, rated claimant's psychological impairment as moderate. Dr. Parvaresh and Dr. Dewey, psychologist, agree claimant is not psychotic and is capable of making a decision and to realize the consequences.

Claimant refuses vocational rehabilitation and has not sought employment. Claimant has decided to retire. Claimant testified that other occupations retire early and, "as far as I'm concerned, I've reached that point also." Claimant is content staying at home while his wife works. At home claimant vacuums the carpet, mops floors, gardens, removes snow from the driveway, drives his wife to work and goes on errands.

Claimant as a high school diploma and one semester of college. Claimant has done various jobs in a lumber mill and was a pressman in a print shop. Claimant can do light work.

In Burks v. Western Irrigation, 36 Or App 587 (1978), the court defined the difference between attitudinal impairment and psychological impairment due to injury. Claimant's decision to refuse vocational rehabilitation, not seek work and to retire early is attitudinal. ORS 656.206(3) states claimant must be "willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment." (Emphasis Added.) Claimant is neither willing nor has he made reasonable efforts to obtain employment. The Board can not find claimant permanently and totally disabled.

ORDER

The Referee's order dated November 6, 1980 is affirmed.

JUAN ANFILOFIEFF, Claimant
Paul Lipscomb, Claimant's Attorney
Keith Swanson, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-04612
July 29, 1981

This case is before the Board on remand from the Court of Appeals. The Referee and the Board determined that claimant had sustained a compensable industrial injury on January 10, 1978. The SAIF Corporation appealed this matter to the Court contending claimant was not a subject worker as defined in ORS 656.027(2). Claimant cross-appealed, contending he was entitled to penalties for the employer's alleged unreasonable resistance and delay in providing compensation.

The Court of Appeals affirmed the prior finding that claimant's injury was compensable. It went on to find that claimant was entitled to a penalty for the employer's unreasonable conduct. The case was remanded to the Board for "determination of appropriate penalties to be paid by SAIF for unreasonable denial of the claim."

We hereby remand this case to Referee Raymond Danner for any further proceedings, if necessary, in order for him to determine what time period should be covered by the penalty and at what percentage it should be paid.

IT IS SO ORDERED.

KENNETH BAKER, Claimant
Allen Murphy, Claimant's Attorney
Roger Leudtke, Defense Attorney
Request for Review by Claimant

WCB 80-04731
July 29, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee St. Martin's order awarding 10% unscheduled permanent partial disability for claimant's low back injury of August 1979, an increase of 5% over the May 12, 1980 Determination Order. No brief has been filed by either party. Presumably, the issue on appeal is the extent of claimant's disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 31, 1980 is affirmed.

DAVID BLAIR, Claimant
Allen Murphy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant
Cross Request by SAIF

WCB 79-08936
July 29, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review and the SAIF Corporation cross requests review of Referee James' order which granted claimant an additional award of 32° for 10% unscheduled left hip disability for a total to date of 35% unscheduled disability.

The Board adopts the Referee's statement of fact. The original diagnosis of claimant's injury was dislocation of the left femur with laceration. Dr. Stephens performed surgery for open reduction and found a fracture in the greater trochanter. The doctor also found a fracture fragment from the left upper femur. This is as explicit as the medical evidence gets, but it is sufficient for the Board to conclude that the award granted by the Determination Order, as well as by the Referee, should have been to a scheduled award.

Dorland's Illustrated Medical Dictionary, the 23rd Edition, defines the greater trochanter as:

> "...a broad flat process at the upper end of the lateral surface of the femur to which several muscles are attached."

In Chester Clark, WCB Case No. 79-09297 Order on Review (May 5, 1981), the Board held that an injury to the femur is a leg injury and, therefore, was a scheduled injury. In this case the fracture of the greater trochanter is also a scheduled leg injury because the greater trochanter is part of the femur.

Based on the medical evidence of record we conclude claimant's loss of function of his left lower extremity equals 30%.

ORDER

The Referee's order dated October 7, 1980 is modified. Claimant is hereby granted an award of 45° for 30% scheduled disability for loss of the left leg. This award is in lieu of all prior awards granted by the Determination Order and the Referee's order.

PAULINE BOHNKE, Claimant
J. Rion Bourgeois, Claimant's Attorney
Darryl Klein, Defense Attorney
Request for Review by Employer

WCB 80-02336
July 29, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Gemmell's order which found claimant permanently and totally disabled.

The Board adopts the facts as recited by the Referee. The evidence indicates claimant suffers from two conditions, chronic hepatitis and psychological depressive neurosis. The former was treated by Dr. Goldman. The latter was treated by Dr. Wolgamott. As early as 1976 Dr. Goldman rated the hepatitis condition as mild. By his final report of December 1, 1980, Dr. Goldman indicated claimant's mild hepatitis was not disabling. Dr. Wolgamott testified at the hearing that claimant's psychological condition was Class II, i.e., an impairment of 10 to 45%. He had urged claim closure as early as 1978 and felt with closure claimant's condition would improve. Dr. Parvaresch testified at the hearing that he only interviewed claimant one time in September 1979. He found her psychological impairment was mild.

The claim was closed after eight years of temporary total disability compensation with an award of 40% unscheduled body systems disability.

Based on the medical reports in evidence and the testimony of the two doctors at hearing, the Board finds no support for the award of permanent total disability. Claimant is 51 years of age with a high school education and two years of college course work. Almost her entire working life has been as a nurse's aide. She was maintaining medical laboratory equipment at the time of her injury. Although vocational rehabilitation personnel worked a long time with claimant, her counselors changed frequently and her own vocational goals were unrealistic for a person with serum hepatitis. Failure to achieve such unrealistic goals does not document she is precluded from employment in the broad field of industrial occupations.

Dr. Goldman's finding that her mild hepatitis was not disabling requires the award granted by the Determination Order to be modified to indicate no permanent disability due to that condition. The only award claimant is entitled to would be for her depressive neurosis to the extent that condition precludes her return to gainful employment.

The fact claimant experienced a protracted illness and slow recovery resulting in her claim remaining open for eight years cannot negate the fact the medical evidence indicates a good recovery. Dr. Parvaresh rated the psychological disability mild. Dr. Wolgamott, her treating psychiatrist, rated it between 10-45%. The psychological disability, taken alone, is not sufficient to preclude claimant from gainful and suitable employment. The claimant must show motivation to return to work, ORS 656.206(3), and in our opinion she is obligated to approach the vocational rehabilitation effort with some semblance of realism. Her attitude regarding vocational rehabilitation has been one of insisting on pursuing training in jobs from which she is likely forever precluded because of her serum hepatitis. This problem is in part attitudinal and, to the extent that it has contributed to a failure of the vocational rehabilitation effort, it is not properly part of the calculus of claimant's disability award.

We conclude that claimant would be adequately compensated for her loss of wage earning capacity related to her industrial injury by an award of 40% unscheduled psychological disability. It is only a coincidence that this is the same award granted by the Determination Order.

ORDER

The Referee's order dated January 15, 1981 is reversed. The Determination Order of January 22, 1980 is modified to reflect claimant's entitlement to compensation equal to 128° for 40% unscheduled psychological disability.

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.

MAX BROWN, Claimant
Brian Welch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-0916
July 29, 1981

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.

DAVID O. CLARK, Claimant
Jeff Gerner, Claimant's Attorney
Dennis VavRosky, Defense Attorney
Request for Review by Claimant
Cross Request by Employer

WCB 80-05748
July 29, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Johnson's order which approved a Determination Order which awarded 5% permanent partial back disability. Claimant contends the award is insufficient. The employer/carrier cross-appeals contending the award is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 21, 1981 is affirmed.

LAFAYETTE CORNWELL, Claimant
Michael Royce, Claimant's Attorney
Scott Kelley, Defense Attorney
Request for Review by Claimant

WCB 80-01399
July 29, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee James' order which granted defendant's motion to dismiss because of claimant's failure to timely file a request for hearing from a denial.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 16, 1981 is affirmed.

RANDY DAY, Claimant
Rolf Olson, Claimant's Attorney
John Klor, Defense Attorney
Request for Review by Claimant

WCB 80-00737
July 29, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Baker's order which affirmed the employer/carrier's denial of compensability.

The Board affirms and adopts the order of the Referee. As an additional reason for the same result, we find the claimant was not credible--an issue on which the Referee made no ruling. Claimant's testimony was significantly impeached in numerous respects. As just one example, claimant testified that he was unable to report to work on a certain date because he was physically incapacitated. Claimant's supervisor testified that claimant phoned about 10 a.m. on that date explaining only that he had not reported for the start of his shift at 6 a.m. because he overslept. This lead to a union grievance proceeding at which, claimant admits, he did not claim physical incapacity as a reason for not reporting for work on the date in question, even though he had filed this workers' compensation claim by the time of the grievance proceeding.

ORDER

The Referee's order dated February 3, 1981 is affirmed.

STEVEN K. GOTTFRIED, Claimant
Allen Knappenberger, Claimant's Attorney
Delbert Brenneman, Defense Attorney
Request for Review by Employer

WCB 80-01702
July 29, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Pferdner's order which found this occupational-disease claim compensable. We reverse.

Claimant has worked for ITT Continental Baking Co. since 1966 except for about two years of military service. Since 1971 he has mostly worked in the mixing room. Claimant testified that there was extensive flour dust in the mixing room; that there was poor ventilation; and that the window screens were clogged with flour dust. A supervisor agreed that there was some flour dust in this environment but indicated that claimant was overstating the extent of the problem.

Claimant suffered a variety of respiratory problems over the years. Dr. Smith, a general practicitioner, treated claimant for subacute influenzal bronchitis in November 1973 and December 1974; for upper respiratory infections in January 1975 and February 1976; and for acute pneumonitis in January 1977. On March 31, 1980, Dr. Smith reported that claimant had "recurrent pulmonary disease" and concluded: "It is my impression that this man is suffering from an environmentally-induced upper respiratory disease." Dr. Smith did not offer any more precise diagnosis, but his report is the basis of this occupational disease claim.

The strongest evidence to support the claim is as follows. Claimant quit his employment on January 7, 1980. For the next three months he tended bar at his wife's restaurant. By the end of that time, he was free of symptoms. Claimant subsequently returned to his job at the bakery. He testified that within three to four days his symptoms returned. Claimant's being symptomatic while working in the bakery and asymptomatic when not doing so was the only expressed basis of Dr. Smith's opinion on causation:

> "...I have done no tests to show sensitivity to flour dust or powders and do not claim to be an authority on this subject. I am, however, certainly qualified to state that any man who works in an environmental situation which is potentially harmful because the constant presence of particles in the air and who subsequently suffers from repeated respiratory infections can reasonably be expected to have a causal relationship between his symptoms and his environment. It is my impression that this man is suffering from an environmentally induced upper respiratory disease."

None of Dr. Smith's reports note or comment on the fact that according to the doctor's records claimant also had periods of being symptomatic and asymptomatic throughout the 1970's while constantly working in the bakery.

The contrary evidence comes from Dr. Lawyer, a specialist in lung diseases. Dr. Lawyer first reported that claimant's history suggested bakers' asthma and suggested inhalation challenge testing to confirm that diagnosis. Dr. Lawyer performed such tests and concluded claimant did not have any "demonstrable pulmonary condition related to work exposure to flour and mycoban." Dr. Lawyer opined that in all medical probability claimant had no pulmonary condition related to his employment.

We find the opinion of Dr. Lawyer more persuasive than the opinion of Dr. Smith based on: (1) Dr. Lawyer's greater expertise; (2) Dr. Lawyer's opinion being based on specific test results; and (3) the basis of Dr. Smith's opinion--symptomatic while working, asymptomatic while not working--overlooks the fact that claimant went through the same cycle while constantly working. See Thompson v. SAIF, 51 Or App 395 (1981); Brandow v. Portland Willamette Co., 44 Or App 393 (1980); Smith v. Lew Williams Cadillac, 33 Or App 21 (1978).

ORDER

The Referee's order dated September 3, 1980 is reversed and the employer's denial is reinstated.

JAMES E. HOGAN, Claimant
Jerry Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 78-03921
July 29, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of Referee St. Martin's order which granted claimant 224° for 70% unscheduled permanent partial disability for back injury and loss of vestibular function of the right ear. Claimant has filed no brief.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 29, 1980 is affirmed.

RUTH M. HOWARD, Claimant
Sam McKeen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for REview by Claimant

WCB 77-00591
July 29, 1981

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Williams' order which granted her an increased award of permanent partial disability compensation for a total of 112.5° for 75% loss of the right leg. Claimant has filed no brief but apparently contends she is permanently and totally disabled.

This case is proceedurally confusing. On September 18, 1978 the Court of Appeals ruled that claimant's right leg condition had compensably worsened and ordered acceptance of her aggravation claim. Howard v. SAIF, 36 Or App 205 (1978). Ordinarily, a subsequent Determination Order would be issued to close the aggravation claim. However, this case proceeded to hearing before the Referee on claimant's request for hearing on an earlier Determination Order dated November 5, 1976 with the parties apparently treating review of that earlier Determination Order as an indirect way of litigating the extent of claimant's increased disability because of her aggravation claim.

Despite serious doubts about the procedural aspects of this case, on the merits we affirm and adopt the Referee's order.

ORDER

The Referee's order dated August 28, 1980 is affirmed.

MILFORD JACKSON, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-02779
July 29, 1981

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Menashe's order which granted claimant an additional $5.00 per week in permanent total disability compensation benefits because of his remarriage. The Referee also assessed penalties for SAIF's refusal to pay the additional sum.

The issue is whether a permanently, totally disabled worker is entitled to $5.00 per week in increased benefits when he marries more than two years after the injury. This involves interpretation of ORS 656.206(2) which provides:

> "When permanent total disability results from the injury, the worker shall receive during the period of that disability compensation benefits equal to 66-2/3% of wages not to exceed 100% of the average weekly wage nor less than the amount of 90% of wages per week or the amount of $50, whichever amount is lesser. In addition, the worker shall receive $5 per week for each additional beneficiary not to exceed five." (Emphasis Added.)

The relevant facts of this case were presented to the Referee by stipulation:

July 25, 1973:	Claimant sustained a compensable injury.
April 27, 1976:	Claimant granted permanent total disability.
October 22, 1976:	Claimant's first wife dies; $5.00 per week benefits are terminated by SAIF.
August 10, 1978:	Claimant remarried.
May 30, 1979:	Claimant requests the $5.00 per week benefits to be resumed based on his remarriage.
August 21, 1979 and March 17, 1980:	SAIF denies the additional benefits.

ORS 656.005(3) defines "beneficiary" to mean:

> "...an injured worker and the husband, wife, child or dependent of a worker, who is entitled to receive payment under this chapter. However, a spouse of an injured worker living in a state of abandonment for more than one year at the time of the injury or subsequently is not a beneficiary. A spouse who has lived separate and apart from the worker for a period of two years and who has not, during that time, received or attempted by process of law to collect funds for support or maintenance, is considered as living in a state of abandonment." (Emphasis Added.)

There is a problem with applying this ORS 656.005(3) definition of beneficiary to the ORS 656.206(2) rule of additional compensation for each beneficiary. Spouses of injured workers cannot know if they are "entitled to receive payment" within the meaning of ORS 656.005(3) until the injured worker dies. Stated differently, the statutes determine level of payment to a living injured worker by using a definition (beneficiary) that can only be determined upon a worker's death.

A surviving spouse is only entitled to direct payment of benefits: (1) If a worker's death is the result of a compensable, accidental injury (ORS 656.204); (2) if an injured worker dies during a period of permanent total disability, whatever the cause of death, and if the surviving spouse was married to the worker at the time of injury or within two years thereafter (ORS 656.208); and (3) the surviving spouse is not barred by the abandonment, etc., rules stated in ORS 656.005(3). All these rules depend on circumstances as they exist at the time of death. To illustrate, the status of permanent total disability once granted may be changed after reexamination required by ORS 656.206(5). The status of being married may be changed by dissolution of marriage. Thus, reading the ORS 656.005(3) definition of beneficiary literally into ORS 656.206(2) produces the absurd result that no spouse is a beneficiary during the worker's lifetime because we cannot know whether the spouse is "entitled to receive payment" until the injured worker dies.

We cannot believe that the legislature intended this result. We therefore conclude that "beneficiary" as used in ORS 656.206(2) means a spouse who will potentially become entitled to receive payment of benefits under Chapter 656.

In this case, claimant's second wife who he married in 1978 is a potential beneficiary. If claimant dies as a result of his industrial injury, and if his present spouse is then his spouse as defined in ORS 656.005(3), his spouse will become a beneficiary entitled to receive payment of Chapter 656 benefits. Therefore, under our interpretation that "beneficiary" in ORS 656.206(2) means "potential beneficiary," claimant is entitled to receive $5 per week as part of his permanent total disability benefits.

There is sufficient confusion in the structure of the statutes that we do not think SAIF's contrary interpretation was so unreasonable as to warrant assessment of a penalty. The Referee's assessment of a penalty will be reversed.

ORDER

The Referee's order dated October 24, 1980 is affirmed except that the Referee's order that the SAIF Corporation pay a 25% penalty is reversed.

Claimant's attorney is granted the sum of $50 for services rendered on this Board review, payable by the SAIF Corporation.

DENNIS C. KEMERY, Claimant
Jack Ofelt, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order on Remand

WCB 79-03851
July 29, 1981

This case is before the Board on remand from the Court of Appeals. On March 10, 1980, Referee St. Martin directed that claimant be granted compensation totalling 96° for 30% unscheduled low back disability and ordered the payment of Dr. Fleming's bill for psychotherapy. On appeal, the Board reversed the Referee's order that SAIF pay Dr. Fleming's bill and decreased the award to 48° for 15% unscheduled disability.

Claimant appealed the Board's decision to the Court of Appeals. The Court determined that the Referee's order should be affirmed. The award of 96° for 30% unscheduled low back disability is hereby reinstated together with the attorney fee granted by the Referee. SAIf is also directed to pay Dr. Fleming's bill for psychotherapy from January 8, 1979 to April 30, 1979; the Referee's attorney fee of $250 is reinstated.

IT IS SO ORDERED.

STEVEN LUNDMARK, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Employer

WCB 80-04474 & 80-03297
July 29, 1981

Reviewed by the Board en banc.

The Fred J. Early Co. seeks Board review of Referee Igarashi's order which set aside its denial of responsibility for claimant's back condition. Early contends that claimant's subsequent employer, the Donald M. Drake Co., is responsible. We agree and therefore reverse.

Both Early and Drake denied responsibility for claimant's back condition, each contending the other was responsible. Claimant experienced the first onset of symptoms while working as a heavy equipment operator for about a month for Early. Subsequently, during his second day working for Drake, the symptoms became so severe that he could no longer work. Dr. Pasquesi reported: "In my opinion, this patient has an occupational disease, which [was]...made worse by the work at the Donald M. Drake Company."

We agree that under the standards of James v. SAIF, 290 Or 343, 348 (1980), claimant has an occupational disease. In such a situation, the most recent employer is responsible under the last injurious exposure rule if that employment environment "could have" contributed to the disease. Inkley v. Forest Fiber Products Co., 288 Or 337, 344 (1980). From Dr. Pasquesi's opinion that claimant's work for the second employer, Drake, did worsen his condition, it rather easily follows that claimant's work at Drake could have contributed to the disease and Drake is responsible.

Drake resists that conclusion by relying on Bracke v. Baz'r, Inc., 51 Or App 627 (1981). Bracke holds that the last injurious exposure rule does not prevent a claimant from contending and proving that an earlier employer in a series of employers should be found responsible for a compensable condition, despite subsequent employment that "could have" contributed to the compensable condition. Drake would extend the Bracke holding to permit a subsequent employer to contend and prove that an earlier employer should be found responsible. We disagree. As Drake would extend Bracke, it would become inconsistent with Inkley.

Bracke is limited, as we understand it, to permitting the claimant to prove that an earlier employer in a series of employers is responsible; it is not a rule that can be used by a more recent employer to place responsibility on an earlier employer. As we interpret the record, claimant is indifferent whether Early or Drake is found responsible; he merely wants his claim paid by somebody. Under Inkley, his claim should be paid by Drake.

ORDER

The Referee's order dated August 28, 1980 is modified. The denial issued by the Fred J. Early Co. is reinstated. The denial issued by the Donald M. Drake Co. is set aside and this claim is remanded to Drake's carrier for acceptance and payment of benefits as required by law. The Referee's award of attorney fee is affirmed.

ORWELL R. MAILLOUX, Claimant
Larry Bruun, Claimant's Attorney
Roger Warren, Defense Attorney
Request for Review by Employer

WCB 79-10361
July 29, 1981

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Nichols' order which granted claimant an award of 80° for 25% unscheduled left shoulder disability. The employer contends that the left shoulder condition is not causally related to an accepted right shoulder claim and therefore claimant is not entitled to any award for permanent partial disability; alternatively, the employer contends the Referee's award is excessive.

The threshold issue is what body parts are involved in this claim. The only 801 form in the record, executed by claimant in February 1976, claims right shoulder disability. Medical reports written over the following months refer only to the right shoulder or the shoulder (singular). After December 1976 and January 1977, the medical reports begin to refer also to the left shoulder or the shoulders (plural). Years later, in 1979, claimant's treating physician wrote, "...he had bilateral [calcific] deposits when first seen [in 1976]." (Emphasis Added.)

The initial right shoulder claim of February 1976 was closed by a Determination Order on June 9, 1978--a date by which the medical evidence already documented left shoulder involvement. Claimant requested a hearing. By a stipulation of the parties dated December 27, 1978 claimant was awarded 10% unscheduled right shoulder disability, despite the then-existing medical evidence of left shoulder involvement.

Claimant argues that his left shoulder condition has never been denied by the carrier and points out that all medical services for treatment of it have been paid. However, the absence of a denial for left shoulder disabilty is rather easily explained by the absence of a specific claim for left shoulder disability.

We conclude that both of claimant's shoulders have been involved in this claim from the outset; that the emphasis on claimant's right shoulder in the early medical reports is explainable and understandable because claimant's principal problems have consistently involved the right shoulder; and that claimant's shoulder condition, variously described as rotator cuff tendonitis and bursitis, is equally compensable in both shoulders. Given our conclusion of both-shoulder involvement from the outset, the employer could have, but did not, argue that the December 1978 stipulation is res judicata as to both shoulders.

We thus turn to the question of the extent of claimant's disability relating to his shoulders (plural). Claimant was awarded 10% unscheduled disability by the 1978 stipulation. Claimant was awarded an additional 25% unscheduled disability by the Referee. The combined conclusion is that claimant has lost more than one-third of his wage-earning capacity.

The record does not support such a conclusion. Claimant has returned to the job he had before his 1976 claim, although he now declines overtime. He has had no surgery and none is contemplated. No medical report documents any limitation of motion in claimant's shoulders. He suffers on-again, off-again episodes of pain as is common to tendonitis/bursitis. Apparently, although the record is not completely clear, this pain causes claimant to miss about two to three days per month from work, and he is paid time loss for these days.

In 1978 claimant regarded 10% unscheduled disability as adequate when the sole focus was on his more severe right shoulder condition. Considering all relevant factors, we conclude that an award of an additional 10% unscheduled disability, for a total of 20% unscheduled disability for both shoulders, would be adequate.

Finally, we note a collateral error in the Referee's order. The Referee stated: "The claimant's disability on his right shoulder may well be in excess of that stipulated to, but since there has been no change in the claimant's condition since then, I have no authority to increase the award for the right shoulder." The stipulation was executed in December of 1978. At some point for some reason, neither explained in the record, the claim had been reopened. It was closed by a second Determination Order dated November 27, 1979, issued after the December 1978 stipulation. Claimant requested a hearing on the November 1979 Determination Order. Under these circumstances, the Referee did have authority to rule on the extent of permanent partial disability.

ORDER

The Referee's order dated November 20, 1980 is modified to grant claimant an award of 10% unscheduled disability for loss of earning capacity due to right and left shoulder conditions; this award is in addition to that granted pursuant to the December 27, 1978 stipulation of the parties. The balance of the Referee's order is affirmed.

EUGENE R. MARTIN, Claimant
Robert Gardner, Claimant's Attorney
Brian Pocock, Defense Attorney
Request for Review by Employer

WCB 80-00369
July 29, 1981

Reviewed by the Board en banc.

The employer seeks Board review of Referee Johnson's order which granted claimant an award of 144° for 45% unscheduled disability and an award of 60° for 40% loss of the right forearm.

The Referee erred in ruling that the rules of the Workers' Compensation Department governing the rating of disability did not here apply because claimant was injured before the effective date of those rules. Dennis Gardner, WCB Case No. 79-04289 (Order on Review June 30, 1981). The Referee correctly ruled that the provision of those rules that would classify the shoulder as a scheduled area was invalid as inconsistent with prior law. OSEA v. Workers' Compensation Dept., 51 Or App 55 (1981).

Applying the Department's rules for rating loss of use to claimant's scheduled right wrist condition and applying the Department's rules for rating loss of earning capacity to claimant's unscheduled cervical and right shoulder condition, we reach the same result as did the Referee.

ORDER

The Referee's order dated September 17, 1980 is affirmed. Claimant's attorney is awarded as a reasonable attorney fee for services rendered in connection with this Board review the sum of $400.

DISSENT BY BOARD MEMBER LEWIS:

I do not concur in the majority opinion of the Board. I adhere to the views of my dissent in Dennis Gardner, WCB Case No. 79-04289 (June 30, 1981).

ULAN R. MOORE, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-10724
July 29, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Knapp's order approving as compensable claimant's knee problem and subsequent surgery as a worsened condition resulting from a September 18, 1980 on-the-job incident.

SAIF attacks as highly suspect the medical opinion of claimant's treating physician, Dr. Chester, contending that the doctor's own reports are contradictory. Dr. Chester's opinion is, however, uncontradicted by medical evidence. In the Board's opinion, Dr. Chester's opinion of a worsened condition was not appreciably affected by his momentary misconception that the initial 1977 knee injury was job-related, particularly since his 1977 chart notes reflect that the first injury was while claimant played basketball.

The Referee found, and the Board agrees, that:

> "Where, as here, there is uncontradicted medical evidence that causally relate contribution of the injury to the worsening of a pre-existing condition, the evidence preponderates in favor of claimant. Neathamer v. SAIF, 16 Or App 402 (1974)."

Dr. Chester, who had treated claimant for his knee problem since his original injury in 1977 and who examined him in the emergency room on September 19, 1980, had also performed the 1978 knee surgery. He believed claimant's pushing the 1,000-pound tanks up the incline contributed to the worsening of his knee condition. Mr. Chester's December 11, 1980 letter stated:

> "I have reviewed my notes on this patient and they include the fact that he was seen in the emergency room on September 18 with a knee injury which was related to the on the job injury that you referred to in your letter of December 1. He has since had surgery for removal of the meniscal remnant that we knew was present from previous arthrography and other clinical findings dating back a couple of years.

"However, the emergency report, plus the patient's history does support on the job injury on or about September 18. At that time it was described that the patient was pushing a heavy weight up an incline when he experienced sudden onset of left knee pain. The knee popped and was unable to hold his weight and gave way on him. There was later swelling and considerable pain. This brought him to the emergency room which is documented, and later my office notes indicate the situation and the subsequent surgery. So to comment to your question, the recent injury did contribute to the worsening of his knee condition and brought him to the situation in which the surgery appeared to be indicated and was performed."

The Referee concluded that Dr. Chester's earlier reference to the claimant's problem being a continuance of the 1977 injury is not a contradiction. The Board agrees and accepts the Referee's analysis which stated:

"The presence of the meniscus remnant in the knee was the continuing problem, the underlying condition, that was aggravated by the industrial accident of September 18, 1980. Whether directly causing it, lighting up, aggravating or accelerating a disease condition, the resultant disability is chargeable to the accident. Armstrong v. State Industrial Accident Commission, 146 Or 569 (1934)."

The Board concludes that claimant has carried his burden of proof in establishing the compensability of his claim.

ORDER

The Referee's order dated February 3, 1981 is affirmed. Claimant's attorney is hereby awarded $350 as an attorney fee for legal services rendered in this appeal.

THEODIS E. POE, Claimant
J. Rion Bourgeois, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order of Dismissal

WCB 80-00559, 80-00560 & 80-00857
July 29, 1981

The Board has received a Motion to Dismiss the above-entitled matter on the grounds the Request for Review by the SAIF Corporation was not mailed within 30 days after the date the Opinion and Order was issued.

The Opinion and Order was issued June 9, 1981. The thirty days for filing a Request for Review expired July 9, 1981. The Request for Review was dated July 10, 1981. Therefore, more than 30 days have passed, and the order of the Referee is final by operation of law, and the SAIF Corporation's Request for Review is hereby dismissed.

IT IS SO ORDERED.

CHARLES R. SHIPMAN, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-00668
July 29, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee St. Martin's order which affirmed the SAIF Corporation's denial of compensation for his heart condition.

The Board affirms and adopts the Referee's order with the additional observation that under cases like James v. SAIF, 290 Or 343 (1981), and Thompson v. SAIF, 51 Or App 395 (1981), it behooves claimant to make up his mind whether he is claiming an accidental injury or an occupational disease.

ORDER

The Referee's order dated January 27, 1981 is affirmed.

LUCINDA WATTERBERG, Claimant
Frank Susak, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-06535
July 29, 1981

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Leahy's order which affirmed the November 17, 1978 Determination Order granting time loss only. The Referee also approved the insurer's denial of a claim for psychiatric treatment allegedly arising out of claimant's December 2, 1976 compensable automobile accident.

No briefs have been filed in this appeal. We presume that the issues are those raised at the hearing and that claimant appeals the Referee's order in its entirety. At the hearing, claimant sought a permanent partial disability rating and continued psychiatric treatment.

Unfortunately, the Referee's order merely jumps from a mere recitation of the evidence to an unexplained conclusion. We do not, therefore, have the benefit of the Referee's legal or factual analysis, if any, upon which his order was based.

While employed on December 2, 1976 by the Bulletin, a Molalla newspaper, selling advertising for a salary plus mileage, claimant's vehicle was involved in a rear-end collision. She received out-patient treatment at the Kaiser Foundation Hospital where Dr. R. Goodwin diagnosed her condition as a moderate cervical strain. Recommended treatment included physical therapy, a rib belt, and a cervical collar. After years of conservative treatment, attendance at Kaiser's neuromuscular pain clinic, three weeks at the Northwest Pain Center, participation in a Callahan Center Disability Prevention course, psychological counseling and hypnosis sessions, claimant continued to suffer chronic pain in her neck, arms and head. Other than muscle spasms and some limitation of motion, no objective findings have been made to explain her continued symptoms. The medical consensus is that claimant's continued problems are the result of functional overlay, unrelated personality disorders and personal problems at home.

Claimant seeks payment of psychiatric treatment, apparently provided either by the Kaiser Foundation or a Dr. Jasper Ormond. Although the Referee kept the record open for months to allow claimant time to submit a report from Dr. Ormond, none was offered. Claimant has refused authorization for the release of medical reports or records by the Kaiser medical facility. As a result, there is no way to know what way, if any, the claimed psychiatric treatment relates to the December 1976 compensable injury. The Board concludes, therefore, that there is an absence of proof that Dr. Ormond's or Kaiser's psychiatric treatment relate to her on-the-job injury. On the issue of the provision of these specific psychiatric treatments, the Board affirms SAIF's April 17, 1980 denial.

On the issue of whether claimant has any permanent disability as a result of the December 1976 compensable automobile accident, we confront a similar problem in the record. Taken as a whole the medical evidence does not document any objective finding of permanent physical impairment; all suggestions of any possible permanent impairment rely in large part on various psychological conditions; and the weight of the medical evidence does not relate these conditions to the automobile accident.

ORDER

The Referee's order dated December 5, 1980 is affirmed.

PRUDENCE WEHRLY, Claimant
Mark Wehrly, Claimant's Attorney
Ridgway Foley, Defense Attorney
Request for Review by Claimant
Cross Request by Employer

WCB 80-03048
July 29, 1981

Reviewed by Board Members Barnes and Lewis.

Both the claimant and employer seek Board review of Referee James' order which affirmed the February 7, 1980 Determination Order whereby claimant was granted no compensation for permanent disability and affirmed the September 22, 1980 denial of responsibility for claimant's psoriatic arthritis (if it exists).

The Board affirms and adopts the order of the Referee.

ORDER

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

YVONNE WEISER, Claimant
Mike Ratliff, Claimant's Attorney
Roger Luedtke, Defense Attorney
Request for Review by Claimant

WCB 79-09899
July 29, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Braverman's order which awarded claimant 10% unscheduled permanent partial back disability. Claimant contends the award is insufficient.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 22, 1980 is affirmed.

DIXIE I. WILLIAMS, Claimant
B. Gil Sharp, Claimant's Attorney
Donald Hull, Defense Attorney
Request for Review by Claimant

WCB 79-10615
July 29, 1981

Reviewed by Board members Barnes and McCallister.

Claimant seeks Board review of Referee Pferdner's order denying her claim for thrombophlebitis, allegedly caused by prolonged standing or sitting in one position at a conveyor belt for a period of one and one-half weeks as a fruit sorter.

On September 4, 1979, at the age of 38, claimant began working for Diamond Fruit Growers, Inc., having previously worked as a waitress at different clubs and for two months at another fruit company as a sorter. Claimant testified that even though ninety percent of her work as a waitress was on her feet, she had no prior problems with swelling or pain in her legs. After working for three partial and five full days for Diamond Fruit Growers, claimant was hospitalized for what was first diagnosed as phlebitis by Dr. W. T. Edmundsen, her treating physician. On consultation, Dr. W. B. Thompson diagnosed her condition as deep calf thrombophlebitis. The claim was filed on September 26, 1979 and was later denied although the denial was not introduced into evidence.

In December of 1978, Dr. John R. Kingsley confirmed the diagnosis, referring to it as deep venous thrombosis. Dr. Kingsley specializes in thoracic and vascular surgery and was asked to examine claimant for diagnostic purposes only. He saw claimant on several occasions for testing and evaluation but did not treat her. His most recent exam indicated that her current symptoms were not related to the initial problem but were neuromuscular in origin. Dr. Kingsley had viewed the sorting table where claimant had worked. In his deposition, he testified:

> "...as I simulated the job, the job required sitting on a high stool and standing, and mostly upper extremity motion, but it did require some movement of lower extremities, and my impression, having at least attempted to simulate her job, was that an occlusion in her venous system would be unlikely, based on what I could see and simulate, particularly in view of the short time she was there. I have to tender that with the knowledge that deep venous occlusions can occur at any time, can occur in short intervals, can occur from prolonged sitting, more so than prolonged standing...

"...As I simulated her job, I would think that movement of her legs would have been enough to, especially in her age group, to not have caused thrombosis...

"...Any motion, any movement whereby she puts weight on her legs, either placing her legs on the stool or on the floor, there is a little tilt table, a little tilt board there on the bottom, if she leaned forward and pressed on that with her foot, any motion that caused contraction of her lower leg muscles would propel the venous blood, so it is unlikely, if she did that, it's unlikely that blood would become so static or flow slow enough to cause thrombosis."

Although Dr. Kingsley believed that it was possible that claimant's prolonged standing or sitting in one position could cause a clot, he thought it unlikely.

Dr. Edmundsen, claimant's treating physician who had been her doctor for three or four years, testified that the primary cause of thrombophlebitis is stasis, or lack of motion so that the circulation does not keep moving. It was his opinion that claimant's job was a material contributing factor to her condition, although he conceded inactivity around the house on the part of an overweight woman could also cause thrombophlebitis. He had no idea of how long a person might have to be inactive for the blood clots to form since the underlying condition is silent before showing any symptoms. Dr. Edmundsen did not bring his records with him to the hearing, and simply did not know much of claimant's history concerning prior work or home activities preceding her leg condition. He had not seen the sorting operation where claimant worked, but insisted that the work condition was the precipitating factor, adding that "whether it started or whether it was there before, why I don't know, nor does anybody else--nobody can tell."

The Board concludes that Dr. Edmundson's testimony falls somewhat short of that required to establish medical causation in view of the conflicting opinion of Dr. Kingsley.

The Referee declined giving much weight to the testimony of claimant's treating physician on the question of medical causation as contrasted with the opinion of the consulting vascular surgeon. In so doing, the Referee said:

> "...the principal reason for the referee's choice is the testimony of Dr. Edmunsen (sic) thrombophlebitis and phlebothrombosis are one and the same. Therefore the referee cannot accord as much weight to the opinion of Dr. Edmundsen as he does to the opinion of Dr. Kingsley. It is therefore the opinion of the referee it is unlikely that there is any material causal relationship between claimant's work and the development of her thrombophlebitis. It is the further opinion of the referee defendant's denial should be sustained." Opinion and Order, p. 3.

Claimant argues that Dr. Edmundson simply stated that both medical terms mean clotting of the veins in response to an offhand question by the referee as to the difference between the two. Claimant points out that there is absolutely no testimony in the record to contradict Dr. Edmundson's response. Claimant contends that the Referee improperly took official notice of the medical distinction between the two conditions. Concerning such notice, claimant argues:

> "...the referee has no authority to take judicial notice of contrary medical information, if indeed there is such without an opportunity to claimant to explain or rebut. That this causal question and response is the 'principle reason' for the referee's decision when there is no contrary evidence in the record is baffling and legally insupportable."

While our de novo review and decision render moot any problems with the Referee's reasoning process, we note that ORS 183.450(4) states in part: "Agencies may utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence presented to them." We interpret this to mean that the Referees and the Board may utilize their expertise in the evaluation of medical evidence without the necessity of affording prior notice.

ORDER

The Referee's order dated November 12, 1980 is affirmed.

B. BOOTH, Claimant
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-01980
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Fink's order which granted him an award of 35% unscheduled disability. Claimant contends his claim should be reopened, or in the alternative, that he is permanently and totally disabled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 15, 1981 is affirmed.

RONALD F. BRENNEN, Claimant
S. David Eves, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-10210
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Baker's order which remanded claimant's knee injury claim to it for acceptance and payment of benefits he is entitled to.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 23, 1981 is affirmed. Claimant's attorney is granted the sum of $500 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the SAIF Corporation.

LARRY CHASTAGNER, Claimant
Donald Atchison, Claimant's Attorney
Leslie Mackenzie, Defense Attorney
Request for Review by Claimant

WCB 80-07911
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee James' order which affirmed the February 8, 1980 Determination Order whereby claimant was granted compensation equal to 60° for 40% loss of the right hand and 52.5° for 35% loss of the right leg. Claimant contends both these awards are inadequate and also that he is entitled to an award for unscheduled disability to the right acetabulum.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 24, 1981 is affirmed.

GALE R. CROXELL, Claimant
Richard Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-05964
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee McSwain's order which affirmed the SAIF Corporation's denial of June 4, 1980. Claimant contends that his aggravation claim is compensable.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 6, 1981 is affirmed.

DANIEL C. DUNN, Claimant
Allan Knappenberger, Claimant's Attorney
Noreen Saltveit, Defense Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-04110 & 80-04111
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mongrain's order which affirmed the denial issued by American Motorists Insurance Co. on behalf of Chase Bag Co. for a claimed aggravation and the denial issued by the SAIF Corporation on behalf of Custom Stamping for an alleged new injury.

The Board affirms and adopts the Referee's conclusions. In addition to the Referee's application of Weller v. Union Carbide, 288 Or 27 (1979) the Board finds claimant simply failed to carry his burden of proof. After claimant's claim was closed from his accepted injuries in 1977 with Chase Bag Co., he was involved in a major automobile accident in September 1977 and a motorcycle accident in November 1977 which also injured his right upper back. Claimant saw Dr. Eckhardt on January 7, 1980, 15 days before the alleged new injury at Custom Stamping, at which time the doctor diagnosed chronic myofascities. After the alleged new injury the diagnosis remained the same. Therefore, proof is lacking in the record to prove that the condition being conservatively treated by Dr. Eckhardt was related to any incident with either Chase Bag Co. as an aggravation or with Custom Stamping as a new injury.

ORDER

The Referee's order dated December 26, 1980 is affirmed.

MICHAEL EDWARDS, Claimant
Donald Wilson, Claimant's Attorney
G. Howard Cliff, Defense Attorney
Request for Review by Claimant

WCB 80-03813
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Seifert's order affirming the Determination Order of July 23, 1979 which awarded no compensation as a result of claimant's on-the-job accident of March 7, 1978.

Claimant has failed to establish, by a preponderance of the evidence, that his earning capacity has in any way been impaired as a result of his injury. Pain and discomfort are only compensable to the extent that they are disabling. No convincing evidence has been presented which would support claimant's assertion that he suffers disabling pain. Although there is evidence that claimant missed one week of work immediately following his automobile collision, he was released for work the day following the accident.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated September 29, 1980 is affirmed.

ANNA EMRA, Claimant
Michael Strooband, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-01927
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Seifert's order which affirmed SAIF's denial dated February 22, 1980. Claimant contends her compensable condition has worsened.

We accept the facts as recited by the Referee. We concur with his conclusion that claimant has failed to prove her aggravation claim. The Referee's opinion was:

> "Consequently, it appears from the medical evidence that the conditions for which claimant is presenting (sic) being treated are unrelated to her industrial injury, and the denial must be affirmed."

He bases this finding on the medical opinions of Drs. Pasquesi and Camerer that claimant's cervical problems are unrelated to her February 1976 industrial injury. That statement is only partially correct in that the neck condition is unrelated to the February 1976 injury. However, the issue of compensability of the cervical, left side of face and left shoulder condition was decided by Presiding Referee Daughtry (Opinion and Order dated September 19, 1978) and that order is res judicata.

We therefore conclude that any treatment being provided to claimant for a left neck, left side of face and left shoulder condition is to be provided under the provisions of ORS 656.245.

ORDER

The Referee's order dated November 18, 1980 is affirmed.

JAMES HARVEY, Claimant
Robert Uzdiela, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney
Request for Review by Claimant

WCB 80-04766
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee James' order which granted him compensation for 15% loss of the right hand. Claimant contends this award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 28, 1980 is affirmed.

NORMAN W. HICKMAN, Claimant
Thomas Laury, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 78-06990
August 4, 1981

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Fink's order which awarded claimant's beneficiary temporary partial disability from May 23, 1977 through July 31, 1978 and 75% unscheduled disability.

The claimant was a clinical psychologist. His work required use of his voice interviewing clients and dictating reports. He first filed an occupational disease claim in 1975 for an ulcer on his left vocal cord. That claim was accepted and closed by Determination Order dated July 9, 1976 awarding time loss benefits only.

On January 26, 1977 claimant filed a second claim alleging a recurrence of his voice problem. It would seem that this claim was compensable, if at all, only based upon an aggravation of claimant's condition since the July 9, 1976 Determination Order. See ORS 656.273. There was, however, little or no evidence that claimant's condition had compensably worsened in just six months--other than an ongoing need for ORS 656.245 medical services. Nevertheless, SAIF reopened the claim. It was closed by Determination Order dated August 15, 1978. Claimant requested a hearing. He died in December of 1978, and the pending request for hearing was then pursued by claimant's widow pursuant to ORS 656.218.

The Board concludes that this case was incompletely and insufficiently developed and heard by the Referee and, therefore, remands for further proceedings pursuant to ORS 656.295(5).

I. Compensability.

At the outset of the hearing, SAIF's attorney started to contend that claimant's condition was not compensable. It never became clear whether SAIF's attorney was questioning the compensability of claimant's original 1975 claim or his 1977 "aggravation" claim or both before the Referee ruled that compensability would not be considered. It would seem that under Frasure v. Agripac, 290 Or 99 (1980), SAIF was entitled to contest compensability at the time of the hearing. Neither the Referee nor claimant's attorney offers any reason for a contrary conclusion.

The compensability issue must be resolved under the standards of ORS 656.802(1)(a) as interpreted in James v. SAIF, 290 Or 343 (1981), and Thompson v. SAIF, 51 Or App 395 (1981). Occupational diseases are only compensable when they arise from circumstances to which an employee is not ordinarily subjected except at work. It is elementary that any human being is going to use his or her voice in both employment and nonemployment contexts. To the extent it is theorized that claimant's use of his voice at work caused a vocal cord ulcer, something more must be shown than contained in this record to establish compensability.

II. Temporary Partial Disability.

If this claim is compensable, we agree with and adopt the Referee's approach to and award of temporary partial disability.

III. Permanent Partial Disability.

The Referee stated:

> "There isn't any evidence as to what other type of work Dr. Hickman may have been able to do if he had to discontinue working as a clinical psychologist. He was obviously a very intelligent man. I assume there would be jobs available for a clinical psychologist where the use of his voice would not be such an important factor in his earning ability. However, there isn't any evidence concerning the availability of such employments. The record is pretty clear that as a clinical psychologist in the type of work Dr. Hickman did, he had lost 75% of his ability to earn."

This analysis is erroneous for at least two reasons: (1) There is too much emphasis on this worker's ability to do a specific job, i.e., practice psychology on a self-employed basis in a particular manner; and (2) the burden of proof appears backwards--it was claimant's burden to show what he was precluded from, not SAIF's burden to show "the availability of such employments."

We utilize a different approach in determining the claimant's extent of permanent partial disability than that used by the Referee. The Board adopts the rationale of the American Medical Association, in its Guides to the Evaluation of Permanent Impairment (1971) which states:

> "...speech means the capacity to produce vocal signals that can be heard, understood and sustained over a useful period of time. It should permit effective communication in the activities of daily living...
>
> "At this time there is no single acceptable proven test that will measure objectively the degrees of impairment from the many varieties of speech disorder. It is therefore recommended that, for the present, speech impairment be evaluated clinically as to audibility, intelligibility, and functional efficiency." p. 109-110.

In the absence of an impairment rating from the claimant's doctors, we conclude from our review of the medical evidence as a whole, that claimant's functional efficiency, with regard to his speech, fell in the Class II classification listed in Table 5 of the AMA's Speech Classification Chart, which indicates a speech impairment which ranges from 15 to 35%. That classification is described as:

"Can meet MANY of the demands of articulation and phonation for everyday speech communication with adequate speed and ease, but sometimes gives the impression of difficulty, and speech may sometimes be discontinuous, interrupted, hesitant or slow."

Because claimant's speech efficiency bordered on the next classification where he could only sustain consecutive speech for brief periods, giving the impression of being rapidly fatigued, the Board concludes that the higher range of Class II, or a 35% speech impairment, is appropriate.

The AMA guidelines provide that a 35% speech impairment, as related to whole person impairment, means a 12% impairment of the whole person. The Board concludes, therefore, that claimant suffered a 12% impairment as a result of his voice problems.

At the time claimant became medically stationary, he was approximately 65 years of age, having practiced clinical psychology for approximately 20 years, and possessing a Ph.D. There was no showing that claimant was unable to continue in some form of psychology practice, which might not involve the heavy use of his voice. Applying the 1980 rules of the Workers' Compensation Department which govern rating disability, the claimant's disability may be computed as follows:

Impairment	+12	
Work Experience	+10	
Age	+10	
Adaptability (to physical labor)	n/a	
Mental Capacity		-25
Education		-25
Emotional	+15	
Labor Market	+ 0	
Pain	+ 5	

The plus factors are combined rather than added for a total of 42 points which must then be offset by the mitigating factors of claimant's education and mental capacity which total 50 points. By multiplying the 42 points by .5 and then subtracting that result from the 42 points, a remainder of 21% disability exists. OAR 436.65-681. By rounding that figure to the nearest 5%, the result indicated is a 20% disability rating.

ORDER

The Referee's order dated June 19, 1980 is vacated, and this case is remanded to the Referee. The Referee shall first consider the compensability issue in accordance with this order. If claimant's condition is found compensable, the Referee shall award temporary partial disability for the period May 23, 1977 through July 31, 1978 using the approach in the Referee's order dated June 19, 1980 here under review, and 20% permanent partial unscheduled disability.

(Concurring opinion follows)

CONCURRING OPINION OF BOARD MEMBER GEORGE LEWIS:

I concur with the majority decision on each of the issues in this case. I do not agree, however, with the method used for evaluating the extent of disability. The majority applies department rules governing the method for determining extent of disability which did not become effective until April 1, 1980.

Retroactive application of law--whether enacted by rule or statute--which affects substantive rights or the obligation of contracts is prohibited by law. Administrative rules may be applied retroactively only where they do not affect the substantive rights of the parties. In cases such as this where the extent of disability is at issue, I believe they do for the reasons expressed in my dissent in Dennis Gardner, WCB Case No. 79-04289 (June 30, 1981).

Even if retroactive application were proper, it is my opinion that the Department's rules (OAR 436-35-000, et seq) are inconsistent with law. As stated in Gardner, I conclude that the Department's "Green Book" rules--whether strictly applied or used only as guidelines--not only affect substantive rights but are contrary to statutory and case law.

VIDA HICKS, Claimant
Douglas Green, Claimant's Attorney
E. Kimbark MacColl, Defense Attorney
Request for Review by Claimant

WCB 79-00920
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee McCullough's order which granted claimant an award of 10% unscheduled disability and review of his subsequent Order on Reconsideration which allowed the carrier an offset for overpayment of temporary total disability and corrected his earlier awarding of attorney fees to two law firms. Claimant contends on appeal that her claim was prematurely closed, that she suffered an aggravation in May 1980 or in the alternative that she is entitled to a greater award of permanent partial disability and the carrier should not be allowed an offset.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 28, 1981 is affirmed.

MICHAEL T. JOHNSON, Claimant
Thomas Finnegan, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 78-06133
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee James' order which granted him compensation equal to 80° for 25% unscheduled disability for injury to his back and pelvis. Claimant contends this award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 24, 1980 is affirmed.

HELEN M. KNAPP, Claimant
Richard Nesting, Claimant's Attorney
Thomas McDermott, Defense Attorney
Request for Review by Employer

WCB 78-05601
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Fink's order which remanded claimant's claim to it for acceptance and payment of compensation to which claimant was entitled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 13, 1980 is affirmed.

Claimant's attorney is granted the sum of $500 for his services at this Board review, payable by the employer/carrier.

LYNN S. KNAPP, Claimant
John Stone, Claimant's Attorney
Charles Holloway III, Defense Attorney
Request for Review by Claimant

WCB 80-10332
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Neal's order which upheld the employer/insurer's refusal to reopen his claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 31, 1981 is affirmed.

RUSSELL LANDOR, Claimant
James Robinson, Claimant's Attorney
Dennis VavRosky, Defense Attorney
Request for Review by Claimant

WCB 80-02258
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mongrain's order which found claimant's condition was medically stationary on November 15, 1979 and affirmed the Determination Order of January 18, 1980. Claimant contends he is entitled to additional compensation for temporary total disability and/or an award for unscheduled disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 11, 1980 is affirmed.

IONA MATHEWS, Claimant
Evohl Malagon, Claimant's Attorney
Paul Roess, Defense Attorney
Amended Order on Review

WCB 80-06675
August 4, 1981

This Amended Order on Review is to correct the Board's Order on Review dated July 21, 1981 which failed to provide an attorney fee for claimant's attorney.

IT IS HEREBY ORDERED that claimant's attorney is awarded the sum of $550 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the SAIF Corporation.

LAURI A. NIRSCHL, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-9366
August 4, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Menashe's order which awarded her 15% unscheduled permanent partial disability. Claimant contends the award is insufficient.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 30, 1980 is affirmed.

LELAND D. OWENS, Claimant
Milo Pope, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Ridgway Foley, Jr., Defense Attorney
Request for Review by SAIF

WCB 78-05543 & 78-10313
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of that portion of Referee Leahy's order which approved the 307 order of the Workers' Compensation Department which designated SAIF the paying agent and remanded the claim to it for acceptance as a claim for aggravation.

The Board affirms and adopts the order of the Referee.

ORDER

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

ROBERT J. PRICE, Claimant
Robert Morgan, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-01903
August 4, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Gemmell's order which granted claimant an award of permanent total disability. In an argument long on indignation and short on factual and legal analysis, SAIF contends the Referee's award is excessive.

The Board affirms and adopts the Referee's order despite an immaterial error in one date.

ORDER

The Referee's order dated August 20, 1980 is affirmed. Claimant's attorney is awarded the sum of $600 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the SAIF Corporation.

ALLAN D. SMITH, Claimant
Douglas Hagen, Claimant's Attorney
Daniel Meyers, Defense Attorney
Request for Review by Claimant

WCB 80-08592
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Braverman's order which affirmed the denial issued by the employer for responsibility of claimant's occupational disease claim.

The Board affirms and adopts the order of the Referee. The Referee's conclusion is supported by the holdings in James v. SAIF, 290 Or 343 (1981) and Thompson v. SAIF, 51 Or App 395 (1981).

ORDER

The Referee's order dated December 17, 1980 is affirmed.

HAZEL STEEN, Claimant
Evohl Malagon, Claimant's Attorney
Order to Show Cause

Own Motion 81-0047M
August 4, 1981

Claimant, by and through her attorney, requested claim reopening under the Board's own motion jurisdiction.

The carrier, Wausau Insurance Companies, wanted claimant examined by the Orthopaedic Consultants but could not contact the claimant in May 1981, and by June 1981 it appears that even claimant's attorney was not in contact with claimant.

THEREFORE, CLAIMANT IS ORDERED to show cause filed with the Workers' Compensation Board, 555 13th Street, N.E., Salem, Oregon 97310 within 30 days of this order why the above entitled case should not be dismissed as abandoned.

CHARLES A. STEPHENS, Claimant
Todd Westmoreland, Claimant's Attorney
MacDonald, McCallister & Snow, Defense Attorneys
Request for Review by Claimant

WCB 80-03919 & 80-03920
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Leahy's order which affirmed the Determination Order of December 10, 1979, whereby claimant was award no permanent disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 23, 1980 is affirmed.

CHARLES TURPEN, Claimant
Douglas Green, Claimant's Attorney
Roger Warren, Defense Attorney
Request for Review by Claimant

WCB 78-06900
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Leahy's order which affirmed the December 31, 1975 Determination Order whereby he was granted compensation equal to 224° for 70% unscheduled low back disability. Claimant contends that he is permanently and totally disabled or, in the alternative, that the award he now has is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 14, 1981 is affirmed.

JULIA WEATHERSPOON, Claimant
Leeroy Ehlers, Claimant's Attorney
Paul Bocci, Defense Attorney
Request for Review by Claimant

WCB 80-05960
August 4, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mulder's order which denied claimant's request for additional temporary disability compensation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 12, 1980 is affirmed.

VERNON E. CECIL, Claimant
David Gallaher, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-03981
August 6, 1981

Claimant seeks Board review of Referee Mongrain's order which dismissed his request for hearing.

Claimant sustained a compensable hand injury on July 14, 1973. The claim was a medical-only and no Determination Order was issued. Claimant now contends he has a compensable aggravation of the July 1973 injury. The Referee determined that claimant failed to file his claim within five years of the date of the injury and his case must be handled under the Board's own motion jurisdiction. The issue presently before us is whether claimant is entitled to a hearing on his aggravation claim.

The law upon which the Referee based his decision is found in ORS 656.273(4)(b).

> "If the injury was nondisabling and no determination was made, the claim for aggravation must be filed within five years after the first determination was made under subsection (3) of ORS 656.268."

This law was actually enacted in lieu of ORS 656.271 in July 1973. ORS 656.273 did not become law until October 5, 1973, 90 days after the close of the 1973 Legislative session on July 6, 1973.

In approximately 1968, because of the vast number of medical-only claims processed every year and the enormous costs involved in closing these claims, the Board concluded an informal "administrative" closure could be implemented which would carry out the legislative intent and save costs. The Board has previously determined that since no formal determination was issued, the medical-only closure did not start the running of the aggravation period. [Elizabeth Simmons, 11 Van Natta 282 (1974).]

At the time claimant was injured, cases such as his required no Determination Order. When the new law was enacted in October 1973 it provided that medical-only claims would result in an aggravation only within five years of the date of the injury. There is no evidence that that statute is to be applied retroactively. See Chapter 620 Oregon Laws 1973, Sections 4 and 5. Claimant's aggravation period has never commenced to run.

We conclude claimant is entitled to a hearing on his aggravation claim and remand this case to Referee Mongrain for the taking of evidence.

IT IS SO ORDERED.

DAVID DOMNEY, Claimant
Donald Tarlow, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-08125
August 6, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee McSwain's order which found claimant's "tennis elbow" claim compensable. The issues are whether the claim is for an injury or occupational disease, whether the claim was timely made, whether claimant's condition is compensable and penalties/attorney fees.

Claimant's condition is chronic lateral epicondylitis, commonly known as "tennis elbow." Claimant's theory is that his frequent grasping and twisting movements with hand tools as a mechanic caused this condition. But as the Referee put it, "with artful evasiveness, the claimant's counsel has elected to stand neither on a theory of injury nor on a theory of disease." Despite that evasiveness, we are confident that claimant's condition, if compensable at all, is compensable as an occupational disease.

Having so concluded, we agree with and adopt those portions of the Referee's order that concluded that this occupational disease claim was timely filed under the standards of ORS 656.807(1).

We turn to the question of compensability. We find two flaws in the Referee's reasoning. First, the Referee invoked the doctrine that compensability is established when it is proven that work activity worsens a pre-existing disease. We have no quarrel with that doctrine, but it has nothing to do with this case. There is no persuasive basis in this record for finding claimant had pre-existing tennis elbow; the issue is whether work activities caused tennis elbow in the first place.

Second, in deciding causation, the Referee applied a legal standard that is of doubtful validity. In situations like this where the evidence shows both on-work and off-work activities as possibly causative, the Referee thought "more extensive exposure" was the test; citing O'Neal v. Sisters of Providence, 22 Or App 9 (1975). However, more recent appellate court decisions do not seem to follow a "more extensive exposure" test. See James v. SAIF, 290 Or 343 (1981); Thompson v. SAIF, 51 Or App 395 (1981); see also Robert Sanchez, WCB Case No. 80-00224 (Order on Review, July 17, 1981); Walter J. Dethlefs, WCB Case No. 79-04604 (Order on Review, June 19, 1981).

Because of these flaws in the Referee's analysis, we conclude this case was incompletely heard by the Referee and, therefore, pursuant to ORS 656.298(5), we remand for further proceedings.

Finally, the Referee imposed a 10% penalty based on his finding that SAIF's denial was unreasonable. We disagree. Given the recent flux in the law governing the compensability of occupational diseases, although SAIF's denial might ultimately be found to have been wrong, it can hardly be called unreasonable. No penalty is warranted on this record.

ORDER

The Referee's order dated October 20, 1980 is affirmed in part, reversed in part and vacated and remanded in part. That portion of the Referee's order finding this occupational disease claim was timely filed is affirmed. That portion of the Referee's order imposing a 10% penalty for unreasonable denial is reversed. That portion of the Referee's order holding this claim compensable is vacated and that issue is remanded for further proceedings consistent with this order on review.

MARIE GILBERT, Claimant
Martin McKeown, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-10786
August 6, 1981

Reviewed by Board Members McCallister and Lewis.

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 and directed it to pay claimant's medical expenses subsequent to June 21, 1978 under the provisions of ORS 656.245.

Claimant sustained a compensable injury to her low back on September 21, 1976. She has been granted a total award for this injury equal to 96° for 30% unscheduled low back disability. On September 27, 1978, claimant filed a claim for aggravation which was denied by SAIF. After a hearing, the Referee determined that claimant's condition at that time was due to an underlying congenital problem and not due to her industrial injury. By an order dated August 16, 1979, he affirmed the SAIF's denial of her aggravation claim. Claimant requested a review by the Board of this order and the Board issued its order on April 21, 1980. The Board's order is not very clear and has been subject to several interpretations by the parties involved. The Board first affirmed the Referee's decision with respect to claimant's aggravation claim. This means that we agreed with the Referee's finding that claimant's condition at that time was due to an underlying congenital problem and that any worsening was not due to the residuals of her industrial injury. Therefore, the medical expenses in question at that time were not the responsibility of SAIF. SAIF's denial, dated December 18, 1978 made the statement, "...and are sorry that we can no longer accept the responsibility for this claim." SAIF has a right to accept or deny any request claimant may make for either medical services or aggravation. However, it may not deny all future responsibility in one "blanket statement" as it did in this case. The Board's Order on Review merely attempted to clear up that statement. Claimant, at some future time, was entitled to medical services under ORS 656.245 so long as her condition was related to the industrial injury. At the time of the Board's order, the Referee and the Board found she had not proven her condition was related to the industrial injury and, therefore, affirmed the denial. We find that issue of claimant's entitlement to medical services from June 21, 1978 to the date of the Referee's order (WCB Case No. 78-07623) has already been litigated and is res judicata. The Referee's order on this issue (WCB Case No. 79-10786) is reversed.

Claimant now has a new aggravation claim before us together with a request for medical services. The initial report she offered in support of her claim was from Dr. Field dated November 20, 1979. He found low back and right leg pain which was probably discogenic in origin. A repeat myelogram was recommended with possible referral to a Pain Clinic. SAIF denied continuing medical treatment based on the Referee's affirmance of their denial at the earlier hearing. On January 15, 1980, Dr. Field stated:

"It is my opinion that the patient's present condition is probably due to the incident which occurred in September of 1976 or due to aggravation to the pre-existing condition. Under either circumstance, her present condition would be a result of the injury in September 1976. The patient's condition is worse. This is based on subjective findings. In other words, the worsening is based on the patient's statement that her condition is worse." (Emphasis added.)

We find that claimant has failed to show that her condition related to the industrial injury is objectively worsened. Claimant has not submitted the requisite medical evidence to support her claim. Her aggravation claim should be denied. However, the medical reports before us at this time do indicate that her continuing need for medical services is due to residuals from her industrial injury. If claimant is admitted to the hospital for the recommended myelogram, she is entitled to have her claim reopened at that time. Dr. Field, on November 20, 1979, indicated claimant's condition was a result of her injury sustained in September 1976. From that date forward, as long as he continues to connect claimant's problems to her injury, the SAIF Corporation is responsible for continuing medical services under the provisions of ORS 656.245.

ORDER

The Referee's order dated August 28, 1980 is modified. Claimant is entitled to medical services under ORS 656.245 from November 20, 1979 so long as her doctor continues to connect her condition to her industrial injury. Claimant's attorney is entitled to a fee equal to $150 for prevailing on this portion of claimant's claim. The remainder of the Referee's order is reversed.

ALTON GRANVILLE, Claimant
Richard Yugler, Claimant's Attorney
Delbert Brenneman, Defense Attorney
Request for Review by Claimant

WCB 81-02677
August 6, 1981

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.

ROY SMYLIE, Claimant
Robert Chapman, Claimant's Attorney
Mary Danford, Defense Attorney
Request for Review by Claimant

WCB 80-10714
August 6, 1981

The claimant has moved to remand to the Referee for the taking of additional testimony allegedly not obtainable for the hearing. The motion is denied for the reasons stated in the employer's July 27, 1981 memorandum in opposition, with which we fully agree.

IT IS SO ORDERED.

DONALD C. WISCHNOFSKE, Claimant
Garland, Karpstein & Verhulst, Claimant's Attorneys
Rankin, McMurry et al, Defense Attorneys
Interim Order

WCB 80-00424
August 10, 1981

This case is pending before the Board on the employer's request for review and claimant's cross request for review. Presently before us is the employer's motion to suspend enforcement of a portion of the Referee's order pending Board review.

This is a denied claim. The Referee sustained the denial. The Referee also found: (1) The claimant was disabled from March 13, 1979; (2) the employer first received notice of claim on September 26, 1979; and (3) the claim was denied on December 17, 1979. We accept these dates as accurate for present purposes. The question raised by the employer's motion is whether the duty to pay interim compensation runs from the date of disability (March 13, 1979) or from the date of notice of claim (September 26, 1979).

The Referee took both positions. He first stated:

> "Statute requires commencement of payment of interim compensation no later than the 14th day after notice. The employer failed to do so. Claimant was entitled to interim benefits until the denial was issued." (Emphasis added.)

The Referee then proceeded to order:

> "...that claimant be paid temporary total disability benefits from March 13, 1979 [the date of disability] until the date of denial..." (Emphasis added.)

The employer's motion concedes its duty to pay interim compensation between date of notice, September 26, 1979, and date of denial, December 17, 1979. The motion argues only that there is no duty to pay interim compensation between date of disability and date of notice of claim, that is, between March 13, 1979 and September 26, 1979.

As we understand Jones v. Emanuel Hospital, 280 Or 147 (1977), the employer is correct. The purposes of interim compensation, according to the court in Jones, are: (1) To encourage employers and carriers to make prompt decisions on whether to accept or deny workers' compensation claims; and (2) to guarantee the worker some income if the employer and carrier for whatever reason take more than 14 days from the notice of the claim to decide whether to accept or deny. Both purposes are served by making interim compensation payable between notice of claim and denial; neither purpose is served by making interim compensation payable for an earlier period of disability during which the employer and carrier had no notice or knowledge of the claim and thus could hardly make any decision, prompt or otherwise, on whether to accept or deny. Indeed, the result in Jones was to order interim compensation paid between date of notice and date of denial. We conclude that if a claim is not compensable, which by virtue of the Referee's decision is now the situation in this case, the duty to pay interim compensation only runs from notice or knowledge of claim to denial.

If, on the other hand, a claim is ultimately found compensable, then the employer and carrier may, depending on the circumstances and specific evidence of each individual case, be liable for pre-claim temporary total disability payments back to the date of disability. But such an entitlement on a claimant's part would be to receive regular compensation, not interim compensation.

We will grant the employer's motion at this time. In order to expedite final resolution of all issues, we have requested that the hearing transcript be prepared as soon as possible and will review this case as soon as the parties have filed their briefs.

ORDER

That portion of the Referee's order that claimant be paid temporary total disability between March 13, 1979 and September 26, 1979 is suspended pending Board review.

ADA C. DEL RIO, Claimant
Thomas Caruso, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-10596
August 11, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Pferdner's order which granted claimant compensation for temporary total disability, awarded a penalty and ordered SAIF to pay an attorney fee in the amount of $1,000. SAIF contends the penalty was not proper and the attorney fee was excessive.

This case was "tried" before the Referee only on the representations of the attorneys; no sworn testimony was presented. It is doubtful that this "record" presents an evidentiary basis for anything. But SAIF does not question claimant's entitlement to the temporary total disability ordered by the Referee, so that portion of the Referee's order will be affirmed.

Some penalty was warranted by SAIF's admission that it paid temporary total disability "tardy" and failure to offer any explanation. However, we agree with SAIF that a penalty should not be assessed against the temporary total disability due for the two weeks preceeding November 11, 1980 as that payment was timely mailed and its alleged nonreceipt by claimant does not, standing alone, establish any unreasonableness by SAIF.

We also find that the attorney fee granted to claimant's attorney was grossly excessive. The "hearing" lasted one-half hour. One exhibit was introduced. The Referee's only explanation for a $1,000 attorney fee in these circumstances is that he always imposed a "minimum" fee of $1,000.

In setting attorney fees, the Referee is under a duty to comply with the standards in the Board's relevant rules. Neither any statute nor any rule provides for a "minimum" attorney fee. Rather, attorney fees are to be based on the efforts of the attorney and the results obtained, subject to any maximum limits set forth in the rules. OAR 438-47-010. A Referee is not authorized to establish a subjective and individualistic "minimum" fee which makes efforts expended and results obtained irrelevant.

The result obtained in this case was recovery of about $426 in temporary total disability. There is no information in the record about efforts expended other than that claimant contacted SAIF representatives three times before the "hearing" and then participated in a half-hour "hearing" at which no testimony was presented and one exhibit introduced. It is ludicrous to regard this as $1,000 worth of legal services. Based on our statutory authority as interpreted in Anlauf v. SAIF, 52 Or App 115 (1981), we conclude that the Referee's attorney fee award must be decreased.

ORDER

The Referee's order dated January 8, 1981 is modified. The temporary total disability award granted by the Referee is affirmed with the amount corrected to read $426.61. The 25% penalty shall be paid on the above amount less the amount due for the two weeks preceeding November 11, 1980. Claimant's attorney's fee is reduced from $1,000 to $300.

GLORIA E. DOUGLAS, Claimant
Tom Hanlon, Claimant's Attorney
Jerry McCallister, Defense Attorney
Request for Review by Claimant
Cross Request by Employer

WCB 79-07056
August 11, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant and the self-insured employer seek Board review of Referee Menashe's Interim Order of May 21, 1980 which ruled that the claimant was not entitled to a hearing on the employer's November 30, 1978 denial but was entitled to proceed to hearing regarding an occupational disease claim filed on July 3, 1979 and denied on July 10, 1979. The parties also seek review of Referee Mongrain's Order of October 24, 1980 which awarded claimant payment for medical services and temporary total disability from January 8, 1979 to claimant's last day of work in June 1979 but denied payment for medical services, temporary total disability and any permanent disability related to the surgical removal of the bone spur in the claimant's right heel performed July 19, 1979.

Claimant first filed a claim for an occupational disease of Achilles tendonitis on November 13, 1978. The employer denied the claim by letter dated November 30, 1978. Beside the notice of appeal rights, the substantive part of the denial said only: "Careful consideration has been given to your claim for Workers' Compensation benefits for problems allegedly arising from your employment. We must, however, respectfully deny payment for any bills arising from your tendonitis." Claimant failed to appeal the denial within 180 days as required by ORS 656.319.

Claimant contends that the November 30, 1978 letter was an ineffective denial because it lacked the specificity of reasons required by ORS 656.262(6) and OAR 436-83-120. Referee Menashe held:

> "The letter was concise, but it was sufficient to plainly inform the worker that the employer felt her tendonitis did not arise from her employment and inform her of her right to request a hearing if she felt the denial was not right. The letter was adequate to constitute an effective denial."

We agree. Therefore, the 180-day statutory limitation period began to run on November 30, 1978 and claimant's request for hearing on August 13, 1979 was too late in regards to the November 13, 1978 claim. ORS 656.319.

Referee Menashe correctly held that the letter of July 3, 1979 by claimant's treating doctor, Dr. John Harris, to the employer constituted a new claim. He also correctly held that a response of July 10, 1979 from the employer's representative to Dr. Harris which included a copy of the November 30, 1978 denial constituted a new denial. Claimant's August 13, 1979 request for hearing on the July 10, 1979 denial was timely.

The employer's argument at times seems to be that successive occupational disease claims are impossible. We disagree. Nothing in the statutes, rules or case law prohibits successive claims provided all are timely filed, meaning within 180 days of when the worker was medically informed of the existence of an occupational disease or became disabled. ORS 656.807. (The 180-day statutory limit on making an occupational disease claim, ORS 656.807, is not to be confused with the ultimate 180-day statutory limit on requesting a hearing on the denial of a claim, ORS 656.319.) We cannot say that claimant's July 3, 1979 second claim was time-barred under ORS 656.807 because there is no evidence in the record of when claimant was informed by a physician that she was suffering from an occupational disease.

On the merits, Referee Mongrain found, as we do, that claimant's condition of tendonitis and the manner in which the tendonitis increased and decreased depending on work activity amounted to a "temporary worsening of the underlying disease requir[ing] medical services or result[ing] in temporary disability..." Weller v. Union Carbide, 288 Or 27, 37 (1979). The Referee awarded time loss payments and payment for medical services but limited the award to the time loss and medical services generated by the temporary worsenings between January and June 1979.

The record shows that claimant was under the care of Drs. John O'Donovan and John Harris in December 1978 for her Achilles tendonitis. Claimant also sustained time loss during that month because her doctors took her off work on December 4, 1978 and did not release her to work until January 8, 1979. Consequently, we modify that part of Referee Mongrain's Order which ordered that claimant receive time loss and medical services only from January 8, 1979. We conclude that time loss and medical services related to the tendonitis should be calculated from December 4, 1978.

We affirm and adopt the balance of Referee Mongrain's Order.

ORDER

Referee Menashe's interim order dated May 21, 1980 is affirmed. Referee Mongrain's order dated October 24, 1980 is modified to provide that claimant shall be entitled to temporary total disability compensation and medical services beginning December 4, 1978; in all other respects Referee Mongrain's order is affirmed. Claimant's attorney is allowed the sum of $100 as a reasonable attorney fee for services rendered in connection with this Board review payable from the increased compensation awarded by this order.

MICHAEL GRAY, Claimant
Vincent Ierulli, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-10635
August 11, 1981

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 jointly 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.

GLEN HENRIE, JR., Claimant
W. A. Franklin, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-09434
August 11, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant requests Board review of Referee James' order which awarded 65% unscheduled permanent partial disability for claimant's injury to his neck, low back and groin. Claimant contends he is permanently and totally disabled.

Claimant, at the age of 57, injured his neck and back on June 14, 1978 when the company truck he was driving through a field dropped off into a ditch or hole, throwing him about in the cab of the truck. Claimant's injuries were diagnosed as chronic cervical and lumbar back strain with degenerative changes. As a result of physical therapy treatment for his neck and back, claimant developed a recurrent right inquinal hernia. Surgery to repair the hernia was performed in November of 1978. That surgery resulted in complications involving induration of the right testes followed by epididymitis and testicular atrophy, all of which involved considerable pain. Tenderness and pain in the right scrotal area persists.

It is medically documented, and not disputed, that the testicular atrophy and epididymitis were complications relating to the hernia operation; and that the recurrent right inguinal hernia developed as a result of physical therapy exercises which were necessary due to claimant's compensable back injury. Consequently, all of these related conditions are compensable.

These compensable consequences are superimposed on claimant's significant past health problems, which include: (1) Bilateral hernia operations, including an infection involving the surgical tract in the left inguinal region; (2) a stroke in 1974 which

produced hemiparesis (muscle weakness) on the right side of his body, and aphasia (defect or loss of the power of expression by speech, writing or signs, or of comprehending spoken or written language), with nearly complete resolution except for some residual impairment of coordination on the right side; (3) High blood pressure; (4) Cerebrovascular disease; (5) Coronary artery disease, including a myocardial infarction in 1975; progressive angina pectoris leading to a quadruple coronary by-pass operation in July of 1976; visual problems documented on June 14, 1977; dizzy spells and blurred vision relating to a shortage of blood to the brain; recurring angina pectoris in 1977; (6) Upper GI disorders, including a peptic ulcer in 1968; and (7) Anxiety neurosis and a variety of psychosomatic disorders throughout his lifetime.

The Referee disallowed consideration of claimant's pre-existing heart condition (ischemia) because it had not been disabling immediately prior to the injury and its subsequent worsening resulted from other factors unrelated to the compensable injury. Stating that the law does not provide for compensation as a permanent total disability when the disability reaches that extent after the accident but not because of the accident, the Referee concluded that claimant's compensable disability is therefore partial only. We agree.

Moreover, claimant's ischemia condition is probably now the most serious cause of his disability. Vocational Rehabilitation counselor Garbarino testified that claimant's recurring ischemic attacks are the primary limiting factor to his returning to work because it cuts off the blood that flows to his brain, causing reduced mentation and blurred vision. He testified that claimant had stated that the attacks occur about three times each day.

In sum, then, claimant is entitled to compensation for his 1978 injuries and related surgical complications; claimant's compensation is to take into account his pre-existing disabilities; but any worsening of those pre-existing disabilities, meaning primarily claimant's ischemic condition, since the injury but not caused by the injury is not properly part of the compensation calculus.

Despite the difficulty in separating the compensable and non-compensable aspects of claimant's current unfortunate physical condition, from a consideration of all relevent factors and compared to other similar cases, the Board concludes that the compensable components of claimant's disability merit an award of 80% unscheduled permanent partial disability.

ORDER

The Referee's order dated October 23, 1980 is modified. Claimant is awarded 256° for 80% unscheduled permanent partial disability; this award is in lieu of all prior awards. Claimant's attorney is allowed 25% of the increased compensation awarded by this order as and for a reasonable attorney fee.

HERBERT HILTERBRAND, Claimant
Rick McCormick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-05516
August 11, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Foster's order which found claimant permanently and totally disabled effective the date of his order.

Claimant testified that on May 15, 1973, while working on the planer chain, he was stacking lumber, bent over and coughed and felt his back go out. The diagnosis was a lumbosacral strain. As early as December 1973 claimant had retired from the labor market, declaring he would never work again, and commenced drawing social security. Since this injury claimant has never worked nor sought any work or any vocational rehabilitation retraining.

Subsequently, in 1977, claimant developed nerve root irritation which caused pain to radiate into his right hip and leg. Surgery was recommended by Dr. Hoda, but claimant repeatedly refused such surgery.

Claimant's left leg is five inches shorter than the right due to pre-existing osteomyelitis. Regarding this condition, claimant testified:

"Q. How about your left leg?

A. It don't bother me. I won't say it can't. It is very rare that it ever does."

The only impairment rating in the record indicates that claimant's residual impairment from this injury was mild. The Orthopaedic Consultants felt that claimant had been adequately compensated by the award of 60% unscheduled disability with 40% of that rating due to his shortened left leg. Even though Dr. Hoda felt claimant was permanently and totally disabled, this does not appear to be based on objective evidence of physical impairment but rather on claimant's subjective complaints of his pain and total inability to do anything. These same complaints have been present ever since 1973.

The physical impairment resulting from claimant's industrial injury is not severe and therefore claimant is not excused from the statutory requirements of ORS 656.206(3) which states:

> "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."

In this case claimant has made no efforts, reasonable or otherwise, to seek gainful employment. He has never looked for work or made any efforts to help himself by retraining for work within his physical capabilities. Further, he has refused surgery which one would assume could have relieved him of his radiating-pain complaints.

The Board concludes that claimant has been adequately compensated for the residuals of the 1973 industrial injury and for his loss of wage earning capacity from that injury by the 60% unscheduled low back disability previously awarded.

ORDER

The Referee's order dated February 9, 1981 is reversed. The Determination Order of June 15, 1979 is affirmed.

ROBERT L. MOWRY, Claimant
Steven Yates, Claimant's Attorney
Daryll Klein, Defense Attorney
Request for Review by Carrier

WCB 79-10891
August 11, 1981

Reviewed by Board Members Barnes and McCallister.

The carrier seeks Board review of Referee Peterson's order which set aside the April 10, 1980 Determination Order on the ground of premature closure.

Claimant sustained a compensable low back injury in January of 1974 which has resulted in several surgeries. About January 1978 claimant developed a psychological condition that the carrier accepted as a compensable consequence of the 1974 back injury and resulting surgeries. The Referee found that claimant was neither physically stationary as to his back condition nor psychologically stationary as to his mental condition when the April 10, 1980 Determination Order was issued.

The Referee's conclusion that claimant was not physically stationary is just plain wrong. In March 1978, Dr. Degge found claimant's back condition was medically stationary. In January 1979, Orthopaedic Consultants found claimant's back condition was medically stationary. Claimant's primary treating physician for his back condition, Dr. Becker, reported in July 1980 that claimant was medically stationary. The evidence that claimant's back condition was medically stationary is unanimous and overwhelming; indeed, claimant's brief on Board review does not even attempt to defend the Referee's contrary finding.

Whether claimant was psychologically stationary is more complex. Claimant has been treated for his psychological condition by Dr. Radmore and examined by Dr. Parvaresh and Dr. Quan. Based on examinations of claimant and reviews of all medical records, both Dr. Parvaresh and Dr. Quan opined before the April 10, 1980 Determination Order was issued that claimant was psychologically stationary. The Referee found Dr. Radmore's contrary opinion more persuasive. We do not.

To catalog all the factors that detract from the weight of Dr. Radmore's opinion could fill a book. We note only some:

(1) Claimant has not worked nor sought work since his 1974 back injury. Instead, he has collected temporary total disability during most of that seven-plus years. Anytime his claim has come close to closure because some doctor finds him stationary, claimant regresses psychologically. Dr. Radmore cannot see through that behavior pattern, but rather seems to aid and abet it.

(2) When Dr. Radmore was furnished copies of the reports of Dr. Parvaresh and Dr. Quan and asked to respond, the responses were aggressive and personal attacks on those other doctors. In our opinion, Dr. Radmore has lost objectivity and has become claimant's advocate.

(3) Dr. Radmore's stated reason for the opinion that claimant was not medically stationary is that he would not be stationary until restored to his pre-injury status. That is not the legal definition of "medically stationary." See ORS 656.005(21).

(4) Claimant's only ongoing treatment is to take medication and to see Dr. Radmore once a week at the most. It would appear that Dr. Radmore's "treatment" has become merely palliative; obviously, after three years, it is not curative. Ongoing palliative treatment does not foreclose a finding that claimant is now and was, when the April 10, 1980 Determination Order was issued, medically stationary.

ORDER

The Referee's order dated October 28, 1980 is reversed and this case is remanded for consideration of the extent of claimant's disability.

JAMES THURSTON, Claimant
Doug Vande Griend, Claimant's Attorney
R. Kenney Roberts, Defense Attorney
Request for Review by Carrier

WCB 79-09759
August 11, 1981

Reviewed by Board Members Barnes and McCallister.

The carrier requests Board review of Referee Gemmel's order which found the claimant's myocardial infarction compensable. The carrier contends the claimant's work activity on February 20, 1979 and February 21, 1979 was not a material contributing factor to claimant's heart attack. It is the carrier's contention that the myocardial infarction resulted from the progressive deterioration of claimant's pre-existing arteriosclerotic heart disease.

The claiant was employed as a truck owner-driver for Mitchell Brothers. While on a trip to San Francisco, claimant experienced symptoms he described as "pain in chest and back." These symptoms became so acute that on February 21, 1979 he sought help at the emergency room, Intercommunity Hospital, Fairfield, California. He was admitted to the ICU after preliminary examination. At the hospital Dr. Parkinson examined claimant and secured a specific history of the onset of claimant's symptoms together with a general medical history. Dr. Parkinson's diagnostic impressions when claimant was discharged were:

(1) Acute inferior wall myocardial infarction.

(2) Arteriosclerotic heart disease with prior anterseptal myocardial infarction and with subsequent episodes of angina and probable cardiomyopathy.

(3) Cardiac rhythm disturbance with episode of acute ventricular tachycardia and subsequent episodes of multifocal PVC's secondary to #1 and #2 occurring during hospital course.

(4) Episodes of acute congestive heart failure with pulmonary edema secondary to #1 and #2.

(5) Newly discovered diabetes melitis.

Upon discharge from the hospital the claimant returned to his home in Mt. Vernon, Washington where medical treatment was provided by Dr. J. Feld. In June 1979 claimant filed a claim with his employer. The claim was denied September 18, 1979.

The carrier denied the claim after securing an opinion on causation from Dr. John Rush, a cardiologist. Dr. Rush did not initially examine claimant; he reviewed information submitted to him by the carrier. On August 23, 1979 Dr. Rush reported:

> "From the information available, it would be my opinion that Dr. Thurston's myocardial infarction was not related to his employment nor accelerated by it. It appears that he had had coronary disease probably for five to seven years with an old, probably anteroseptay infarction. The myocardial infarction that resulted in his hospitalization on February 21, 1979 was most likely due to the progression of his coronary artery disease in an individual with multiple risk factors including obesity, diabetes and cigarette smoking."

The denial was issued only after Dr. Feld, the treating physician, had concurred with Dr. Rush's opinion.

Dr. Rush examined the claimant February 27, 1980 and again reviewed the records. On February 27, 1980 he reported: "I find nothing on examining him to change my opinion as stated in my letter of August 23, 1979." In May 1980 Dr. Feld reported to claimant's attorney:

> "As per our telephone conversation regarding the role of Dr. Thurston's work on his development of a heart attack on February 21, 1979:
>
> (1) Mr. Thurston's work was probably a causal factor in the attack.
>
> (2) Mr. Thurston's work was not a primary or predominant factor in the attack.
>
> (3) I am unable to quantify the amount of significance that the work was to the attack except as above."

On September 26, 1980 Dr. Charles Grossman reported:

> "The sequence of events indicates that Dr. Thurston's myocardial infarction was work related and that work activity on February 20, 1979 including emotional strains did in fact contribute significantly to triggering of the (1st?) attack which probably started developing in the late work hours of February 20, 1979, finally culminating in complete occlusion of the coronary artery while eating dinner at 6:15 p.m. on that day."

and:

> "In any case there was a sequence of events which clearly implicates his work activity in the triggering of his coronary thrombosis and myocardial infarction on February 20, 1979 and the continued activity aggravated his infarctions by increasing its size or triggering a second occlusion."

Both Dr. Grossman and Dr. Rush testified at the hearing. Both physicians on testimony adhered essentially to the opinions expressed in their respective written reports.

The Referee found Dr. Grossman's explanation of the cause of claimant's heart attack the more persuasive. We do not. We find Dr. Feld's opinion of little value except to observe that his opinion is essentially "neutral" on the question of causation--at one point he concurs with Dr. Rush's opinion of no relationship and at another point, absent any reason for the shift, he makes the statement that he does not know to what extent claimant's work contributed to the myocardial infarction.

We are thus faced with two medical opinions, diametrically opposed on the question of medical causation. We are more persuaded by the opinion of Dr. Rush because (1) he is a cardiologist, Dr. Grossman is not; (2) his opinion seems to be more logically developed than does that of Dr. Grossman; and (3) his opinion is more consistent with and is supported by the history obtained at Intercommunity Hospital than is the opinion of Dr. Grossman.

ORDER

The Referee's order dated January 12, 1981 is reversed and the employer's denial is reinstated.

R. JAY WATSON, Claimant
David Hytowitz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-04902
August 11, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee James' order which found it must pay both permanent partial disability and reimburseable temporary total disability to claimant while he is enrolled in an authorized vocational rehabilitation program. The Referee's order is inconsistent with Charles C. Tackett, WCB 79-08040 (Order on Review, May 18, 1981).

ORDER

The Referee's order dated December 29, 1980 is reversed.

DEE ALLEN, Claimant
John Danner, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-09150 & 79-09151
August 12, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee James' Order on Remand which affirmed the Referee's order of January 31, 1980 which affirmed the denials of aggravation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 10, 1981 is affirmed.

JOHN CHANDLER, Claimant
Jerome Bischoff, Claimant's Attorney
R. Ray Heysell, Defense Attorney
Request for Review by Claimant

WCB 80-03349 & 80-03350
August 12, 1981

Reviewed by Board Members Barnes and McCallister.

The Claimant seeks Board review of Referee Braverman's order which granted him an award of 35% loss of use of the right leg and 30% unscheduled low back disability. Claimant contends he is permanently and totally disabled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 19, 1981 is affirmed.

GLEN R. MARTIN, JR., Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-02855
August 12, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of those portions of Referee Baker's order denying additional compensation for temporary or permanent disability arising out of claimant's compensable April 21, 1977 logging accident. The Referee's order that time loss benefits previously paid be recomputed at a higher rate of earnings which include claimant's regular overtime pay is not contested. The issues on appeal are the extent of claimant's permanent partial disability, compensability of an alleged back condition and entitlement to additional periods of temporary total disability benefits.

The Referee found, as do we, that there is a failure of proof of any neck or back condition materially caused by the 1977 industrial injury and that the compensable rib fractures and related costochondral junction subluxation have no permanent disabling effects which impair earning capacity. Although claimant is severely disabled and may even be unemployable, the Board concludes that this 46-year-old claimant's disabilities result from the multitude of other unrelated and noncompensable problems from which he suffers, including chronic obstructive pulmonary disease, alcoholism and hearing loss.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 22, 1981 is affirmed.

JOHN R. PETERSON, Claimant
James Francesconi, Claimant's Attorney
David Horne, Defense Attorney
Request for Review by Employer
Order Vacating Order of Remand

WCB 79-09942
August 12, 1981

On June 25, 1981 the Board entered an Order of Remand remanding this case to the Referee for consideration of new evidence not obtainable at the time of the hearing. The parties have since stipulated that the employer's request to present new or additional evidence is withdrawn, that the Board shall retain jurisdiction to review the Referee's July 2, 1980 order without consideration of any additional evidence not originally offered before the Referee and that the parties shall submit new briefs for Board review without any references to evidence not originally offered before the Referee.

Based upon the parties' stipulation, our June 25, 1981 Order of Remand is vacated, the parties are instructed to submit new briefs simultaneously within 20 days and this case will then be reviewed by the Board in due course.

IT IS SO ORDERED.

TERRY D. SWINDELL, Claimant
C. H. Seagraves, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-00270
August 12, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Foster's order which awarded claimant 50% permanent left leg disability.

This case involves a worker who had sustained a previous injury to his left knee in industrial accidents before the current claim of injury to his left knee. Until the current claim, claimant had not received any award for permanent left knee disability. The Referee applied ORS 656.222 to find that since "(t)he claimant has never received any award for his previous difficulties to his left knee..., under statute ORS 656.222, it is my interpretation that any disability that existed to the knee at the time of claimant's [current] injury must be charged to this injury." The Referee found that the current injury disabled claimant's knee by about 25%, but also found that, since claimant's total leg disability was 50% from all the injuries, the full award of 50% disability should be granted as a result of this injury.

The Referee's ORS 656.222 analysis is mistaken. For scheduled disability awards, ORS 656.222 properly comes into operation when a claimant has already received compensation for a permanent disability, but suffers a further accident to the injured member. In this case, however, since no previous awards of permanent disability were made to claimant for his left knee, this application of the statute is not required or warranted.

Where no previous awards of permanent disability were made for injury to a body part from previous industrial accidents, then all the permanent disability of the body part is the result of the current industrial injury.

ORS 656.214(2), dealing with scheduled injuries, only requires that the claimant receive permanent partial disability that results from the current industrial injury. We agree with the Referee that the current injury resulted in a 25% permanent partial disability to claimant's left knee. We so conclude by application of ORS 436-65-550(1) and OAR 436-65-555. The claimant has already received awards amounting to 10% permanent disability from Determination Orders dated June 13, 1979 and January 8, 1980. Therefore, we allow an additional 15% disability producing a total of 25% disability resulting from the January 23, 1979 industrial injury.

ORDER

The Referee's order dated November 12, 1980 is modified to provide that claimant is awarded 22.5° for 15% disability to the left leg. This award is in addition to that granted by the Determination Orders dated June 13, 1979 and January 8, 1980. Claimant's attorney is allowed 25% of this increased award over that of the Determination Orders as a reasonable attorney fee. This is in lieu of the attorney fee granted by the Referee.

NINA L. TINDLE, Claimant
Kenneth Peterson, Claimant's Attorney
Paul L. Roess, Defense Attorney
Request for Review by Claimant

WCB 80-06436
August 12, 1981

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Wolff's order denying relief to either party and affirming the Determination Order of October 31, 1980 which awarded 5% unscheduled permanent partial disability for claimant's neck injury. The issues raised at the hearing and on appeal are the extent of claimant's permanent disability, premature closure, and penalties and attorney's fees for the insurer's initial improper computation of time loss benefits which resulted in a delay in payment of part of the amounts due. SAIF contends that, if any adjustment at all is warranted, it is entitled to a credit for an overpayment.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 30, 1981.

HARRY E. BAKER, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-04867
August 13, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Braverman's order which granted claimant an additional 20% unscheduled disability, making a total award to date of 30% unscheduled low back disability. SAIF contends that the award granted is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 13, 1981 is affirmed.

Claimant's attorney is awarded the sum of $300 for his services at this Board review, payable by the SAIF Corporation.

MARY BESS, Claimant
Todd Westmoreland, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-04185
August 13, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee James' order which affirmed the SAIF's denial of April 18, 1980. Claimant contends that she suffered staphylococcal coagulase-positive infection as an occupational disease.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 30, 1981 is affirmed.

FLORENCE M. CLARK, Claimant
Jan Baisch, Claimant's Attorney
Noreen Saltveit, Attorney
Frank Moscato, Attorney
Request for Review by Carrier

WCB 80-02769
August 13, 1981

Reviewed by Board Members Barnes and McCallister.

The carrier, Kemper Insurance Company/American Motorists Insurance Company, seeks Board review of Referee Mulder's order which set aside its denial of responsibility and remanded claimant's occupational disease claim to it for payment of benefits as required by law. Kemper contends that another carrier, Home Insurance Company, should be found responsible and that claimant did not show good cause for requesting a hearing more than 60 days from the date of Kemper's denial.

The Board affirms and adopts the Referee's order with the following additions:

Kemper is clearly the responsible carrier under the "could have" test of Inkley v. Forest Fiber Products Co., 288 Or 337 (1980).

The Board recently considered the "good cause" issue at length in Curtis A. Lowden, WCB Case No. 79-10215 (March 30, 1981), and Cecil Black, Jr., WCB Case No. 79-03984 (April 28, 1981). As does this case, both Lowden and Black involved workers caught in a cross-fire between two insurance carriers, neither denying compensability, both claiming the other was responsible. In Lowden, the 60-day period ran on the first denial while the claimant was still pursuing his claim with the second carrier; we found good cause for a delayed request for hearing on the first denial. In Black, the 60-day period ran on both denials without the claimant taking any action; we found no good cause for a delayed request for hearing.

This case is more like Lowden. Kemper's December 28, 1979 denial suggested contacting Home Insurance Company. Claimant did so. Home Insurance Company's March 13, 1980 denial suggested contacting the Workers' Compensation Board. Claimant did so by letter dated March 25, 1980 which the Hearings Division apparently treated as a pro se request for hearing. Claimant's attorney subsequently filed a more formal request for hearing on both denials on April 25, 1980.

In sum, throughout the first four months of 1980 claimant was actively pursuing her claim by doing everything that was suggested by any and all carrier representatives she had any contact with. This established good cause for failing to request a hearing within 60 days of Kemper's denial.

Finally, there is the question of attorney fees for claimant's brief on Board review. It is unclear what interest, if any, claimant had in the outcome of the carrier-responsibility issue. To the extent that claimant's attorney devoted about one-third of his brief to this issue, we will not consider it in awarding attorney fees. Claimant had an obvious interest in the outcome of the good-cause issue. But claimant's brief on this issue contains a fundamental flaw in that it builds on the foundation of Sekermestrovich v. SAIF, 280 Or 723 (1977) without any apparent appreciation of the significant change in that precedent effected by Brown v. EBI, 289 Or 455 (1980). In valuating efforts expended and results obtained, see OAR 438-47-010(2), we think it appropriate to consider to what extent a brief has aided the Board in its review process.

ORDER

The Referee's order dated November 21, 1980 is affirmed. Claimant's attorney is awarded the sum of $150 as and for a reasonable attorney fee for services rendered in connection with this Board review, payable by Kemper Insurance Company.

PATRICK ELLIOTT, Claimant
David Vandenberg, Jr., Claimant's Attorney
Brian Pocock, Defense Attorney
Margaret Leek Leiberan, Defense Attorney
Request for Review by Carrier

WCB 80-01598 & 80-04905
August 13, 1981

Reviewed by Board Members McCallister and Lewis.

EBI Companies request Board review of Referee Igarashi's order disapproving its January 23, 1980 denial of claimant's request that his 1978 claim be reopened, and assessing penalties and attorneys fees for unreasonable refusal to pay compensation.

The issue in this case is which of two insurance carriers is responsible for claimant's low back injury. The Referee found that no new injury had occurred on November 15, 1979 when the employer was insured by Argonaut, but that claimant's back condition is the result of his compensable June 22, 1978 injury when EBI was the carrier at risk.

EBI contends that the Referee mischaracterized Dr. Scheer's opinion by focusing on isolated portions of his medical analysis and ignoring the doctor's conclusions. Contesting the award of penalties and attorney fees, EBI further argues that its denial cannot be classified as unreasonable based on a medical report which was dated four months after the denial was issued. EBI contends that there was adequate reason, based on nonmedical evidence available prior to the denial, to believe that a new injury had occurred.

Citing Calder v. Hughes & Ladd, 23 Or App 66, 69-70 (1975), Argonaut contends that there is no evidence whatsoever that anything occurred while Argonaut was on the risk which produced anything more than symptoms or which causally contributed to claimant's pre-existing condition. Argonaut further argues, apparently on EBI's behalf, that under the "Weller" rule, the claimant's worsened symptoms do not qualify as an aggravation absent medical evidence that the underlying condition has worsened.

Claimant argues that EBI unreasonably denied the claim without the benefit of any medical evidence whatsoever about whether the November 1979 incident constituted an aggravation or a new injury. Claimant cogently argued at the hearing that his request to re-open need not be supported by proof of a worsened condition, or aggravation, since it was filed within one year of the date the original claim was closed.

Claimant first injured his back on June 22, 1978 while he was stacking lumber. Dr. Robert Garrison, his treating chiropractor at the time, found a vertebral misalignment producing subluxations with probable nerve root irritation at C7 and the sacroiliac. Claimant was eventually released for work on September 11, 1978 by Dr. George Pedan. The claim was closed by Determination Order dated July 3, 1979 awarding time loss only from August 10, 1978 through September 10, 1978.

On December 15, 1978 Dr. Benjamin Balme reported that claimant was doing reasonably well until the previous week when his pain had become more severe and he had again been forced to miss work. At that time, Dr. Balme noted that claimant did not have leg pain. His impression was that claimant suffered low back pain of undetermined etiology. It was his opinion that claimant's back condition was not stationary, yet he ventured a prediction that claimant would suffer no permanent impairment from the injury.

On December 26, 1978, claimant was again seen by Dr. Garrison who had last seen him on September 5, 1978. The following January, Dr. Garrison declined answering questions regarding treatment since he had not seen the claimant since December. On March 27, 1979, Dr. Pedan reported that his February 21, 1979 exam indicated a diagnosis of "chronic low back strain syndrome." Putting claimant on an exercise program, he stated his expectation that claimant would become symptom free.

Claimant testified that his back continued to bother him until a month or so before the second on-the-job incident. On November 15, 1979, he apparently restrained the muscles of his lower back while attempting to straighten a unit of lumber as reported on an "801" form dated November 21. That claim alleged severe low back pain with an ache extending into the left hip and left sciatic area. Attached to the claim was Dr. Dale Scheer's chiropractic report of November 21, 1971 which stated:

> "X-RAY FINDINGS:
> The following anomalies were noted: Tropism at the L3/4 level; and mild sacral base deficiency on the right. Otherwise, all views were considered essentially negative exhibiting no evidence of recent or ancient fracture or gross osseous pathology.
>
> "DIAGNOSIS:
> Acute traumatic sprain, lumbar spine, attendant myofascitis and left sciatic radiculitis, grade II."

An "827" form dated November 15, 1979 and signed by Dr. Robert Garrison stated that claimant was injured on November 15, 1979 while banding a unit of lumber. Dr. Garrison's diagnosis was lumbar sprain and thoracic strain, stating the date of injury as November 15, 1979 with the added notation that claimant had been injured on June 22, 1979 while stacking lumber.

On November 28, 1979 claimant signed a statement taken on behalf of Argonaut which described continuing back problems and pain from the time of the initial 1978 injury until November 15, 1979 when he had to quit working again due to his worsened condition.

Dr. Scheer's January 2, 1980 status report to Argonaut referred only to a November 15, 1979 accident date. At that time claimant was experiencing marked pain in the lumbar spine with radiation over the right sciatic distribution. Dr. Scheer believed the claimant presented a syndrome of an intervertebral disc involvement with nerve root pressure, radicular pain with parethesia right sciatic distribution, L5 dermatone.

After Argonaut's January 8, 1980 denial, Dr. Scheer requested that EBI Companies reopen their claim. On January 15, 1980 he forwarded copies of his earlier reports and billings to EBI. Based upon a review of the medical and investigative evidence in their file, EBI denied the claim on January 23, 1980 on the ground that claimant had a new claim and that Argonaut was responsible.

Dr. Scheer's January 15, 1980 request for reopening stated:

> "This claimant has been under my care since Nov. 19, 1979 for severe symptom complaints resulting from a re-injury/aggravation of pre-existing injury having occurred June 22, 1978. The claim was originally filed in my office through Argonaut Insurance Co., however, following investigation by Argonaut's claims adjuster, they have denied the coverage and placed the responsbility onto your company, EBI.
>
> * * *
>
> "In complying with Argonaut's suggestion... this letter from me will serve as a request that the claimant's file be re-opened..."
>
> "If further information is required, please feel free to contact me office."

Even though EBI had, on January 23rd, denied responsibility, it apparently requested further information from Dr. Scheer on March 17, 1980 to which he responded on April 8, 1980:

> "1. It is my opinion that the November 15, 1979 incident was not the only etiologic factor contributing to Mr. Elliott's pain and symptomatology with ensuing disability from that date. That incident should be considered an injury/traumatic aggravation of chronic residuals secondary to a similar injury incident June 22, 1978.
>
> "2. The incident of Nov. 15, 1979 did contribute to the claimant's present disability as an injury/traumatic aggravation.

"I did appreciate your sending me copies of the medical file regarding Mr. Elliott's June 22, 1978 injury, particularly Dr. Balme's report dated Dec. 15, 1978. The history in Dr. Balme's report indicated Mr. Elliott was experiencing back pain continuously since his on the job injury June 22, 1978. The degree of back pain was expressed from 'reasonably well' to severe enough that disability was

again a factor. It is confusing to note that with Dr. Balme's report indicating disabling pain continuing since his June 22, 1978 injury and his condition not medically stationary, that based on this report, Mr. Elliott's claim was submitted by you for claim closure. Possibly this was done because Dr. Balme had hopefully (sic) Mr. Elliott would spontaneously recover without need of further treatment. Contrary to that hopeful prognosis Mr. Elliott did continue to have low back pain and discomfort and on November 15, 1979 this continuing low back pain and discomfort was traumatically aggravated by an incident causing acute low back pain with ensuing disability."

Again on June 19, 1980, Dr. Scheer reported to claimant's attorney:

"...it is my opinion the incident occurring November 15, 1978, when Mr. Elliott was restacking a unit of boards, was a traumatic aggravation with ensuing exacerbation of chronic residuals secondary to a sprain injury to the low back having occurred June 22, 1978. My basis for this opinion relies on the knowledge of the previous injury, June 22, 1978 and knowing that Mr. Elliott had never fully recovered from that injury, that he did have periodic exacerbations from that injury even severe enough to cause time loss. November 15, 1979, Mr. Elliott was performing his usual work duties and without any specific accident incident having occurred other than the usual work responsibility of stacking a unit of lumbar (sic), he experienced a sudden and disabling exacerbation of low back pain. It is reasonable to assume that the exacerbation of severe low back pain was the result of a normal function occurring on an abnormal spine. The abnormal spine in this case is Mr. Elliott's unstable lower lumbar motor units, chronic residuals of a previous industrial injury..."

The Referee concluded, and the Board agrees, that claimant's back condition is attributable to his 1978 compensable injury for which EBI Companies is the responsible carrier. The remaining problem is that claimant, while caught in a cross-fire between two carriers, was wrongfully denied time loss compensation and the provision of medical services.

Where compensability of a claim is not in dispute and the only issue is which of two insurer's is responsible, specific action is required on the part of both insurers, as established by OAR 436-54-332, which became effective January 11, 1980. The applicable subsections are as follows:

> (3) Insurers...with knowledge of a situation as defined in subsection (2) shall expedite the processing of the claim by immediate investigation, if necessary, to determine their responsibility and whether the claim is otherwise compensable.
>
> (4) Verbal and written communications between insurers...involved in such a situation shall be required to insure the worker receives any compensation benefits due in a timely manner. A copy of all medical reports or other pertinent material available relative to the injury shall be provided the other party by the insurer...
>
> (5) Such notice received from another insurer...shall be notice of a claim referred by the Director as provided by ORS 656.265(3).
>
> (6) Insurers...shall jointly determine whether an issue exists as to responsibility of an otherwise compensable claim."

There is no evidence in the record that either of the insurers even attempted to comply with their duty to act, as enunciated by the above rule. Instead, both carriers simply denied the claim. Arguably, Argonaut might not necessarily have known that EBI was also denying the claim. The clear result is that claimant was deprived of compensation to which he was entitled.

The Board finds that EBI had full knowledge that a situation existed which required both insurers to request the Compliance Division to issue a "307" order, but that it failed to take appropriate action as required by law to insure that the worker receive compensation benefits in a timely manner.

The Board concludes, therefore, after de novo review, that assessment of penalties and attorneys fees is appropriate in this case, and that the Referee's order should be affirmed.

ORDER

The Referee's order dated September 12, 1980 is affirmed. Claimant's attorney is hereby awarded $500 as a reasonable attorney fee for legal services rendered in this appeal.

RAYMOND FAUST, Claimant
Walter Aho, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-07609
August 13, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee St. Martin's order affirming the Determination Order of November 7, 1979 which awarded 60% unscheduled disability as a result of injury to claimant's right shoulder. The Referee's order also affirmed SAIF's partial denial of a claimed arthritic condition which was excluded in the disability rating.

The sole issue on appeal is the extent of claimant's permanent disability, claimant contending that he is permanently and totally disabled. SAIF contends that the award should be reduced.

The Board, after de novo review, considers the Referee's recitation of the facts, analysis of the evidence and applicable law, and his conclusions, to be well reasoned and accurate. The Board therefore affirms and adopts the Referee's order in its entirety.

ORDER

The Referee's order dated January 29, 1981 is affirmed.

PAUL E. LACKIE, Claimant
Keith Skelton, Claimant's Attorney
Marcus Ward, Defense Attorney
Request for Review by Claimant

WCB 79-08648
August 13, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Nichols' order which awarded 35% unscheduled permanent partial disability for claimant's loss of earning capacity based on injuries to his low back sustained in a compensable 1972 injury.

On November 2, 1972 while working as a logger, claimant sustained low back injuries when he jumped from his truck. Surgery for a herniated disc was performed in March 1973. The initial claim was closed by Determination Order dated February 1, 1974, granting 15% unscheduled disability which was increased to 25% disability by Opinion and Order dated February 21, 1975.

Following vocational rehabilitation training, claimant returned to work as a truck driver until January 1975 when he suffered another on-the-job injury, this one affecting his neck, upper back and left shoulder, diagnosed as a cervical strain. A disputed claim settlement was approved in November 1975 awarding 15% unscheduled disability to his neck following issuance of a "307" order issued by the Department. Assuming the validity of that stipulated settlement (see J. C. Compton Co. v. SAIF, ___ Or App ___ [May 18, 1981]), claimant has waived all future claims against that employer, Owens Bros. Trucking.

Some of claimant's present physical and psychological problems stem from the unrelated 1975 injury. It is necessary, therefore, to segregate the residual affects of both injuries and limit our evaluation of the extent of disability on the instant claim to problems which result solely from the 1972 low back injury.

Claimant suffers what has been diagnosed as an intractible pain syndrome, anxiety and reactive depression as a result of the combined effects of both industrial injuries. As the sole result of the 1972 injury, he suffers chronic lumbar strain with recurrent paresthesias to the left lower extremity and left testicle. He can no longer work as a loggger as the result of the 1972 injury. His inability to return to truck driving results from the 1975 injury.

Dr. Howard Henson, claimant's treating psychiatrist since June 1978, testified at length concerning claimant's problems. Claimant was initially referred to him for treatment by Dr. Arlan Quan. He agreed with Dr. Quan's statement that claimant's emotional state was such that he could not fully utilize the vocational opportunities that could be made available to him. He also agreed with Dr. Colbach's statement that claimant's emotional state interfered with his ability to get going. He did not, however, agree with Doctors Quan and Colbach that the psychological problems were not disabling.

Dr. Hanson testified that claimant was not malingering when asked about claimant's "fixation" on the compensation system and his anger at the carrier, vocational rehabilitation and the medical community. Dr. Quan had earlier expressed the opinion that claimant's psychiatric difficulties alone would not preclude his being employed. Since claimant's psychiatric difficulties are not an isolated factor but are combined with physical limitations and an intractible pain syndrome, the Board concludes that the combined impact of all factors must be considered.

Following issuance of the second Determination Order on February 8, 1978 but prior to the November 15, 1978 Determination Order here being contested, the extent of claimant's physical impairment as a result of the low back injury alone was rated at 21% of the whole man by Dr. Theodore Pasquisi. There is no medical evidence to indicate that his impairment level had appreciably changed by the time of the hearing. When combined with the psychological problems, only part of which are attributable to this accident, the Board finds that the claimant's overall impairment, as a result of the 1972 injury, is 30% of the whole man.

Based on the above impairment rating and in consideration of the claimant's age, education, work experience and adaptability the Board concludes that claimant is entitled to 40% of the maximum allowable by law for unscheduled permanent partial disability as a result of his 1972 compensable injury.

ORDER

The Referee's order dated December 17, 1980 is modified. Claimant is hereby awarded 40% of the maximum allowable by law for permanent partial disability in lieu of all prior awards for his 1972 compensable injury. Claimant's attorney is hereby granted an attorney fee equal to 25% of the additional award, not to exeed $250.00.

FLOYD LANCASTER, Claimant
Timothy Bailey, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-01505 & 80-05713
August 13, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Mulder's order which sustained SAIF's partial denial (WCB Case No. 80-05713) and awarded 10% unscheduled permanent partial disability on claimant's appeal from an October 10, 1979 Determination Order which granted time loss only (WCB Case No. 80-01505).

The order upholding SAIF's partial denial is so obviously correct as to not warrant discussion, especially since claimant has filed no brief.

We turn to the question of whether claimant has any permanent disability as a result of hernias he suffered March 11, 1979 and which were surgically repaired. So far as the limited record discloses, that surgery was uneventful and successful. The surgeon did report that claimant had thinned fascia and rents in his abdominal wall which the surgeon attributed primarily to the aging process. (Claimant was 64 at the time of the hearing.)

Claimant testified that he experiences continuous pain in the abdomen and groin and, as a result, cannot lift heavy objects. The Referee could not have fully accepted this testimony and at the same time awarded only 10% unscheduled disability.

But even fully accepting claimant's testimony about continuous pain, the question of medical causation remains. Nothing in the sparse record links claimant's pain to his repaired hernia condition. Claimant's doctor instead implied that advanced age was the more likely cause of any physical impairment claimant experienced. There is no proof of permanent physical impairment caused by claimant's compensable condition. The Referee thus erred in granting a permanent partial disability award.

ORDER

The Referee's order in WCB Case No. 80-05713 upholding SAIF's partial denial is affirmed; the Referee's order in WCB Case No. 80-01505 is reversed and the Determination Order dated October 10, 1979 is reinstated.

OLIVE E. LANGSTON, Claimant
W. D. Bates, Jr., Claimant's Attorney
Marshall Cheney, Defense Attorney
Request for Review by Claimant

WCB 80-04325
August 13, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Peterson's order which found claimant was not temporarily working in California incidental to Oregon employment at the time of injury and does not fall within the provisions of ORS 656.126(1) or ORS 656.004(20) not a "subject worker," and denied relief.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 27, 1981 is affirmed.

MELVIN H. LINDSEY, Claimant
David Cuniff, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-02601
August 13, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Knapp's order denying temporary total disability benefits from October 5, 1979 through December 20, 1979 and after March 21, 1980.

The sole issue on appeal is claimant's entitlement to time loss benefits claimed as a result of a compensable leg injury.

Claimant, a 50 year old heavy equipment operator, injured his left leg when it was pinned by the foot brake on a road roller, resulting in muscle strain, pain and swelling. The accident occurred on Thursday, August 30, 1979. Due to the Labor Day weekend, claimant was not to work again until September 4, 1979. He did not immediately consult a doctor. The following Thursday, claimant went to a hospital emergency room where he saw Dr. E. R. Mack who prescribed medication, crutches and heat treatments and advised claimant to elevate his foot.

Dr. Charles L. Schroff, claimant's family physician, examined him the following day and diagnosed acute muscle pull with deep internal hemorrhage. He advised claimant to apply heat, elevate his foot and to stay off work until the swelling subsided. Claimant continued to work, however, until October 5, 1979. Claimant testified that because much of his work involved sitting, he had attempted to continue working but finally was forced to quit because of continued pain.

Because claimant did not actually miss work when he was authorized by his doctor to do so, SAIF apparently processed the claim as a non-disabling injury. It now contends that the claimant stopped working on October 5 due to a general lay-off rather than as a result of disabling pain as claimant alleges.

Dr. Schroff's reports show that he was aware that claimant had continued working, even though time loss had been authorized at the time of his first examination on September 7. The Referee interpreted Dr. Schroff's October 18, 1979 report as a release for regular work without limitations. It would appear, however, that Dr. Schroff was aware that claimant had restricted his activities at work when he reported:

> "I subsequently treated this patient with some anti-inflammatory medication and again saw him on October 16, 1979. At that time he complained of continuing pain of the extremity with disability from doing any continual or heavy work. Examination revealed considerable improvement of both the edema and the induration. There was currently no redness. Although he has not returned to complete recuperation I advised that he might continue work particularly at light activity or restricted activity. Because of the continuing induration of a portion of his calf he was referred for a two week course of some physiotherapy.
>
> "It would be my feeling that he should make eventual complete recuperation from this injury."

Dr. Schroff's November 19, 1979 report attempts to clarify the time loss question:

> "I saw this man first on September 7, 1979 for injury to his left leg which he alleged occurred August 30, 1979. I found moderate swelling and tenderness which I diagnosed as muscular strain with possible phlebitis. I advised heat, elevation and restriction from work until the swelling improved. However, I understand Mr. Lindsey continued voluntarily to work.
>
> "I next saw him October 2, 1979. The leg was improving. He was continuing to work, and I did not indicate he do otherwise.
>
> "The next visit was October 16, 1979. There was continued improvement and no sign of active phlebitis. Mr. Lindsey indicated discouragement at his progress and thought he should not work. I told him I believed he could continue at restricted activity...(He stated then his regular job entailed operation of heavy equipment requiring full use of both extremities. This is why I suggested 'restricted activity.')

> "At last visit on November 5 the calf area was still a little swollen compared to the right but was continuing to improve, pretty much as I had expected. He still indicated he could not work, but I told him I again felt he was not incapacitated and should be able to do many job activities."

Clearly, as of October 16, 1979, claimant was not released for his regular work as a heavy equipment operator. Although Dr. Schroff's assessment of claimant's ability to work as of November 5th is somewhat ambiguous, the Board has the impression that the doctor believed claimant was no longer incapacitated as of that date and could return to his regular work.

It would appear that Dr. Schroff attempted to make a legal determination based on the facts before him in his final comments in his November 19 report, to the effect that he "did not find sufficient evidence to warrant job loss" during October and November.

Where there has been a general lay-off due to the unavailability of any type of work--whether regular or restricted--we must give particular attention to the work limitations imposed by claimant's treating physicians. We interpret Dr. Schroff's reports to mean that claimant was released for limited work only until November 5, 1979.

Dr. Richard Semon began treating claimant on December 21 at which time he authorized time loss. In reviewing Dr. Schroff's reports, Dr. Semon also interpreted them to mean only that claimant had been released for restricted work activity. Dr. Semon's February 13, 1980 chart notes contain the following comment:

> "There is a discrepancy on when the patient has been out of work. His time loss started October 8, 1979 and I think that this is appropriate..."

Dr. Semon believed, as late as February 19, 1980, that claimant's work activities should be restricted and should not entail the use of heavy equipment which required the full use of both lower extremities and could endanger claimant or others around him. Not until March 21, 1980 was claimant released by Dr. Semon to return to his regular work as a roller operator.

Claimant testified that he stopped working on October 5 due to continued pain rather than due to the general lay-off at his job. He testified that although he had checked with his employer some 15 times about limited work, no restricted work was available. In this case, time loss benefits were not paid until December 21, 1979 when authorized by Dr. Semon.

The claim was not submitted for closure and evaluation by the Evaluation Division. There is no evidence that claimant was ever declared medically stationary.

ORS 656.268(2) provides:

> "...If the attending physician has not approved the worker's return to his regular employment, the corporation...must continue to make temporary total disability payments until termination of such payments is authorized following examination of the medical reports submitted to the Evaluation Division under this section."

Here, despite Dr. Schroff's attempt at making a legal determination, the fact remains that he did not release claimant for full work activities until November 5, 1979 when he told claimant he should be able to do many job activities and was not, in the doctor's opinion, then incapacitated.

The Board concludes that claimant is entitled to temporary total disability benefits from September 7, 1979 through November 5, 1979, less time worked, but that he is not entitled to benefits after March 21, 1980 when he was released to return to his job as a roller operator by Dr. Semon.

ORDER

The Referee's order dated September 8, 1980 is modified. Claimant is hereby awarded temporary total disability benefits from Oc;tober 6, 1979 through November 5, 1979 as a result of leg injuries sustained on August 30, 1979. The Referee's denial of time loss benefits after March 21, 1980 is affirmed.

Claimant's attorney is hereby awarded an attorney fee for services rendered equal to 25% of the additional compensation hereby granted.

JOY MALONE, Claimant
Jerome Bischoff, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-00278
August 13, 1981

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Nichols' order which remanded claimant's claim to it for acceptance and payment of compensation to which claimant is entitled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 23, 1980 is affirmed.

Claimant's attorney is awarded $75 as a reasonable attorney fee for services rendered on Board review, said services being the filing of a one-page brief without citation to the record, statutes or case law; said fee payable by the SAIF Corporation.

ZELDA B. MOONEY, Claimant
Michael Williams, Claimant's Attorney
Ridgway Foley, Defense Attorney
Request for Review by Claimant

WCB 79-03594
August 13, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of referee Foster's order which affirmed the carrier's denial of her claim for spastic dysphonia.

After de novo review, the Board affirms the conclusion reached by the Referee. Under the rationale of James v. SAIF, 290 Or 343 (1981), claimant has failed to prove that her claim is compensable.

ORDER

The Referee's order dated January 28, 1981 is affirmed.

MIKE MOYER, Claimant
Evohl Malagon, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by SAIF

WCB 80-02762
August 13, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of that portion of Referee Johnson's order which remanded claimant's claim to it for acceptance and payment of compensation as required by law.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 27, 1981, is affirmed.

Claimant's attorney is awarded the sum of $250 for his services at Board review, payable by the SAIF Corporation.

JAMES S. REYNOLDS, Claimant
Robert Thorbeck, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-05949
August 13, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Braverman's order which remanded claimant's claim for his asthmatic condition to SAIF for acceptance and payment of benefits as due.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 5, 1981 is affirmed.

Claimant's attorney is awarded the sum of $500 for his services at this Board review, payable by the SAIF Corporation.

JOAN SHOCKLEY, Claimant
James Bernstein, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-01070
August 13, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee James' order which found claimant's unknown condition compensable. We reverse.

Claimant was employed as a bartender. Her duties involved moving canisters of soft drinks that she estimated weighed about 80 pounds. SAIF concedes that while at work on May 19, 1979 shortly after moving and lifting a soft drink cannister, claimant experienced chest pain and passed out. The question is whether claimant has sustained the burden of proving a compensable condition caused by her work.

Within the next few days after the May 19, 1979 incident claimant went to three different hospitals with reports of chest pain. In July she went to a fourth hospital. None of these hospital visits produced any specific diagnosis or documentation of any possible work connection.

In October 1979, five months after the May incident, claimant began being treated by Dr. Leveque, an osteopath. Dr. Leveque has made a variety of diagnoses: Torn intracostal muscle, a pinched nerve in the thoracic area, and a dorsal spine problem. Dr. Leveque seems to place most emphasis on the dorsal spine problem diagnosis, which we find to be an inplausable explanation for claimant's chest pain which she has constantly identified as being at the sternum level.

Dr. Brown, an M.D., found no evidence of a pinched nerve in the thoracic area and no evidence of dorsal spine damage. He found no indication of any neurological disease or any seizure disorder. Dr. Brown's diagnosis was syncope by history which, in his opinion, was not job-related because claimant had syncopal episodes at other times than on the job.

We find Dr. Brown's opinion more persuasive than Dr. Leveque's opinion. Dr. Leveque seems to constantly and rather expediently change his diagnosis to fit the circumstances. He ultimately arrives at a dorsal spine theory to explain chest pain at the sternum level for which he offers no explanation and which, in the absence of any such explanation, makes little sense.

We do not doubt that claimant experienced chest pain and passed out at work as SAIF has conceded. But there is no cogent diagnosis of claimant's medical condition and no evidence that causally links claimant's medical condition, whatever it is, to her work as a bartender. Claimant has failed to prove a work connected injury or disease.

ORDER

The Referee's order dated December 3, 1980 is reversed.

JACK SHUMAKER, Claimant
Nick Zafiratos, Claimant's Attorney
Jerry McCallister, Defense Attorney
Request for Review by SAIF

WCB 80-04961
August 13, 1981

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Braverman's order which awarded claimant an additional 15% permanent partial disability, unscheduled, to his lower back, being a total of 40% unscheduled disability. SAIF contends this award is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 13, 1980 is affirmed.

Claimant's attorney is awarded the sum of $250 as reasonable attorney fees for services at this Board review, payable by the SAIF Corporation.

CHARLES VANLANDINGHAM, Claimant
Douglas Green, Claimant's Attorney
Ronald Atwood, Defense Attorney
Request for Review by Claimant

WCB 80-04652
August 13, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Pferdner's order which upheld a denial of medical treatment for claimant's right shoulder condition and a separate denial of an aggravation claim.

We disagree with the Referee on claimant's entitlement to treatment for his right shoulder condition. In December 1975, contemporaneous with claimant's original injury, Dr. Rarey reported acute cervical, dorsal and lumbar sprain with pain into the upper extremities. January 19, June 28, August 7 and October 19, 1976 medical progress reports note the injury and treatment to involve claimant's mid and low back, neck and shoulders. It thus seems obvious that claimant's shoulders were involved in his original injury and were treated during the first year thereafter. Presumably the carrier has had no problem with paying for this shoulder treatment. We cannot understand why the carrier now tries to draw a line that excludes claimant's right shoulder as a compensable consequence of his 1975 injury.

We agree with and adopt those portions of the Referee's order which upheld the denial of claimant's aggravation claim.

ORDER

The Referee's order dated February 9, 1981 is affirmed in part and reversed in part. That portion upholding the carrier's denial of claimant's aggravation claim is affirmed. That portion upholding the carrier's denial of medical treatment for claimant's right shoulder condition is reversed, that denial is set aside and the matter is remanded to the carrier for provision of medical services pursuant to ORS 656.245. Claimant's attorney is awarded as and for a reasonable attorney fee the sum of $800 for services rendered at the hearings and Board levels in prevailing on the denial of medical services, payable by the carrier.

WILLIE E. WILLIAMS, Claimant
David Hittle, Claimant's Attorney
Don Howe, Defense Attorney
Request for Review by Employer

WCB 80-0341-IF
August 13, 1981

Reviewed by the Board en banc.

The employer, Oregon State Penitentiary, seeks Board review of Referee Nichols' order remanding as timely filed a claim for injuries sustained on May 7, 1979 by claimant while working as an inmate in the OSP kitchen. Payment of benefits was ordered under the provisions of the Inmate Injury Law (ORS Chapter 655) and the Workers' Compensation Act (ORS Chapter 656).

On May 7, 1979, claimant reported the accident to his supervisor and completed and signed both an "Inmate Occupational Injury Report" and an "Inmate's Statement of Injury." The next day the accident was reported to the Assistant Superintendent of Business Services. This immediate notice of injury is obviously timely notice under ORS Chapter 656.

The Department of Justice argues that this claim is barred by the provisions of ORS Chapter 655, specifically ORS 655.520(3), which now require the filing of a written claim with the Department of Justice within 90 days after the injury. The Department fails to note that ORS 656.520(3) was amended in 1979. The earlier version in effect at the time of claimant's injury required only that the claim be filed with the State Accident Insurance Fund rather than the Department of Justice as provided by the 1979 amendment. That amendment does not apply to injuries which occurred prior to its July 1, 1979 effective date. Service of that notice upon an employer is effective service upon the insurer since the employer has a statutory duty to promptly forward all claims to the insurer. The Board concludes that timely notice was given by claimant in this case.

The Board has considerable doubt about whether the Referee was correct in awarding attorney fees to claimant's attorney in this ORS Chapter 655 proceeding in which all payments come from the tax-supported general fund rather than a private insurance fund. However, the Department of Justice has not raised that issue so we will not disturb the Referee's award. Our doubts are serious enough to lead us to the conclusion not to award any additional attorney fee on Board review absent supplemental briefs from the parties which shall be filed within 20 days of the date of this order.

ORDER

The Referee's order dated December 24, 1980 is affirmed.

BLANCHE WINEBRENNER, Claimant
Rolf Olson, Claimant's Attorney
Dennis VavRosky, Defense Attorney
Request for Review by Employer

WCB 79-04570
August 13, 1981

Reviewed by Board Members Barnes and Lewis.

The employer and its carrier seek Board review of Referee McCullough's order which awarded claimant permanent and total disability as of October 4, 1977. The only issue is the extent of claimant's permanent disability.

The Board affirms the Referee's Order and adopts his findings with the following additional remarks.

Claimant sustained a compensable injury to her back on April 19, 1973 while employed as a registered nurse by McMinnville Hospital. Dr. L. B. Hanson diagnosed a probable herniated disc and claimant was hospitalized and treated with pelvic traction. She was released to work on May 14, 1973 with lifting restrictions. She wore a back brace. Her claim was closed by a Determination Order dated October 5, 1973 with a 5% unscheduled permanent disability award.

The claim was reopened on May 25, 1976 because of claimant's aggravated low back condition. Claimant underwent a partial hemilaminectomy with disc removal performed by Dr. Nicholas Fax. She was released to work on September 4, 1976 with continued lifting restrictions.

On September 17, 1976, claimant slipped on a wet floor and fell at work, reinjuring her back and injuring her neck. Claimant left work on October 14, 1976, and for the most part has not worked since. There is some evidence in the record that the claimant may have worked a few weeks between January 1977 and March 1977.

On January 14, 1977, Dr. Fax released the claimant to return to work on a modified basis. Dr. Fax rated claimant as having a "moderate residual disability" and stated that claimant "will be unable to go back to doing floor nursing in the hospital." Dr. Fax indicated that the claimant would have to "do some more sedentary work such as administrative nursing if such jobs are available and she may be able to handle office nursing."

After this date, however, claimant continued to have increased pain in her neck and was hospitalized in February 1977 for a short time. On March 29, 1977, Dr. Fax stated that the claimant could not go back to work until she had seen a neurosurgeon in Portland, Dr. Ray Grewe. Claimant saw Dr. Grewe on April 19, 1977 and the next day claimant underwent a myelogram. He diagnosed cervical transverse bars at the C3-4, 4-5 and 5-6 levels with some anterior subluxation of C4 on C5. He also found marked spondylosis changes at the C6-7 level. Claimant's treatment consisted of traction at night, wearing a cervical collar during the day with the pain controlled by Darvon and muscle spasm handled with Valium. Claimant's neck pain seemed to decrease. However, her low back, left hip and side pain seemed to increase.

On October 4, 1977, Dr. Grewe reported that claimant's condition was stationary. He recommended no further treatment other than medication. He thought it was likely that she could not return to her usual occupation as a nurse and that to do so would result in further disability. He did not release the claimant to work.

In February 1978, claimant suffered a heart attack and underwent open heart surgery in August 1978. A few weeks later she suffered a stroke.

On December 5, 1978, she was examined by Dr. Faulkner Short, Dr. Ian Brown and Dr. Thomas Boyden. They found that the loss of function to the lower back due to the compensable injury was "moderate". They also found that the loss of function in the neck due to the injury was "mild".

A Determination Order dated April 25, 1979 reclosed the claim with an additional 45% unscheduled permanent disability award. Claimant appealed and was awarded permanent and total disability commencing October 4, 1977 by the Referee's Order dated September 29, 1980.

As the Referee noted in his opinion, a subsequent, non-compensable injury is not relevant to the determination of the extent of a worker's permanent disability. Emmons v. SAIF, 34 Or App 603 (1978). Therefore, claimant's loss of earning capacity must be determined on the basis of her compensable back and neck injuries, not in considering her subsequent non-compensable heart disease and stroke.

Based on medical factors only, the claimant has not proven that she is permanently and totally disabled. On November 22, 1976, Dr. Fax said that although claimant may not be able to go back to floor nursing, she may be able to go back to office nursing. Again on January 14, 1977, Dr. Fax said that claimant may be able to handle office nursing or administrative nursing. After examination of the claimant on December 5, 1978, Drs. Short, Brown and Boyden, indicated that:

> "...the loss of function in the lower back is due to this injury and is moderate. The loss of function in the neck is not all due to this injury because she had pre-existing osteoarthritis. The total loss of function in the neck is moderate, and the loss of function due to this injury in the neck is mild."

On February 15, 1979, Dr. Grewe wrote that he agreed with the findings and recommendations of Drs. Short, Brown and Boyden. On October 24, 1979, Dr. Short wrote: "It is my opinion that Mrs. Winebrenner could have returned to light employment if her only impairments were in the neck and lower back." On January 7, 1980, Dr. Grewe wrote:

> "This is to advise that, based upon my prior treatment and examinations of Mrs. Winebrenner and based upon my review of the Orthopaedic Consultants' narrative of December 11, 1978 and a followup statement by Dr. Short of October 24, 1979, I concur with Dr. Short's opinion that Mrs. Winebrenner could have returned to some form of light or sedentary employment had it only been for her neck and lower back impairment."

On January 28, 1980 Dr. Grewe wrote that after reviewing two job descriptions prepared for him he felt that claimant could have performed the jobs of ward clerk and intravenous nurse notwithstanding her lower back and neck injuries.

Analysis of social/vocational factors, however, strengthens the claimant's case that she is totally and permanently disabled. On October 4, 1977, Dr. Grewe wrote:

> "She has improved a little bit. She is quite certain that she would not be able to tolerate a full day's activity. She has been a floor nurse in the past, but the amount of patient handling, walking, time on her feet, etc., probably precludes her returning to that type of hospital work. She does not have a degree, and apparently the hospital standards now dictate that supervisors be degree nurses rather than diploma nurses. Additionally, she has

difficulties in both her cervical area and her low back area with a persistent large lumbar myelogram defect. Although she has made some improvement on conservative management, I think return to her usual occupation is not likely and would result in further disability."

"She will be 60 years old in May; prospects for retraining at this age are poor in most incidences.

"It would seem to me that the most practical thing to do would be to evaluate her disability and retire her from nursing and seek Social Security benefits on the basis of her disability at this age."

A claim form dated October 13, 1977 shows that the treating doctor had not released the claimant to even modified work.

On December 14, 1979, Dr. Grewe wrote:

"It was my impression that taking all factors into consideration, her age, which was in October 1977, 61 years, her advanced cervical spondylosis changes, the residuals from her low back and the myelogram evidence of a persistent defect which may become symptomatic and the residuals in the left upper extremity which I think are secondary to nerve root compression, all make the prospect of returning to work on a sustained, gainful employment basis unlikely, if not impossible. Additionally, I think because of her age and

her underlying physical problems, retraining or re-employing her in a sedentary role probably is difficult if not impossible. Consequently, although her disability is not solely due to the accident per se, I think with the factors of her underlying medical problems with her age, which probably precludes retraining, I think from a practical standpoint she was permanently disabled for gainful employment as a result of this fall in September 1976. The aggravation of the underlying degenerative condition I believe is responsible for her disability since she was basically asymptomatic prior to the injury."

On January 28, 1980, David Rollins, Ph.D., a private vocational services consultant, stated:

"In consideration of her age, education, work background and physical incapacities related to her back injury, her vocational potentials render her unemployable in my professional opinion. She has experienced a total loss of wage earning capacity since April of 1977, and in my judgment, she will continue a total loss of wage earning capacity for the indefinite future."

On February 4, 1980, Dr. Grewe wrote in response to claimant's attorney's request to clarify his opinion regarding claimant's extent of disability:

"Your questions specifically pertain to what seem to be conflicting statements regarding possible employability of Mrs. Winebrenner. In the context of physical impairment, she could qualify for job descriptions presented to me specifically for IV nurse or ward clerk. That is, her impairment leaves her in the light work category. The seeming discrepancy between my feeling of her being disabled more than her physical impairment assessment would suggest is based on her age, difficulty to find employment in the presence of persistent back symptoms and the questionable aspects of being able to function full time in a dependable way. When I said that I felt for all practical purposes that she was permanently and totally disabled, I meant that a 61 year old patient who will soon be eligible (with disability) for Social Security retirement almost never is considered a viable candidate for vocational rehabilitation training, and unless given special consideration by an employer can almost never expect to enter the competitive job market with any chance of finding steady employment.

"This judgment is meant to take into consideration the age factor and although it does not have a bearing on the disability evaluation of the time we are concerned with the point that she did develop infirmity some months later nearly points up the significance of the risk involved in the aging process.

"I hope this clarifies the seeming confusion that results between trying to assess physical impairment and trying to assess true disability in the light of establishing meaningful gainful employment."

Claimant has a high school education and three years training as a nurse. She had been a nurse her entire working life with no other training or work experience. The Referee found that the job descriptions of IV nurse and ward clerk that were presented to Dr. Grewe for assessment of whether the claimant could have performed them were inaccurate. The Referee found that those jobs indicated

that there would have been much more lifting, squatting, bending and reaching than had been indicated on the job descriptions provided to Dr. Grewe. If, as we conclude, the claimant could not have performed even these lighter duties, then the record contains no evidence of any job in the nursing field, lighter duty or not, that the claimant could have performed.

Claimant nevertheless attempted to return to work. This is verified by the testimony of the claimant, by testimony of the Personnel Director of McMinnville Hospital, Robert Hendricks, and by testimony of the Director of Nursing, Virginia Buchanan. Also, testimony of the carrier's own rehabilitation coordinator, David Klienstuber, indicates that the claimant had a desire to return to work when she was able. Although the hospital was ready to employ claimant when she was ready to work, the claimant was never able to produce a work release that would have enabled her to be hired.

In conclusion, we agree with the finding of Referee McCullough that:

> "the evidence in this case establishes that prior to her heart attack in 1978 claimant was, because of her neck and back injuries, unable to return to her usual work as a nurse, which was the only work in which she had had any training or experience. She had discussions with the personnel manager for her employer and with a rehabilitation counselor concerning the possibility of obtaining work in some light or sedentary capacity. However, no jobs were offered to her [nor was she ever released for the modified work]. The weight of the evidence establishes that the several jobs brought up at the hearing--ward clerk, IV nurse, motel/hotel clerk, apartment manager--all would have been either beyond her physical abilities or required training and experience she did not possess. Based on my review of the entire record, I conclude that prior to her heart attack and stroke in 1978 and because of the residuals of her back and neck injuries combined with her advanced age and limited education, training and work experience, claimant was unable to obtain and hold gainful employment. She is therefore entitled to permanent total disability, commencing as of October 4, 1977 when...she became medically stationary."

ORDER

The Referee's order dated September 29, 1980 is affirmed.

Claimant's attorney is awarded the sum of $300 for his services at this Board review, payable by the employer/carrier.

EVELYN M. PARTLOW, Claimant
Alan Jack, Claimant's Attorney
Dennis Reese, Defense Attorney
Request for Review by Carrier

WCB 80-00083
August 18, 1981

Reviewed by Board Members Barnes and McCallister.

The carrier seeks Board review of Referee Menashe's order which found claimant had good cause for failing to request a hearing within 60 days of the carrier's denial. We disagree and reverse.

Certain facts are undisputed. The carrier's denial, properly addressed to claimant, was mailed on October 3, 1979 by certified mail. Postal authorities left notice of attempted delivery at claimant's residence on October 5, 1979 and October 12, 1979. The denial letter was returned to the carrier on October 25, 1979 as unclaimed. The carrier then remailed the denial letter by ordinary mail and claimant received it November 15 or 16, 1979. Claimant requested a hearing on January 4, 1980--some 93 days after the first attempted October 3, 1979 certified mailing of the denial letter.

Other facts are less clear. Claimant testified that the two notices of attempted delivery of certified mail showed only the addressee's last name, Partlow; that her brother-in-law with the same last name was then living at the same address; that her brother-in-law was having financial difficulties, which included receiving various past-due and collection notices by certified mail; and that claimant was intentionally refusing to claim certified mail for Partlow assuming it related to her brother-in-law's financial difficulties.

All of this reasoning depends upon accepting claimant's testimony that the two notices of attempted delivery showed the addressee only as Partlow. The Referee found claimant credible and accepted this testimony. We do not. The postal service form 3811 (return receipt requested) attached to the October 3, 1979 mailing shows the carrier paid an extra fee to "show to whom and date delivered." We are confident that, under these circumstances, postal service regulations require notice of attempted delivery to show an addressee's full name. The presumption is that official duty has been regularly performed.

But even accepting arguendo claimant's testimony that she thought the attempted certified mail deliveries were for her brother-in-law and did not relate to her pending workers' compensation claim, we still do not find good cause for her tardy request for hearing. The only reason claimant did not receive actual notice of the carrier's denial in early October 1979 was her voluntary refusal to accept certified mail. The good cause test of ORS 656.319 presents a policy question for this Board. Curtis A. Lowden, WCB Case No. 79-10215 (March 30, 1981); Cecil Black, Jr., WCB Case No. 79-03984 (April 28, 1981). We conclude that a workers' voluntary and deliberate refusal to accept certified mail does not establish good cause for an untimely hearing request.

ORDER

The Referee's order dated November 19, 1980 is reversed.

MARK S. ABRAMS, Claimant
William J. Blitz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-10962
August 24, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF seeks Board review of Referee McCullough's order which remanded claimant's claim to it for acceptance and payment of benefits as provided by law and an additional amount of 25% of the compensation granted up to the date of his order for the SAIF's unreasonable resistance to the payment of compensation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 29, 1981 is affirmed. Claimant's attorney is granted as a fee a reasonable attorney fee in the sum of $350 payable by the SAIF.

LEMUEL BRISTOW, Claimant
Nick Chaivoe, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-7372
August 24, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Gemmell's order which affirmed the Determination Order of July 26, 1979, which granted compensation for temporary total disability only. The claimant contends he is entitled to permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 10, 1981 is affirmed.

ROBERT W. BROWN, JR., Claimant
Dennis Skarstad, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney
Request for Review by Claimant

WCB 80-10310
August 24, 1981

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.

PATRICK CHAMBERLAIN, Claimant
John Bassett, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-3902
August 24, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Menashe's order which affirmed the SAIF's denial of March 19, 1980. No briefs were filed in this case.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 19, 1980 is affirmed.

TERRY L. CHRISTOPHER, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order of Dismissal

WCB 80-07027
August 24, 1981

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.

LANCE DAVID EGGE, Claimant
Alice Goldstein, Claimant's Attorney
Michael Hoffman, Defense Attorney
Order Denying Remand

WCB 79-07880
August 24, 1981

On June 25, 1981 we denied claimant's motion to remand on the basis of Robert A. Barnett, WCB Case No. 79-07210 (decided that date). Claimant has renewed his motion to remand, contending that supplemental information and argument submitted now satisfies the Barnett standards.

The renewed motion to remand is denied for the reasons stated in the employer's July 28, 1981 memorandum in opposition, with which we fully agree.

IT IS SO ORDERED.

ANNA EMRA, Claimant
Michael Strooband, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Reconsideration

WCB 80-01927
August 24, 1981

Claimant's attorney has moved for reconsideration of the Board's August 4, 1981 Order on Review on the ground that that order should have included an award of attorney fees.

We disagree. Our order affirmed the Referee's order which had upheld SAIF's denial. Our order did note that claimant had certain rights under the terms of an earlier 1978 Referee's order. But recognition of existing rights is not the same as creation of new rights, and it is only the latter that triggers entitlement to attorney fees.

The motion for reconsideration is denied.

IT IS SO ORDERED.

BETTY J. HUBER, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Request for REview by Claimant

WCB 79-11072
August 24, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Pferdner's order which granted claimant an additional award of 80 degrees for a total award of 192 degrees for 60% unscheduled low back disability. Claimant contends that she is permanently and totally disabled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 29, 1980 is affirmed.

DELBERT V. KOCH, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 78-10015
August 24, 1981

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Baker's order which awarded compensation to claimant for permanent total disability from December 11, 1979. The order also assessed a 15% penalty on SAIF for unreasonable delay and resistance in its failure to comply with Referee Baker's discovery order to produce certain evidence on the question of the employer's policy regarding rehiring of injured workers.

Claimant sustained a compensable injury to his low back on October 20, 1977 while employed as a veneer plant knife grinderman and relief foreman by Mazama Timber Products. On January 26, 1978, claimant underwent a myelogram which revealed bilateral defects at L3-4 and a defect at L4-5 on the left side. He was hospitalized in June 1978 for a left sciatic pain. A Determination Order dated December 4, 1978 awarded claimant 15% unscheduled permanent partial disability. The most recent diagnosis is that claimant has spinal stenosis with L4-5 nerve root compression. Further surgery has been indicated. Thus far for the current injury the claimant has been treated conservatively with physical therapy and medication for pain. He underwent a physical therapy program at the Callahan Center in August and September 1978. Claimant has continued to have low back pain and leg pain.

Based on medical factors alone, the claimant has not proven that he is permanently and totally disabled. On September 22, 1978 Dr. Lewis VanOsdel of the Callahan Center wrote: "The vocational impairment due to intrinsic physical disability is mildly moderate and due to extrinsic psychological disability is mild." On November 7, 1978, Dr. Schroeder indicated that claimant was released for light work. On August 29, 1979, claimant was examined by Drs. Carl Holm, Charles Bird, and William Platt. They indicated that "the total loss of lumbosacral spine function as it exists today is rated as mildly moderate and the loss of function due to the injury of October 20, 1977 is rated as mild." On December 10, 1979, a neurologist, Dr. C. Conrad Carter, reported that the claimant's "total loss of lumbosacral spine function as exists today is rated as mildly moderate, and I would feel that about 75% of this is related to 5 January 1978 injury."

At the hearing claimant testified that he thought he could perform two jobs: Tallying trucks or marking boxes at the veneer plant. (Those jobs have never been offered to him.) He also testified that in 1979 he golfed one hold in Creswell, went goose hunting for two days at Klamath Park, went road-hunting for deer twice (once at Silver Lake and once near LaPine), and went fishing about once a week during the three month fishing season at Winchester. (The hospitalization in June 1978 for left sciatic pain occurred after a short fishing trip on the coast and/or a drive to Eastern Oregon.) On February 28, 1979 claimant applied for unemployment compensation agreeing to register for work with the Oregon State Employment Service. This evidence indicates that claimant was not totally disabled based on physical and medical data alone.

The addition of relevant social/vocational factors, however, strengthen the claimant's case that he is permanently and totally disabled. Claimant was 56 years old at the time of his current injury. He had completed the 11th grade but has a reading vocabulary at the middle of the 5th grade level. Claimant does not have a GED. Except for a job in a filbert nursery that claimant took after leaving high school, he has no other work experience except that in the plywood mill industry, and he has been associated with that industry for approximately 30 years. He took two classes at University of Oregon in management and supervision. He has served as a supervisor in that industry from 1951 to 1975. In 1975, he discontinued being a supervisor and worked as a knife grinderman and relief foreman.

If the medical and non-medical factors do not on their face show that efforts to obtain employment would be unreasonable, then the claimant must seek employment to gain permanent and total disability status under the requirements of ORS 656.206(3).

A report from Rehabilitation Job Development Services dated January 11, 1979 said:

> "During the last two weeks of December and the first two weeks of January, the client has been in contact with this office and has cooperated and participated in our program. The client has stated that he has made several
>
> contacts with employers but has had no interviews or results to report at this time. The most significant thing that needs reporting is that our job developer contacted Mr. Solomon at Mazama Timber, which is Mr. Koch's former employer. The employer at that time stated that there was (sic) no positions open which Mr. Koch could qualify for...The job developer and Mr. Solomon discussed other areas of employment at the mill, such as driving hyster or personnel management or safety inspector. Mr. Solomon stated that he didn't feel Mr. Koch was capable of being a personnel manager.

> ...Mr. Solomon at that time stated he didn't feel he would be able to hire him. The employer did state that he felt Mr. Koch would be qualified as a safety inspector but he did not have any safety inspector positions open at this time...In summary, it is the opinion of this counseling staff that the client has fully participated in his own job development program and has cooperated with our procedure. The client was also informed that we will need a list of ten employers he has contacted. The client stated that he agreed to do that."

On January 31, 1979, Rehabilitation Job Development Services reported:

> "On January 3, Mr. Jerry Solomon contacted our job developer to state he had no positions which he could perform at this time...The job developer told Mr. Delbert Koch that he felt they needed to pursue other companies because of Mr. Solomon's attitude toward him. Delbert stated that he didn't know what to do at this point and needed to think about it and would contact our job developer during the second week of January...On the 30th of January phone contact was made with Mr. Koch. The job developer informed him of his responsibility in job search and also requested that he contact five or ten employers a week. Mr. Koch agreed to do that. The job developer suggested that he go and call mills and apply for jobs he can do, and also Coast to Coast warehouse had openings."

On February 28, 1979, Rehabilitation Job Development Services reported

> "Mr. Delbert Koch has improved his contact with this office, and has kept us informed of his activities. Mr. Koch's biggest complaint is he has problems coming up with or thinking of places to apply each day. The job developer also has given Mr. Koch a list of employers to contact in his area."

On February 28, 1979 claimant registered for work with the Oregon State Employment Service.

On March 15, 1979, Rehabilitation Job Development Services reported:

> "During the past 30 days Mr. Koch has participated in his job search in a more positive manner and has provided the job developer with a list of employers which he has contacted.

These consist of virtually all the mills in the Eugene area. The job developer has contacted these employers in an attempt to schedule an interview with Mr. Koch. However, at this time, we have been unable to do so...Mr. Solomon was contacted and agreed to meet with both the job developer and Mr. Koch at his office in Creswell...During the interview Mr. Solomon repeatedly stated that the only position he had for Mr. Koch was his former position as a knife grinderman. The job developer asked Mr. Solomon if he would be willing to allow W. C. D. to modify the job site to lessen the risk of reinjury to the client, he stated he was not, when asked why he refused to comment. Mr. Solomon continually attacked Mr. Koch's personality and ability to handle the crew and at one time during the interview brought in a supervisor to confirm his statements. Mr. Koch successfully refuted most of the statements made by the supervisor, by citing circumstances that occurred during the time of the alleged problems. Mr. Solomon stated that the job as knife grinder would not be full time as he would be reducing that crew to a one-man operation which would not be full time due to the cutbacks in the lumber industry.

He stated that because of this the person performing this job would have to be capable of performing more strenuous duties wherever needed in the mill. He stated that for this reason he did not feel Mr. Koch would be feasible for even this position. Mr. Solomon was asked if there were other positions Mr. Koch could perform, he stated no...It would appear that due to Mr. Koch's age and apparent lack of willingness by Mazama Timber to support Mr. Koch, returning him to gainful employment may be an arduous task."

Next, the claimant was referred to Ingram and Associates, another private rehabilitation company. On July 5, 1979, Ingram and Associates reported that they had visited with Mr. Solomon at Mazama Timber Products and a list of five possible positions was offered to the claimant. These were knife grinder, bundle tier and labeler, clipper spotter, chain off-bearer and industrial truck operator. It was indicated that for the knife grinder position a cart would be purchased so that the claimant would never have to lift the entire weight of a knife blade. The list was sent to Dr. Schroeder, who said, "It is my opinion that he should attempt to try the knife grinding job to demonstrate good faith. It is possible at this stage that the patient may not be able to perform in a full-time capacity."

Ingram and Associates reported on December 6, 1979 in their closing report:

"As you know our rehabilitation plan originally was to return Mr. Koch to his knife grinding job with Mazama Timber Products. We obtained permission from his treating physician and Orthopaedic Consultants concurred based on the modifications to the work site we had anticipated. Regrettably, when I called Mr. Solomon to arrange for him to review the specifications for the modification he informed me that he had leased the plant in question to Alpine Timber Products. One wonders how long this plan has been in the works. Needless to say, we spent a lot of time and energy for this modification on good faith and were distressed we were not notified of plans to lease the plant...Prior to a referral to our agency another agency had made an extensive job search in the area for a variety of jobs and placement was not successful. It is doubtful we would be any more successful with Mr. Koch in view of his age, impairment to his back and knees, and personality problems. With his former employer not offering Mr. Koch any other position and Alpine Timber Products not being feasible we believe there is nothing more that we can offer Mr. Koch. I deeply regret not being able to assist this interesting gentleman in returning to work. We will at this point, close our file."

In a letter dated January 15, 1980 from the Workers' Compensation Department to the claimant, it was stated:

"In accordance with the final report of Ingram and Associates dated December 6, 1979, I am closing your file with Field Services. Ms. Ingram cited the previous, unsuccessful job placement efforts of Rehabilitation Job Developers, your age, physical limitations and problems stemming from attempts to place you at Mazama Timber Products and Alpine Timber Products as reasons for closing their files. In view of the unsuccessful attempts made by two rehabilitation firms, I do not plan to make a further referral."

Our main concern about this evidence of claimant's job search is that there seems to have been an undue emphasis on claimant's returning to work with Mazama Timber Products long after it should have been clear to all concerned that such a return was rather hopeless because of various frictions between claimant and Mr. Solomon. Another concern is that the rehabilitation counselors seem to have devoted little attention to claimant's significant (1951-75) experience as a supervisor and made little effort in the direction of seeking such relatively sedentary work for claimant.

On the other hand, in the case of a worker claimant's age, often the only employer that will feasibly take the worker back after an injury is the one that employed him at the time of the injury; and the fact remains that two contract rehabilitation agencies have been unsuccessful in placing claimant in regular suitable employment.

Based on the above evidence, we agree with the finding of Referee Baker that:

> "The failure to obtain employment is not due to a lack of motivation. With this claimant's age, education, work experience and disabilities, I conclude he can no longer dependably sell his services in a competitive general labor market. He has established by a preponderance of evidence that he is entitled to compensation for permanent total disability. Should his condition materially improve, with or without additional surgery, his status is subject to review and modification."

We disagree, however, with the penalty assessed by the Referee against SAIF for noncompliance with the Referee's discovery order. As a general proposition, we believe the Referees should have broad authority to enter discovery orders and enforce them with appropriate sactions. Here the Referee's discovery order was for the production of information regarding his former employer's policy regarding rehiring injured workers. Despite the board discovery authority of the Referees, we find this specific order was beyond the outer limits of that authority. Discrimination against injured workers is not an issue that can properly be raised in this forum, but rather an issue within the jurisdiction of the Bureau of Labor pursuant to ORS Chapter 659. Thus, even assuming the information SAIF was ordered to produce but did not produce showed a policy of blatant discrimination aginst injured workers, that information could have in no way been relevant in this proceeding on the extent of claimant's disability. Under ORS 656.206(3) claimant only had the burden of showing reasonable efforts to seek employment; he did not have the burden of showing why he was refused employment by his former employer.

ORDER

The Referee's order dated November 14, 1980 is modified to eliminate the penalty and attorney fee ordered pursuant to ORS 656.382; in all other respects the Referee's order is affirmed.

DONALD LATHROP, Claimant
Peter O. Hansen, Claimant's Attorney
Donald W. Hull, Defense Attorney
Order of Dismissal

WCB 80-10830
August 24, 1981

Since an Order of Abatement of Referee Menashe's Opinion and Order was issued on July 16, 1981 due to a Motion for Reconsideration of that order having been filed, the Request for Review by claimant is, therefore, a nullity.

IT IS SO ORDERED.

OLIVE B. LYONS, Claimant
Richard Carlson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06327
August 24, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Leahy's order which granted claimant compensation equal to 37.5° for 25% loss of each hand and additional time loss compensation from March 24, 1980 up to June 25, 1980, less one day, April 15, 1980. SAIF asks that this order be reversed.

This claimant has bilateral trigger finger and carpal tunnel syndrome conditions for which she has had several surgeries. Dr. Cook has been the treating physician. When claim closure was being considered, it became evident that Dr. Cook's reports were not sufficient to determine claimant's loss of function of her hands. Claimant was referred to Dr. Mary McVay who submitted the only comprehensive medical report in the record. Dr. McVay's report of May 30, 1980 concludes with the following paragraph:

> "The patient has minimal subjective complaints at this time. She does have some weakness but was advised to work on strengthening the hands and improvement is anticipated. The patient is employable in the occupation of her choice. There is no permanent impairment as a result of her multiple operative procedures. While the patient did have a right trigger thumb in 1973, there is no evidence that there was a pre-existing condition prior to her employment at Omark Industries. I do not believe she could have worked at Omark Industries for five months with pre-existing trigger fingers and bilateral carpal tunnel syndrome." (Emphasis added)

Evidently, based on Dr. McVay's report, the claim was closed by Determination Order on June 30, 1980. The delay was caused by Dr. Cook's failure to respond to inquiries concerning Dr. McVay's opinion except to state June 18, 1980 that as of March 24, 1980, "She is reaching a point of being medically stationary. I have communicated with SAIF. I will see her in the future on an as-needed basis only."

The Determination Order granted temporary total disability for March 6, 1979 through March 24, 1980 and for one day only on April 15, 1980. The claimant requested a hearing and contended the she should have received temporary total disability benefits until June 25, 1980 and that permanent partial disability should be awarded.

The Referee granted claimant a permanent partial disability award based on the rationale of Boyce v. Sambo's Restaurant, Inc., 44 Or App 305 (1980). In Boyce, the claimant's award was increased based on the claimant's credible testimony regarding his limitations. His injury had caused residual impairment and his award was increased substantially due to loss of strength, etc. We find a significant distinction between Boyce and this case. In Boyce there was objective medical evidence of some permanent impairment. In this case, the physician upon whom we rely (Dr. McVay) says the claimant has no permanent impairment.

We conclude the claimant has failed to prove by a preponderance of evidence a permanent partial disability in either hand(s) or forearm(s). The Determination Order is affirmed to the extent it awarded no permanent partial disability.

In regard to claimant's entitlement to additional temporary total disability compensation, we concur with the findings and conclusion of the Referee. We find the medical report of Dr. Cook dated March 24, 1980, upon which the Evaluation Division based their determination, was not sufficient to justify a closure. Dr. Cook merely stated claimant was approaching being medically stationary. This is later reinforced by Dr. McVay's report of May 30, 1980 which indicated improvement was expected. Dr. Cook's June 25, 1980 chart note which states in pertinent part, "...generally, however, her condition is stationary, and she can be considered discharged," further supports the Referee's finding.

ORDER

The Referee's order dated January 26, 1981 is reversed in part and affirmed in part. The Referee's award of 37.5° for 25% partial loss of each hand of a maximum of 150° is reversed, and the Determination Order which granted no permanent partial disability is restored. The Referee's additional award of compensation for temporary total disability is affirmed.

DAN MARTISHEV, Claimant
Gerald Doblie, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-11645
August 24, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation requests Board review of Referee Nichols' order which awarded the claimant 35% unscheduled permanent partial disability for a back injury of February 16, 1977. The issue is extent of permanent partial disability.

The claimant injured his back February 16, 1977 when he fell while thinning trees. The medical diagnosis was chronic cervical and lumbosacral sprain. After about a year of conservative treatment, the claimant was declared medically stationary February 17, 1978. A vocational rehabilitation program had been started but was interrupted for further medical investigation of claimant's continued symptoms. Claimant was again declared medically stationary December 18, 1978, and a Determination Order was issued awarding 10% unscheduled permanent partial disability. Claimant's request for hearing was settled by a stipulation dated May 3, 1979 which increased the permanent partial disability award to 25%.

In July 1979 claimant filed a claim for aggravation. SAIF denied the claim, and claimant requested a hearing on that denial. After the denial but before the hearing was held, claimant had low back surgery, a laminectomy, on January 29, 1980. Claimant was declared medically stationary April 2, 1980, and Dr. Frank, a neurosurgeon, at that time evaluated claimant's residual impairment as 5%. The preponderance of the medical evidence then available related claimant's herniated disc and need for surgery to the accepted 1977 claim, so SAIF accepted the 1979 aggravation claim by stipulation dated April 29, 1980.

On December 19, 1980 a Determination Order was issued which awarded claimant no additional permanent partial disability in excess of that previously awarded by Determination Order of January 17, 1979 and stipulation dated April 29, 1980. Claimant requested a hearing contesting the amount of permanent partial disability awarded by the last Determination Order.

SAIF contends that claimant has failed to prove by a preponderance of evidence that his condition had permanently worsened since his last unchallenged award to the degree which justified an award of 35% unscheduled disability. SAIF argues that since the stipulated settlement of April 29, 1979 was never appealed, it has become final, as a matter of law, establishing the extent of permanent partial disability as of April 29, 1979. We agree but fail to see what relevance that argument has regarding the evaluation of claimant's permament partial disability at closure of his aggravation claim. The issue at hearing was whether the Determination Order of December 19, 1980 properly reflected the claimant's permanent partial disability as of the date of the hearing. We find that the 35% permanent partial disability award ordered by the Referee was proper.

Claimant is of Russian descent, having been born in China and raised in Brazil until moving to Oregon. He has a sixth grade education and is now 26 years old. All of his work experience is in heavy physical labor. He has been tested as having a full scale I.Q. of 89 and is limited by his cultural background. He has been rated as a psychological class III and a vocational class III, having unsuccessfully attempted several vocational rehabilitation programs. Taking into account Dr. Frank's impairment rating of 5% and applying the Department's rules for weighing the relevant social/vocational factors, we conclude that the Referee's award of 35% unscheduled disability properly reflects claimant's loss of earning capacity.

ORDER

The Referee's order dated March 17, 1981 is affirmed. Claimant's attorney is awarded the sum of $150 for services rendered in this Board review, payable by the SAIF Corporation, said services consisting of a one page brief.

CHARLES G. McARTHUR, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Dismissal

WCB 80-05966
August 24, 1981

A motion to dismiss the SAIF Corporation'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.

HERBERT I. McCANN, Claimant
Cooley, Byler & Rew, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant
Cross Request by Employer

WCB 80-6770
August 24, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant requests Board review and SAIF cross requests review of Referee James' order which found no premature claim closure, but granted claimant an award of 96 degrees for 30% unscheduled low back disability. Claimant contends the award is inadequate and that he is permanently and totally disabled. SAIF contends claimant's award of permanent partial disability should be reduced.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 24, 1981 is affirmed.

DOROTHY McIVER, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Vacating Own Motion Order

Own Motion 81-014M
August 24, 1981

The Board issued its Own Motion Order on June 3, 1981 which reopened claimant's claim pursuant to the provisions of ORS 656.278.

It has now come to the Board's attention that a Determination Order was entered in this case on July 29, 1980. Therefore, since claimant had one year to appeal from the Determination Order and our Order was issued before that one year expired, the Board had no jurisdiction to reopen this claim.

Therefore, our Own Motion Order dated June 3, 1981 is hereby vacated and held for naught. The claim is remanded to the Evaluation Division of the Workers' Compensation Department for closure pursuant to ORS 656.268.

IT IS SO ORDERED.

LLOYD L. MILLER, Claimant
Robert Bennett, Claimant's Attorney
Ridgway Foley, Defense Attorney
Request for Review by Employer

WCB 80-01112
August 24, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee James' order which set aside its denial of compensation for claimant's skin condition. The employer contends the medical evidence shows claimant's condition is not the result of an underlying disease caused or worsened by work activity. We agree and reverse.

Claimant works in a wood mill. When he works in the ground wood department, his skin itches. No other work station in the mill produces this effect. Dr. Anderson, dermatologist and treating physician, tested claimant for wood pulp allergies. The test results were negative. Drs. Pokorney and Storrs, dermatologists, more extensively tested claimant for allergies. The results were negative. All of the physicians agree claimant is not allergic, and they find no explanation for claimant's subjective itching symptom.

The Board finds that claimant has proven he itches when he works in the ground wood department. However, in order for a condition to be compensable, there must be an occupational disease or injury. No doctor found a disease, allergy, injury or otherwise compensable condition. Itching is a symptom. Symptoms are not compensable. The claimant has failed to prove medical causation, and the Referee's contrary finding is just plain wrong.

ORDER

The Referee's order dated February 13, 1981 is reversed, and the employer's denial of compensation is reinstated.

ANASTACIO OROZCO, Claimant
Joseph Ramirez, Claimant's Attorney
Richard Davis, Defense Attorney
Order of Dismissal

WCB 80-04516
August 24, 1981

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.

ARVEN PETIT, Claimant
Wurtz, Logan & Logan, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-2898
August 24, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Baker's order which affirmed the SAIF's denial of compensability of claimant's right cataract condition being causally related to his December 2, 1978 industrial injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 25, 1981 is affirmed.

ABRAN RODRIQUEZ, Claimant
Noreen Saltveit, Claimant's Attorney
Daryll Klein, Defense Attorney
Order of Dismissal

WCB 80-08676 & 81-00369
August 24, 1981

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.

ROBIN F. ROBINETTE, Claimant
John Peterson, Claimant's Attorney
Douglas Ragen, Attorney
Margaret Leek Leiberan, Attorney
Request for Review by Employer

WCB 79-04246
August 24, 1981

Reviewed by Board Members Barnes and McCallister.

The self-insured employer through Fred S. James and Company seeks Board review of that portion of Referee Gemmell's order which found it responsible for claimant's "new injury" sustained on May 21, 1979.

The Referee's order does an excellent job of segregating, discussing and deciding the numerous other issues raised in this complicated hearing. We affirm and adopt the Referee's order on those other issues despite two immaterial typographical errors in dates.

On the specific issue here raised on review--carrier responsibility for the May 21, 1979 incident--we disagree with the Referee. Claimant suffered a back strain in 1976 when his employer's workers' compensation carrier was Fireman's Fund. Between that date and the May 21, 1979 incident, the employer became self-insured. The issue is whether the 1979 incident is an aggravation of the 1976 injury and thus the responsibility of Fireman's Fund, or instead a new injury and thus the responsibility of the self-insured employer. The Referee found a new injury.

We disagree. Claimant has had continuous symptoms since his 1976 injury. He has had several periods of disability precipitated by various activities since the 1976 injury. To the extent compensable, most have been handled as aggravations of the 1976 injury. There is no basis in the record to distinguish the 1979 incident when claimant pulled or jerked on a lever from the several prior exacerbations of his 1976 back condition. Nor is there any persuasive medical evidence that the 1979 incident contributed independently to claimant's disability; instead, all doctors who treated claimant between 1976 and 1979 believed the 1979 incident was an aggravation of the 1976 injury.

ORDER

The Referee's order dated November 7, 1980 is modified. Claimant's claim for the incident of May 21, 1979 is remanded to Fireman's Fund for acceptance and payment of compensation as provided by law until the claim is closed pursuant to ORS 656.268. Any penalty due under the fourth paragraph of the Referee's order shall be the responsibility of the Fireman's Fund. Fireman's Fund shall reimburse the self-insured employer for any benefits it paid in connection with the May 21, 1979 incident.

BRUCE VOLLSTEDT, Claimant
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-03840
August 24, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Nichols' order which assessed a penalty against it for unreasonable claims processing.

Claimant's treating doctor prescribed use of a TNS unit. SAIF paid the rental fee for the first month. Subsequently SAIF purchased the TNS unit for claimant's use. Between SAIF's payment of the first month's rental fee and SAIF's payment of the purchase price, claimant used the TNS unit for two months. The vendor billed claimant directly for the rental fee for these two months. The first issue is whether SAIF is obligated to pay for the rental fee for these two months.

The Referee concluded that she lacked jurisdiction over that issue, apparently relying on OAR 436-69-420(7) which provides:

> "If the insurer believes a fee may be in excess of the usual, customary, and reasonable standard, he may request an opinion of the medical director. The medical director may consult with the appropriate professional society committee, before advising the insurer. If the fee is judged to exceed the standard, a request shall be made that it be reduced. If it is not voluntarily reduced, the director may order it reduced, in accordance with ORS 656.248(2)."

In other words, as best we understand the Referee's order, she reasoned that since OAR 436-69-420 gives the Medical Director of the Workers' Compensation Department authority over fees for medical services, the Hearings Division lacks authority to consider such questions unless they arise from an order of the Medical Director issued pursuant to ORS 656.248.

Such reasoning may be correct abstractly, but it has nothing to do with this case. OAR 436-69-420 involves authority to review allegedly excessive fees. Here, by contrast, the issue is whether any fee at all is due and payable. It is SAIF's position that the vendor's bill for two month's rental is an error because it has paid for the TNS unit; that there was no evidence at the hearing that the vendor was persisting in its contention that the bill for two month's rental was due and payable; and that the more likely inference from the evidence is that the vendor has accepted that its bill was in error and has abandoned its efforts to collect it. The Referee did have both the jurisdiction and the duty to resolve these contentions.

On the merits, we agree with SAIF. The last bill from the vendor that was introduced in evidence is dated March 12, 1980. The only later communication from the vendor is its letter of May 20, 1980 to claimant's attorney. That letter did not demand payment. It merely concluded: "We will wait to be advised as to how this matter is to be handled." The hearing was held October 22, 1980. All that was shown is that the vendor had last sent a bill to claimant more than seven months earlier and had sent something other than a demand for payment to claimant's attorney more than five months earlier. We find this insufficient to prove that any bill for medical services was due and payable at the time of the hearing.

Having erroneously concluded she lacked jurisdiction over whether a medical services bill was due and unpaid, the Referee compounded the error by proceeding to order that SAIF "acted unreasonably in the manner in which it handled this claim and should pay to the claimant 25% of the allegedly unpaid medical bill" as a penalty. If there were general authority to assess a penalty because of "unreasonable" claims processing, a penalty would be well warranted here. Once SAIF became aware in March 1980 that there was some question or problem about whether two months' additional rental was due the medical vendor, a couple of telephone calls would have likely cleared up the problem. See Joe Meeker, WCB Case No. 78-10097 (Order on Review, March 30, 1981). SAIF's failure to cut through the red tape and get such a minor problem resolved is patently unreasonable and only encourages additional litigation.

There is, however, no general authority to impose a penalty for unreasonable claims processing. ORS Chapter 656 contains three penalty provisions: ORS 656.262(8), 656.268(3), and 656.382(3). None are here applicable.

ORDER

The Referee's order dated January 5, 1981 is reversed in its entirety.

ALEX WATSON, Claimant
David Kryger, Claimant's Attorney
Own Motion Order

Own Motion 81-0209M
August 24, 1981

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 December 9, 1971. Claimant's aggravation rights have expired.

The medical report from Dr. Rustin indicates that claimant's condition which required surgery was a severe post-traumatic stricture of the urethra directly related to the 1971 industrial injury.

By letter dated July 15, 1981, the carrier indicated it was opposed to any claim reopening, but had paid all medical bills. They objected on the ground that claimant's aggravation rights were settled by a stipulation and compromise of a disputed aggravation claim in June 1976. We find this settlement of a disputed aggravation does not bar claimant from a claim reopening for a later worsening of his condition.

We conclude that claimant's hospitalization and medical services shall be paid for under the provisions of ORS 656.245, but that claimant's claim will not be reopened as the information before us is insufficient for us to determine whether or not claimant was employed and lost time from work due to the surgery or if he was available for work but unemployed. If we are provided with employment information, we will reconsider our decision.

IT IS SO ORDERED.

SAMUEL R. WEIMORTS, Claimant
Dwight Gerber, Claimant's Attorney
Brian Pocock, Defense Attorney
Order of Remand

WCB 80-04053
August 24, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of Referee Seifert's order which dismissed the request for hearing on a denial of treatment of low back pain. The issue raised is whether the doctrine of res judicata bars consideration of an issue not raised at the time a stipulated settlement was approved.

Claimant received a Determination Order on August 10, 1979 awarding 25% permanent disability for injury to claimant's right foot. Claimant requested a hearing on the Determination Order. On December 14, 1979 claimant and the employer's insurance carrier disposed of the pending request for hearing by entering into a stipulation settlement which awarded claimant an additional 15% disability for loss of the right foot.

Meanwhile, on October 26, 1979, a claim was submitted to the carrier on behalf of the claimant for chiropractic treatment to the lower back allegedly necessitated by the industrial accident which resulted in the right foot disability award. The carrier did not deny that claim for chiropractic treatment until April 24, 1980.

The carrier argues that Million v. SAIF, 45 Or App 1097 (1980) is analogous to this case and that the principle of res judicata should be applied to bar the claimant from raising the chiropractic treatment claim at this time. In Million, the court barred the claimant from raising an alternative theory when that theory could have been asserted at a previous hearing. The doctrine of res judicata "applies not only to every claim included in the pleadings but also to every claim which could have been alleged under the same 'aggregate of operative facts which compose a single occasion for judicial relief.'" 45 Or App at 1102.

We do not reach the general issue of whether a prior stipulation settlement affords the same defense of res judicata as does a prior hearing because we find that the chiropractic treatment claim had not yet achieved a posture where it could have been asserted in a claim for relief at a hearing as of the date of the stipulated settlement. As of December 14, 1979 (the date of the stipulated settlement), the carrier had not yet accepted or denied the claim for chiropractic treatment, nor had the time elapsed in which the carrier may investigate and consider the claim without risking penalties. The court in Syphers v. K-W Logging, Inc., 51 Or App 769 (1981), held that a referee did not have jurisdiction to hear a premature, and therefore ineffective, appeal.

> "The statutory scheme does not reasonably permit a hearing on compensasbility of the claim prior to a timely acceptance or denial or prior to the expiration of the time in which the carrier may investigate and consider the claim without risking penalties. Until one of those events occurs, it is not known whether a hearing will be necessary or, if so, what issue or issues will be presented at the hearing." 51 Or App at 771.

Further, parties may not "grant" jurisdiction to the Hearings Division merely by submitting the matter for hearing. SAIF v. Broadway Cab Co., 52 Or App 689 (1981).

We conclude that the Referee did not have the authority to approve a settlement of the chiropractic treatment claim as of December 14, 1979 because that claim was not yet in a denied status. Therefore, that issue was not disposed of by the stipulated settlement that was approved by a referee on that date. We, therefore, must remand this case for a hearing on the merits of the claim.

Claimant's attorney is not yet entitled to an award of attorney fees, but if claimant ultimately prevails on the denial of medical care, an attorney fee should then be set which takes into consideration the significant services rendered to this date by claimant's attorney.

ORDER

The Referee's order dated January 4, 1981 is reversed and this case is remanded for further proceedings.

SANDRA P. ATTEBERY, Claimant
Rick McCormick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-02816
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mannix's order which granted claimant an award of 30° for 20% loss of the right forearm.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 10, 1981 is affirmed.

DANIEL T. COBBIN, Claimant
C. David Hall, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06752
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee St. Martin's order which found that claimant was an Oregon worker and remanded his claim to it for acceptance and the payment of benefits as required by law.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 31, 1981 is affirmed. Claimant's attorney is awarded $50 for his services at this Board review, payable by the SAIF Corporation.

LEE COLE, Claimant
James O'Neal, Claimant's Attorney
Brian Pocock, Defense Attorney
Request for Review by Claimant

WCB 80-01786
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee McCullough's order which affirmed the SAIF's denial of February 7, 1980. Claimant contends he has a valid aggravation claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 2, 1981 is affirmed.

TIMOTHY D. CRISMAN, Claimant
John McLeod, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-03571
August 28, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee McCullough's order which remanded claimant's back injury claim to it for acceptance and payment of compensation as required by law.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 5, 1981 is affirmed.

JOSEPH L. DERSON, Claimant
James Larson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-04282
August 28, 1981

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Foster's order which held that claimant could not assert an Oregon workers' compensation claim because his exclusive remedy for an on-the-job injury was under the Federal Employers' Liability Act.

There is no dispute about the facts. While employed by the City of Prineville Railway, claimant sustained an on-the-job injury. His Oregon workers' compensation claim was initially accepted by the Railway's carrier, SAIF, and ultimately closed by Determination Order. Dissatisfied with the Determination Order, claimant consulted an attorney. His attorney filed both a request for hearing on the state compensation claim and a FELA action. SAIF then issued a denial on the state compensation claim. Although it is not clear whether SAIF's attorney ever fully understood the situation, this case proceeded to hearing on the issue of SAIF's denial.

At first blush, claimant is not a subject worker under ORS Chapter 656 because ORS 656.027(4) excludes persons "for whom a rule of liability for injury or death arising out of and in the course of employment is provided by the laws of the United States," e.g., FELA. But there is a catch. Since 1960 SAIF has provided the Prineville Railway with both FELA coverage and state workers' compensation coverage. This provision of coverage for otherwise nonsubject workers converted them into subject workers under ORS 656.039(1): "An em- ployer of one or more persons defined as nonsubject workers...may elect to make them subject workers."

Claimant thus was an Oregon subject worker with state rights under ORS Chapter 656 and, by virtue of being an employee of the Railway, had federal rights under FELA. The question becomes whether claimant's federal remedy is exclusive and excludes claimant's state remedy. The Referee answered that question in the affirmative. We agree with and adopt the Referee's analysis with the following additions.

There are no Oregon or Ninth Circuit cases on the exclusiveness of the FELA remedy. Cases from elsewhere have reached a bewildering variety of results. There is "a complete lack of uniformity among the lower federal and state court decisions." Larson, 33 Wash. L. Rev. 312 (1958). See generally Annotation, 97 L.Ed. 403 and Annotation, 6 ALR2d 581. About the best general summary of the case law appears in 11 Am Jur Trials 409 in which the author states that FELA

> "supersedes state laws relating to the liability of an interstate carrier by rail for injury to employees engaged in interstate commerce and provides the exclusive remedy for such injuries. Accordingly, the workmen's compensation acts of the several states have no application to an injured railroad employee whose relation to commerce brings him within the federal act."

We can find no comfortable basis in the maze of precedents for a contrary conclusion.

ORDER

The Referee's order dated November 13, 1980 is modified. SAIF's denial dated October 11, 1979 is affirmed.

BESSIE L. FERGUSON, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-09965
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Johnson's order which granted claimant an award of 85% unscheduled disability. SAIF contends that the award is excessive.

The facts as recited by the Referee are adopted.

The Orthopaedic Consultants found claimant's condition medically stationary as of the January 16, 1980 but found her precluded from returning to her regular occupation as a cook. They felt she was capable, physically, of light employment and rated her impairment of the cervical area as mild and minimal regarding the lumbosacral spine. Dr. Wilson, claimant's treating orthopedist, and Dr. Carlstrom, claimant's treating chiropractor, concurred with the findings of the Orthopaedic Consultants.

The evidence before us indicates claimant has not worked nor looked for work nor sought any type of vocational retraining since the date of injury, May 5, 1979. Claimant has shown no motivation to return to work or to find any type of gainful employment or retraining which would enable her to be a productive member of the work force. This lack of motivation makes it difficult to rate her loss of wage earning capacity. However, based on her age, her limited education and work experience together with the physical residuals from this industrial injury, we conclude that the Referee's award is excessive.

We feel that claimant would be adequately compensated for her loss of wage earning capacity for preclusion from returning to an occupation she performed for 18 years by an award of 50% unscheduled disability.

ORDER

The Referee's order dated January 9, 1981 is modified. Claimant is hereby granted an award of 160° for 50% unscheduled disability. This award is in lieu of all prior awards.

ARTHUR L. FRY, Claimant
Samuel Imperati, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-07455
August 28, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee McSwain's order which awarded him 40.5° for 30% loss of his left foot, contending the Referee's award is inadequate. We affirm.

Claimant's compensable injury resulted in the amputation of his fourth and fifth toes and some permanent disability to his first three toes. OAR 436-65-535 defines the toes as the body parts distal to the metatarsophalangeal articulations and, by implication, the foot as the body part proximal to the metatarsophalangeal articulations. There is no medical evidence in this record of involvement proximal to the metatarsophalangeal joints.

Claimant's total loss by amputation of the fourth and fifth toes is, by statute, worth a total of 8°. ORS 656.214(2)(3). The sparse medical evidence about permanent disability to claimant's other three toes does not include sufficient detail to meaningfully apply the rating criteria of OAR 436-65-537 to 436-65-540. Dr. Casey's February 6, 1981 report expressing an opinion based on different criteria is hardly helpful.

Had all five of claimant's toes been amputated at the metatarsophalangeal joints, his award would have been 34°. ORS 656.214 (2)(e); OAR 436-65-536(1) and (2)(c). Thus the Referee's award of 40.5° for this claimant with three remaining toes exceeds what a claimant would be awarded for the total loss of all toes. This can just barely be justified by the evidence of sensitivity to cold that is a consequence of claimant's injury and surgery. But there is certainly no basis for any increase in the Referee's award which, if it errs in any direction, is overly generous.

ORDER

The Referee's order dated March 19, 1981 is affirmed.

BARBARA HOLDER, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-00244
August 28, 1981

Reviewed by the Board en banc.

Claimant seeks Board review of Referee Johnson's order which required the SAIF Corporation to compute and pay claimant temporary total disability benefits at a higher rate, taking into account the shift differential pay claimant was earning when injured, but declined to impose a penalty because of SAIF's failure to do so.

At the time of her injury claimant's "base" pay was $779 a month, but, because of a 23¢ per hour shift differential, her actual wage was $810.77 a month. SAIF computed and paid claimant's temporary total disability benefits on her base wage ($779) rather than her actual wage ($810.77).

We agree with and adopt those portions of the Referee's order which held SAIF should have computed and paid claimant's temporary total disability benefits on the basis of her actual wage. Assuming arguendo that any issue involving the collective bargaining agreement between claimant's union and employer was properly before the Referee, we agree with and adopt the Referee's conclusion that such a private agreement cannot modify claimant's statutory rights. Cf. ORS 656.236(1).

We take the requirements that claimant's benefits should have been based on actual wages one step further than did the Referee--we impose a penalty for unreasonable refusal to pay compensation. In Allen Twigger, 27 Van Natta 182 (1979), we held that temporary total disability benefits should be based on actual wages. This Board is not here just to decide individual cases in isolation; rather, it is properly our role to articulate policy to fill legislative interstices. Once policy is articulated, as it was in Twigger, we expect it to be followed. SAIF's failure to comply with Twigger in this case was unreasonable.

ORDER

The Referee's order dated December 24, 1980 is modified to include the requirement that SAIF pay claimant an additional 25% of the amount by which it underpaid temporary total disability benefits between the date of claim and the date of the Referee's order; in all other respects the Referee's order is affirmed.

HENRY A. LYNCH, JR., Claimant
John O'Brien, Jr., Claimant's Attorney
R. Michael Haley, Defense Attorney
Request for Review by Claimant

WCB 79-02098
August 28, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Mulder's order which upheld the insurer's denial of compensation for his back condition, essentially on credibility grounds. Claimant filed no brief.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 5, 1980 is affirmed.

LEE M. McBRIDE, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Motion for Reconsideration

WCB 80-05943
August 28, 1981

Claimant has moved for reconsideration of the Board's denial of his Motion to Remand this claim to the Referee for further evidence taking, specifically consideration of a letter report of Dr. Benjamin F. Balme dated June 10, 1981.

Based upon our decision in Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012 (Order Denying Remand, June 25, 1981), and review of the authority cited by claimant in support of his Motion to Reconsider, we are not persuaded that claimant has shown either good cause or a compelling reason for remand. In fact, we are of the opinion that the evidence in question was available and obtainable at the time of the hearing. Having failed to prevail at the hearing, claimant now is attempting to present additional evidence to strengthen his case. As discussed in our order in Barnett, such cases do not warrant remand for taking further evidence under ORS 656.295(5) and OAR 436-83-480(2)(b).

ORDER

Claimant's Motion to Reconsider the denial of his Motion to Remand is denied.

GEORGE McNAMARA, Claimant
Peter Hansen, Claimant's Attorney
Ronald W. Atwood, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01658 & 79-10681
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of that portion of Referee Neal's order which affirmed denials of compensability issued by SAIF and Fred S. James Co. for claimant's condition diagnosed as adhesive capsulitis.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 2, 1981 is affirmed.

PAUL MILLER, Claimant
Robert Grant, Claimant's Attorney
Keith Skelton, Defense Attorney
Request for Review by Employer

WCB 78-08806
August 28, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Johnson's order which granted claimant an award of 35% unscheduled low back disability. The employer contends that the award is excessive and that the Determination Order which awarded no permanent partial disability should be reinstated.

Claimant, now age 67, was injured August 5, 1978 while employed by this employer as a watchman and cleanup man. The injury was diagnosed as a sprain of the lumbar area. After this injury claimant never returned to work nor sought other employment. Claimant retired on social security as of September 16, 1979. The August 5, 1978 injury claim was closed on November 15, 1978 with compensation for temporary total disability only.

The Referee found that claimant's subjective complaints were not supported by the objective clinical findings and that there was a motivation problem. We agree. He did, however, find that claimant suffered permanent impairment and granted him an award of 35% unscheduled disability. We disagree, but only with the amount of the award.

By a report dated August 31, 1978, Dr. Kendall found full range of motion of the lumbosacral spine with no pain on flexion, extension or left and right lateral bending. X-rays revealed degenerative arthritis L5-S1. Dr. Kendall diagnosed "acute lumbar sprain (resolving)." On September 14, 1978 Dr. Kendall reported claimant "pain free" for the last three days, noting that claimant was afraid to return to work because of fear of recurring symptoms. Dr. Kendall's September 26, 1978 report indicates that he was putting claimant on medication and, if there was no relief from the medication, then claimant would be restricted from heavy work. Subsequently, Dr. Kendall found claimant improved but placed a work restriction on him of no lifting over 25 pounds. He does not indicate whether this restriction is because of the industrial injury or because of the underlying degenerative arthritic condition.

Dr. Graham, a chiropractor and arguably the treating physician, found claimant's condition was medically stationary September 18, 1978 and released claimant for regular work with no permanent partial disability and indicating "patient has recovered."

The medical evidence, even construed in a light most favorable to the claimant, supports only a minimal permanent partial disability award. The question is whether the claimant's social/vocational situation warrants a greater award. We believe it does not. The claimant has voluntarily retired. We are convinced, as was the Referee, that he has no motivation to return to work. Because claimant has "retired," it is well nigh impossible to assess loss of wage earning capacity particularly on this record which is devoid of any vocational assessment. We, therefore, base our evaluation of disability solely on the medical evidence and find that claimant has a 10% unscheduled disability rather than the 35% awarded by the Referee.

ORDER

The Referee's order dated February 26, 1981 and Order on Reconsideration dated March 11, 1981 are modified. Claimant is awarded 32° for 10% unscheduled permanent partial disability for the injury of August 5, 1978. This award is in lieu of and not in addition to all prior awards for this injury. Claimant's attorney is allowed an attorney fee of 25% of the compensation awarded by this order. This is in lieu of the attorney fee allowed by the Referee.

GARY L. MINNICK, Claimant
Cash Perrine, Claimant's Attorney
Marcus Ward, Defense Attorney
Request for Review by Claimant

WCB 80-08251
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Nichols' order which affirmed a Determination Order of September 9, 1980 awarding no additional compensation for his 1970 back injury. The first Determination Order was issued on June 27, 1974 granting 75% unscheduled disability to his back and 10% disability for his left leg.

No brief was filed by either party. The Board assumes that the issues are the same as those presented at the hearing: Extent of disability, including permanent total disability, and attorney's fees.

After de novo review, the Board affirms and adopts the Referee's findings and conclusion, which stated:

> "The medical evidence does not support a finding that the claimant is totally disabled. There is evidence that he can do light work, therefore I do not find him to be permanently and totally disabled. His age should not totally count against his being re-employed. He has a new skill which opens new vocational opportunities to him which he did not have prior to his back injury. He has previously been awarded 75% disability and since that time his overall condition regarding his loss of earning capacity has improved."

ORDER

The Referee's order dated March 5, 1981 is affirmed.

ROBERT PENICK, Claimant
R. Ray Heysell, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06726
August 28, 1981

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Foster's order which remanded claimant's claim to it for reopening as of September 8, 1980 and for the payment of chiropractic treatment provided by Dr. Blandino. SAIF contends that claimant has failed to prove that his condition resulting from the July 1, 1979 industrial injury has worsened and requires further treatment and/or time loss.

We concur with the findings and conclusions reached by the Referee. Claimant has proven by a preponderance of the evidence that his claim should have been reopened as of September 8, 1980 for further temporary total disability benefits together with the continuing chiropractic treatment he was receiving from Dr. Blandino. However, we note that Dr. Blandino's September 8, 1980 report indicates claimant should remain off work for a period of three weeks. In his testimony at the hearing, Dr. Blandino indicated he was seeing favorable results from his treatment, "not curative, but some improvement." He stated that claimant should continue to see him on an "as needed" basis. We strongly infer that claimant is medically stationary at this time and any further treatment is palliative only. As this type of treatment can be handled under ORS 656.245, we recommend that SAIF submit this claim to the Evaluation Division of the Workers' Compensation Department together with any additional medical reports it may have for their consideration of the status of the claim under ORS 656.268.

ORDER

The Referee's order dated November 20, 1980 is affirmed. Claimant's attorney is granted the sum of $250 for his services at this Board review, payable by the SAIF Corporation.

DISSENT BY BOARD MEMBER McCALLISTER:

I disagree with the opinion of the majority. I would reverse the Referee's order and reinstate the SAIF Corporation's denial.

I adopt as my own the arguments recited by appellant, SAIF, in its brief. I find their arguments cogent to the issues on appeal and would reverse the Referee based on those arguments and conclusions.

DANIEL T. PETERS, Claimant
Tim Bailey, Claimant's Attorney
John Eads, Defense Attorney
Request for Review by Claimant

WCB 80-01262
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Ail's order which granted claimant an award of 80° for 25% unscheduled disability. Claimant contends that the award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 12, 1981 is affirmed.

JOYCE A. RUSSELL, Claimant
Arthur Slininger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-06434
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee St. Martin's order which affirmed the SAIF's denial of compensability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 29, 1980 is affirmed.

CURTIS SANDERSON, Claimant
Dwight Gerber, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-03957
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Seifert's order which granted claimant a total award of 96° for 30% unscheduled low back disability. Claimant contends that the award granted is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 10, 1981 is affirmed.

FRANK SCOVILL, Claimant
Allen Murphy, Jr., Claimant's Attorney
John Snarskis, Defense Attorney
Request for Review by Employer

WCB 80-10138
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The employer and carrier seek Board review of Referee Pferdner's order remanding a claim for aggravation of the claimant's 1975 shoulder injury, for payment of benefits including claimant's 1980 surgery. The employer and carrier contend that claimant's rotator cuff tear and need for surgery are not compensably related to his on-the-job injury of October 1, 1975 but was caused by some unspecified intervening on-the-job injury, perhaps while working for another employer.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 24, 1981 is affirmed. Claimant's attorney is awarded $350 for his services at this Board review, payable by the employer/carrier.

ERWIN W. SHERMAN, Claimant
W.D. Bates, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-04132 & 80-04133
August 28, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of that portion of Referee Mannix's order which awarded claimant 22.5% (72°) permanent partial disability for low back disability. Claimant contends that the award is insufficient.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 5, 1981 is affirmed.

WILLIAM C. SIMMONDS, Claimant
Robert Udziela, Claimant's Attorney
Request for Review by Claimant

WCB 80-7050
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The Claimant seeks Board review of Referee Fink's order which affirmed the Determination Order of July 9, 1980. Claimant contends he is entitled to permanent partial disability to scheduled body areas.

The Board affirms and adopts the Order of the Referee.

ORDER

The Referee's order dated February 20, 1981 is affirmed.

JOSEPH SPANU, Claimant
Robert Nelson, Claimant's Attorney
Margaret Leek Leiberan, Defense Attorney
Request for Review by Employer

WCB 79-10412
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee St. Martin's order awarding permanent total disability for claimant's 1979 shoulder injury. The employer requests reinstatement of the Determination Order which awarded 60% unscheduled permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 28, 1981 is affirmed. Claimant's attorney is awarded $350 for his services at this Board review, payable by the employer/carrier.

EDWARD J. TANGEMAN, Claimant
Virgil Osborn, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-05560
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee McSwain's order awarding 10% unscheduled permanent partial disability for claimant's compensable October 27, 1978 back injury, sustained when he fell from the back of a truck.

Although not disputing that claimant suffered a lumbosacral strain, SAIF contends that claimant's subjective physical complaints are not sufficient to prove disability. Claimant's treating physician's diagnosis and the physical limitations imposed on claimant's activities have been confirmed by other medical experts. A lack of substantial objective signs of a permanent back condition which affects earning capacity is not fatal to the claim. Bault v. Teledyne Wah-Chang, 53 Or App 1 (1981).

The Board, after de novo review, accepts the Referee's conclusions, which state in part:

> "I conclude that the claimant has suffered a lumbosacral musculo-ligamentous strain of chronic nature owing to the industrial injury. ...All of claimant's physicians agree to this, despite their skepticism about other complaints made, and despite the subjective nature of the basis for diagnosis. To be compensable, pain must go beyond mere discomfort and be disabling. I conclude that the claimant's limitations allow him to occasionally lift moderately heavy weight, in a proper manner. I conclude that the claimant experiences some discomfort on moderate activities involving bending, stooping, prolonged standing or sitting, and lifting.
>
> He cannot engage in any heavy labor. For one of the claimant's age, education, and vocational experience, I feel this represents a loss of 10% of the maximum allowable partial award for unscheduled disability."

ORDER

The Referee's order dated March 2, 1981 is affirmed. Claimant's attorney is awarded an attorney's fee in the sum of $300 for legal services rendered in this appeal.

SHIRLEY A. THOMING, Claimant
Larry Bruun, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-06378
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mongrain's order which affirmed the carrier's denial of her aggravation claim and did not assess a penalty for SAIF's failure to pay compensation. The Referee did find that claimant was entitled to treatment under ORS 656.245 for conditions resulting from her industrial injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 4, 1981 is affirmed.

WILLIAM TRUEAX, Claimant
Rolf Olson, Claimant's Attorney
Daniel Meyers, Defense Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant
Cross Request by EBI

WCB 79-10734
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Baker's order which found claimant's claim was barred for late notice of injury and dismissed the case. The carrier for Heart of the Valley, EBI, cross-requests review contending the Referee was correct in finding the claim barred, but if the Board finds the claim wasn't barred, then SAIF would be responsible for claimant's injury as Mr. Ardaiz (employer) was a general contractor licensed and doing business as Morningside Construction.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 6, 1980 is affirmed.

JEANIE TUNHEIM, Claimant
Michael Strooband, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06498
August 28, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Peterson's order which ordered it to vacate its denial and accept claimant's claim for an occupational disease as non-disabling and awarded an attorney fee to claimant's attorney of $900, payable by SAIF.

The Board affirms and adopts that portion of the Referee's order that concluded claimant had proven a compensable non-disabling occupational disease claim.

Regarding the issue of the attorney fee payable by SAIF to claimant's attorney, the Board calls attention to its Order on Review in the case of Clara Peoples, WCB Case No. 79-09890 (June 11, 1981) in which we stated:

> "When claimants prevail on denials of their claims, most of the Referees in most of the cases are awarding attorney fees in the range of $800 to $1,200."

The Board went on to say that efforts expended and results obtained could justify larger or smaller attorney fees. In the case at bar the efforts expended and the results obtained were below normal range and therefore the fee shall be below the normal range.

ORDER

The Referee's order dated January 28, 1981 is modified, only insofar as the issue of payment of attorney fees to claimant's attorney. Claimant's attorney is granted as and for a reasonable attorney fee for his services before the Referee, the sum of $500, payable by the SAIF Corporation. Claimant's attorney is further hereby granted as a reasonable attorney fee for his representation at Board review the sum of $300, payable by SAIF.

BARRY B. TURNBULL, Claimant
Wade Bettis, Jr., Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney
Request for Review by Employer

WCB 80-02231
August 28, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Neal's order which set aside the employer's denial and remanded claimant's claim for an occupational disease to it for acceptance and the payment of compensation as required by law.

The Board accepts the Referee's finding of fact. The sole issue is whether claimant has established a compensable occupational disease.

The claimant has a problem with respiratory allergies and claims exposure to air pollutants at work has either caused or aggravated his condition.

Claimant gave a history to Dr. Petrusek of intermittent throat itching for as long as he could remember. Both Drs. Rose and Petrusek indicated by their reports that claimant had pre-existing allergy conditions. Claimant was known to react to white pine, coffee, cigarette smoke, willow trees and, to a lesser degree, spruce and hemlock.

Dr. Rose, by a report dated July 8, 1980, opined that claimant's industrial exposure caused his pre-existing condition to become symptomatic. By a report dated August 4, 1980, Dr. Petrusek opined claimant did have pre-existing underlying allergy and that the industrial exposure caused symptoms but did not cause a worsening of the pathological underlying condition.

We find a preponderance of the evidence does not establish medical causation. The compensability test in cases like this was established by the Supreme Court in Weller v. Union Carbide, 288 Or 27 (1970):

> "...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."

Claimant has failed to sustain his burden of proof to establish (2) of the Weller test. None of the medical reports establish that claimant's exposure caused his underlying condition to become aggravated, worsened or accelerated and, therefore, claimant's claim for an occupational disease must be denied. Also see Stupefel v. Edward Hines Lumber Co., 288 Or 39; Thompson v. SAIF, 51 Or App 394 (1981); James v. SAIF, 290 Or 343.

ORDER

The Referee's order dated March 4, 1981 is reversed in its entirety.

BERNIE BISSONETTE, Claimant
Dan O'Leary, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-07114
August 31, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Mongrain's order which affirmed the SAIF Corporation's denial of claimant's claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 25, 1981 is affirmed.

PATRICK ELLIOTT, Claimant
David Vandenberg, Jr., Claimant's Attorney
Brian Pocock, Defense Attorney
Margaret Leek Leiberan, Defense Attorney
Order of Abatement

WCB 80-10598 & 80-04905
August 31, 1981

A Request for Reconsideration of the Board's Order on Review dated August 13, 1981 has been received from the employer in the above-entitled matter.

In order to give the Board time to fully consider this request, that Order on Review is abated. The claimant's attorney is hereby granted 20 days to file a response.

IT IS SO ORDERED.

DAVID H. KRANZ, Claimant
Larry Bruun, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-03910
August 31, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Neal's order approving as compensable claimant's claim for a low back injury and remanding it for processing and payment. Because the testimony at the hearing differed from the information available to SAIF prior to its April 10, 1980 denial of the claim, the Referee did not award a penalty and attorney's fee for the allegedly wrongful denial.

The issue on appeal is compensability of a claim for an alleged on-the-job injury of April 7, 1980. SAIF apparently contends that claimant's activities unloading lumber for about 10 minutes at home during the weekend immediately preceding the alleged injury might have caused the back injury. There is no medical evidence whatsoever which would support such a theory. The off-the-job work activity unloading a truck-load of lumber was light compared to claimant's on-the-job work activities the following Monday, according to claimant, a co-worker and a neighbor. Claimant had no back problems following the work at home and the rumor that his back injury occurred at home was not well founded.

While employed as a carpenter for P&C Construction Company on April 7, 1980, claimant and a co-worker loaded heavy pieces of scrap iron, weighing an estimated 200 pounds, into a pickup truck and then carried a heavy tablesaw from the basement to the third floor. At one point when the co-worker removed a door from its hinges so they could get through with the saw, claimant had to hold the saw, weighing between 130 and 200 pounds, by himself so it would not fall. His co-worker testified that claimant had difficulty holding the saw up because of its extreme weight and awkward shape. Claimant did not have much pain at the time except for going up and down stairs but felt pain in his low back on the way home from work. Although he worked the next day, he told David Rushmer that he had hurt his back; Rushmer then gave claimant pain pills. Claimant continued having problems with the heavy work. After being sent to a new job site the next day where heavy work was involved, claimant left the job and reported to the hospital emergency room. Dr. Harris, the orthopedist to whom he was referred by the hospital, diagnosed his condition as an acute lumbosacral strain and a very mild degenerative disc disease.

Referring to the transcript of the hearing, SAIF argues that claimant told a co-worker the day following the injury that he had probably hurt his back at home over the weekend. The transcript clearly shows, however, that the witness testified that he had been told that version of the injury by David Rushmer, not David Kranz. Because Rushmer waivered during his testimony and couldn't swear that claimant had actually told him that he had hurt his back unloading wood at home, the Referee chose instead to believe claimant's testimony that he did not tell other workers that he had injured his back at home. Apparently, even the letter written to SAIF by a company employee, Mr. Campbell, regarding the conversation with claimant was derived from second or third hand information from Mr. Rushmer.

Claimant's testimony that he had no back problems following the activity at home was corroborated by a co-worker who had helped him unload the lumber, a friend and a neighbor.

Citing Weller v. Union Carbide, 288 Or 27 (1979) and Autwell v. Tri-Met, 48 Or App 99 (1980), SAIF also argues that claimant must prove a worsening of his preexisting degenerative disc disease in order to prevail on a claim for a low back injury arising from an identifiable incident at work. SAIF also argues that James v. SAIF, 290 Or 343 (1981) precludes a claim for traumatic injury where similar off-the-job exposures and conditions are substantially the same as those on-the-job. None of the cases relied upon by SAIF are in point, since this claim is one for a traumatic injury with the symptoms delayed only a matter of hours.

Here, the uncontradicted medical evidence clearly establishes that claimant's back problems are attributable to an acute back strain superimposed upon a preexisting degenerative disc disease. Dr. John T. Harris, claimant's treating orthopedist, diagnosed claimant's injury as an "acute lumbosacral strain syndrome," reporting that claimant's symptoms and the findings were "consistent with severe lumbosacral sprain and possible ruptured disc which could very well have happened with the work incident which he described." In his deposition, Dr. Harris explained, "...the true definition of acute versus chronic is that acute is something that comes on suddenly..."

After our de novo review, we conclude that the preponderance of the evidence shows that claimant's back condition is the result of his April 7, 1980 on-the-job work activity and is, therefore, compensable.

ORDER

The Referee's order dated February 3, 1981 is affirmed. Claimant's attorney is hereby granted $500 as a reasonable attorney's fee for legal services rendered in this appeal.

BETTIE L. ROGERS, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-08127
August 31, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's order which granted claimant an award of 80° for 25% unscheduled upper back disability but found no psychological permanent partial disability.

No briefs were filed in this matter. On the initial request for review, claimant contends she is entitled to further temporary total disability, permanent partial disability, penalties and attorney fees.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 18, 1981 is affirmed.

JOYCE M. WHEATLEY, Claimant
Robert Udziela, Claimant's Attorney
Delbert Brenneman, Defense Attorney
Request for Review by Claimant
Cross Request by Employer

WCB 80-01744
August 31, 1981

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review and the employer cross requests review of Referee Neal's order. The issues are extent of temporary total disability and permanent partial disability.

The most recent (May 19, 1980) Determination Order granted compensation for temporary total disability through April 17, 1980. Although the Referee did not literally so order, her apparent intent was to rule that temporary total disability compensation should have ended on March 24, 1980. We agree and will so order, subject to one qualification. Claimant was enrolled at the Northwest Pain Center from July 15, 1980 to August 1, 1980. She is entitled to temporary total disability compensation during this period.

The Determination Order granted 20% unscheduled permanent partial disability. The Referee awarded an additional 10% unscheduled permanent partial disability. We find this to be inadequate. Considering all factors in OAR 436-65-600, et seq, we conclude claimant's permanent partial unscheduled disability is 45%.

ORDER

The Referee's order dated September 25, 1980 is modified. Claimant is entitled to compensation for temporary total disability from February 8, 1980 to March 24, 1980 and from July 15, 1980 to August 1, 1980; this is in lieu of the temporary total disability awarded by the May 19, 1980 Determination Order. Claimant is entitled to 144° (45%) unscheduled permanent partial disability; this is in lieu of the permanent partial disability awarded by the January 31 and May 19, 1980 Determination Orders and by the Referee's order. Any right to setoff shall be provided in OAR 435-54-320.

Claimant's attorney is not entitled to a fee payable from the temporary total disability compensation allowed by this order (1) Because of the setoff possibility we do not now know whether our award represents any real increase for claimant; and (2) claimant's attorney presented no argument allowance of temporary total disability from July 15 to August 1, 1980. Claimant's attorney is entitled to a fee payable from the increased permanent partial disability awarded by this order; said fee is to be 25% of the increased permanent partial disability compensation, not to exceed $750.

HELEN M. KNAPP, Claimant
Richard Nesting, Claimant's Attorney
Bill Davis, Defense Attorney
Order of Abatement

WCB 78-05601
September 3, 1981

It appearing to the Board that there may have been some possibility of mismailing of the Order on Review in the above-entitled case dated August 4, 1981 which would have deprived the parties hereto of their 30-day appeal rights, we are hereby abating that order.

IT IS SO ORDERED.

RANDY AINSWORTH, Claimant
Robert L. Burns, Claimant's Attorney
R. Michael Healey, Defense Attorney
Request for Review by Employer

WCB 80-6450
September 4, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Williams' order which set aside its denial and ordered it to process claimant's claim for an occupational disease.

The Referee's recitation of the facts are adopted as our own.

Based on the medical evidence from Dr. Panian we find claimant has not met his burden of proof that his symptoms of headaches, bloody nose, ear problems and eye problems are causally related to his work as a painter using lacquers. In Dr. Panian's report of February 5, 1980, he states, "It is possible that the lacquers which he is exposed to have irritated the mucous membranes." By report dated August 12, 1980,, the doctor indicated "It is possible that the patient's exposure to lacquers has caused his headaches". In his last report of September 24, 1980, Dr. Panian reported that it was also possible claimant had chronic sinusitis which may account for his headaches and discomfort.

We are not persuaded that Dr. Panian's reports are sufficient to carry claimant's burden of proof. No testing was ever done to establish what claimant was or is allergic to nor was any definitive diagnosis ever reached. The denial will be affirmed.

O R D E R

The order of the Referee, dated November 11, 1980 is reversed. The denial issued by employer on July 11, 1980 is reinstated.

JOSEPH T. ALIRE, Claimant
David Glenn, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order on Review

WCB 80-9060
September 4, 1981

Reviewed by Board Members Barnes and Lewis.

The SAIF seeks Board review and claimant cross requests review of the Referee's order which granted claimant an award of 128 degrees for 40% unscheduled disability. SAIF contends that the award is excessive and the claimant contends that the award is inadequate.

The Board affirms and adopts the order of the Referee.

O R D E R

The Referee's order dated March 19, 1981 is affirmed. Claimant's attorney is granted the sum of $200 for his services at this Board review, payable by the SAIF Corporation.

ROY C. ALLEN, Claimant
Bischoff, Murray & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-11129
September 4, 1981

Reviewed by Board Members McCallister and Lewis.

The Claimant seeks Board review of Referee Peterson's Order which affirmed the Determination Order of December 3, 1980 which had granted claimant 15 degrees for 10% loss of the left leg.

The Board affirms and adopts the Order of the Referee.

O R D E R

The Referee's Order dated April 21, 1981 is affirmed.

DAVID BARNETT, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-10902
September 4, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF seeks Board review of Referee Baker's order which disapproved the denial of medical services.

The Board adopts the Referee's recitation of the facts as its own.

After claimant's industrial injury of July 25, 1978, a final examination was performed by Dr. Kelley on February 6, 1979. That examination revealed very little objectively to support anything more than minimal residual impairment. Subsequently, the claim was closed by a Determination Order of February 27, 1979 with compensation for temporary total disability only.

After this injury claimant did return to his regular occupation as a pipelayer for approximately six weeks. He then went to work for Cushing Brothers doing curbing and gutter work for a limited duration. He now spends his full time working on a boat he is building which he has been working on for three and one half years.

Claimant sought no medical treatment for over a year after the Determination Order. In May 1980, he sought treatment from Dr. Pearson, a chiropractor. Upon examination by Dr. Pearson all orthopaedic and neurological testing was normal. Dr. Pearson felt that claimant had never received total rehabilitation to his injured tissues from the industrial injury.

Claimant was examined by Dr. Tilden, a chiropractor, at the request of SAIF. Dr. Tilden indicated claimant told him he was building a boat requiring bending, lifting and twisting; that after two full days of painting the deck of the boat he suffered back pain. Dr. Tilden felt claimant's condition was stationary and that with claimant's generalized complaints and "his continuing level of activity", he opined there was no causal relationship between the July 1978 injury and claimant's on-going treatment.

The Board concurs with Dr. Tilden and finds his opinion more persuasive than that of Dr. Pearson. Dr. Tilden's findings on examination and Dr. Kelly's findings on examination just prior to claim closure are substantially alike. Dr. Kelley found only minimal residuals and minimal findings objectively, and Dr. Tilden found claimant stationary. These examinations, taken together with claimant's activities during the 15 month interval between treatments, indicate to us that the need for on-going treatment is no longer related to the injury of July 1978.

O R D E R

The order of the Referee, dated February 12, 1981, is reversed. The denial issued by the Fund for medical services provided by Dr. Pearson is reinstated.

PHYLLIS M. ENYART, Claimant
Drakulich & Carlson, Claimant's Attorneys
Thomas Mortland, Defense Attorney
Request for Review by Claimant

WCB 80-789
September 4, 1981

Reviewed by Board Members McCallister and Lewis

Claimant seeks Board review of Referee Fink's order which affirmed the carrier's denial of her claim for aggravation and found penalties were not warranted for the carrier's handling of this claim.

The Board affirms and adopts the order of the Referee.

O R D E R

The Referee's order dated November 20, 1980 is affirmed.

JOE HUNT, Claimant
D. Kevin Carlson, Attorney
Own Motion Determination

Own Motion 80-0007M
September 4, 1981

Claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim. Claimant had also requested a hearing appealing from a Determination Order of November 16, 1979 The Board, by an order dated January 28, 1981 referred this own motion matter to a Referee to be heard on a consolidated basis with claimant's appeal from the Determination Order because of some ambiguity in the application of Coombs v. SAIF 39 OR App 293 (1979).

The Referee held a hearing and issued his recommendation on March 6, 1981 wherein he recommended that the Board deny own motion relief. We generally agree. Claimant is entitled to compensation for temporary total disability from September 30, 1980 to October 10, 1980, inclusive and no further award of permanent partial disability.

IT IS SO ORDERED.

JOE L. HUNT, Claimant
D. Kevin Carlson, Attorney
Request for Review by Claimant

WCB 89 [sic]-9453
September 4, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Leahy's order which affirmed the Determination Order of November 16, 1979 which granted no additional award of permenent partial disability beyond the 20% unscheduled disability by prior awards. Claimant contends that he is permanently and totally disabled.

The facts as recited by the Referee are adopted as our own.

Claimant's injury occurred on June 5, 1975 while employed as a maintenance machinist, a job he is now precluded from doing. Claimant's injury was diagnosed as lumbosacral sprain but it was also noted that he had severe degenerative disc disease. Claimant is 6'3" and weighs 280; the medical evidence indicates he has been told to lose weight on numerous occasions but has failed to do so.

Claimant's claim was initially closed on August 27, 1975 with temporary total disability only, but was later reopened. Subsequently it was closed again by a second Determination Order which granted him 20% unscheduled low back disability.

Claimant underwent a myelogram which was normal and Dr. Pasquesi rated his impairment at 20% and placed work restrictions on him of no repetitive bending, stooping, twisting or lifting over 30 pounds. The Orthopaedic Consultants on September 17, 1979, three years after their first examination, diagnosed lumbar strain and felt that due to the underlying disease claimant would be periodically symptomatic.

The Orthopaedic Consultants examined claimant again on December 12, 1980. They found he was still medically stationary and capable of light to sedentary work. The total loss of function related to this industrial injury was rated as mild.

Claimant is 43 years of age and quit high school at age 17. His work history is almost exclusively in manual labor. Claimant's motivation is suspect but the preponderance of the medical evidence indicates he can be gainfully employed. Claimant is not permanently and totally disabled.

We find that claimant is precluded from heavy manual labor and must be rehabilitated into some type of employment in the light category and we urge Field Services Division to contact him for some type of job assistance or job placement. We feel that the award granted by the Determination Order is inadequate to compensate claimant for his loss of wage earning capacity and find that he is entitled to an award of 96 degrees for 30% unscheduled low back disability.

O R D E R

The order of the Referee, dated March 16, 1981 is modified. Claimant is granted an award of 96 degrees for 30% unscheduled low back disability. This award is in lieu of all prior awards.

Claimant's attorney is granted as and for a reasonable attorney fee, the sum of 25% of the increased compensation granted by this order.

HELEN M. KNAPP, Claimant
Richard Nesting, Claimant's Attorney
Bill Davis, Defense Attorney
Republished Order on Review

WCB 78-05601
September 4, 1981

The Board's Order on Review dated August 4, 1981 was abated by order dated September 3, 1981 because of a possible problem with whether the Order on Review was properly mailed.

The Board's Order on Review dated August 4, 1981 is hereby readopted and republished effective this date.

IT IS SO ORDERED.

HAROLD B. LOOPER, Claimant
A.E. Piazza, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 78-5162
September 4, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Wolff's Order which awarded claimant compensation for permanent and total disability dating from October 28, 1980. The issue on review is the extent of claimant's permanent disability.

Claimant sustained compensable injuries on August 1, 1975 as the result of a serious truck accident. Claimant was driving a fuel truck for Olympia Petroleum Company, for which he had been a working co-owner since 1936. Claimant had extensive treatment for injuries to the head, lungs, left rib cage, left arm and left leg.

A Determination Order dated June 13, 1978 awarded compensation equal to 50% loss of claimant's left leg and temporary total disability from August 1, 1975 through March 28, 1978.

There are two types of permanent and total disability: (1) that arising entirely from medical or physical incapacity; and (2) that arising from physical conditions of less than total incapacity plus nonmedical social and vocational conditions, which together result in permanent and total disability. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Under ORS 656.206 (3), claimant has the burden of proving permanent and total disability status, and establishing that he has made reasonable efforts to obtain regular, gainful employment. However, if the evidence shows that it would be unreasonable for claimant to try and seek employment, then the claimant need not demonstrate efforts to obtain such employment. Butcher vs. SAIF, 45 Or App 313 (1980); Dock A. Perkins, WCB Case No. 78-09922 (Order on Review, June 25, 1981).

Based on the findings discussed below, the Board finds that, although claimant has suffered considerable disability, he has not suffered total disability, such that would make it unreasonable for him to try and seek regular, gainful employment. We also find that claimant has not made reasonable efforts to obtain such employment as required by ORS 656.206(3).

On April 15, 1977, Dr. Andrew Lynch, claimant's treating orthopedic surgeon, noted in his chart note, "The patient tells me that he has no intention of going back to work and feels that he is completely unable to." Claimant testified at the hearing on October 23, 1980 that he has made no attempt to find employment since his accident. He sold his interest in the petroleum business about one year after his accident. After claimant left the hospital and before he sold his business, he testified that he worked at his desk in his business for an hour or two each day.

Both Dr. Lynch and Dr. James Quinn, claimant's treating thoracic surgeon, filled out forms indicating claimant's restrictions and physical activity. Dr. Lynch's report dated August 8, 1978 indicates that the claimant could work five hours of an eight hour work day. Of those five hours claimant could sit two hours, stand two hours and walk one hour. Claimant had some lifting restrictions, extensive carrying restrictions, and restrictions involving bending, squatting, crawling, and climbing. On March 16, 1979, Dr. Quinn indicated that claimant could sit through an eight hour work day and could stand for one of those hours, but could not walk. He also indicated that claimant had lifting and carrying restrictions and could not squat, crawl, climb, bend more than occasionally, or reach above shoulder level with his left arm.

Claimant testified that he has not sought out employment because he is in too much pain, and that he could not do even a partials day's work considering his physical condition. At the hearing, Donald Hansen, a qualified self-employed vocational consultant, identified several jobs he felt claimant would be qualified to perform. Mr. Hansen noted that claimant had a stable vocational history as co-owner and employee of his petroleum company since 1936. Mr. Hansen testified at length about the skills claimant had derived from being a co-owner, a tank truck driver and a saleman of petroleum products. Taking into account claimant's disabilities, Mr. Hansen identified the jobs of parking lot attendant, gate tender, box office cashier, hotel and motel clerk, answering service operator, clerk, and lunch truck driver. Mr. Hansen stated that the clerk and lunch truck driver jobs may have to be eliminated, considering the sitting restrictions in Dr. Lynch's report. We conclude from the evidence that there are possible job opportunities open to the claimant, but that no attempt was made to pursue them, even on a part time basis.

The evidence indicates and the Board finds that claimant suffered a 75% loss of function in his left leg. This includes loss of function caused by claimant's hip and knee problems. As a result of the compensable injuries, claimant's left leg is one and three quarter inches shorter. He had a total knee replacement which still leaves him with a limited range of motion. He has continuous pain in his knee. Calcium nodules have formed on his knee which cause pain even when only his his pants leg rubs against them. He has tingling and swelling in his left foot. He walks straight legged with a cane and has limitations on the amount of walking he can do. Finally, claimant has developed trochanteric bursitis on his left hip since the accident for which he has received pain killing injections.

The Determination Order failed to take into account claimant's other problems in the left arm, trunk and head areas.

The Board finds that claimant suffered a 40% loss of function in his left arm. Claimant had to undergo surgery for thoracic outlet syndrome in his left shoulder and arm. He still suffers from minimal median and ulnar nerve compression in his left arm. Medical reports, claimant's testimony and claimant's wife's testimony indicate that claimant continues to have clumsiness with his left arm. Claimant cannot grasp and hold objects without concentrating and then may only lift light objects. He experiences tingling and swelling in his left arm and it is very cold. He has decreased sensation in three of his digits in his left hand.

The Board finds that claimant suffered 25% unscheduled disability because of trunk and head disability. The truck accident fractured claimant's ribs, numbered two through eight in his left rib cage. The ribs healed abnormally, which causes rigidity of movement and grating upon movement. He has constant pain in the left rib cage area of which he complains bitterly. He has undergone alcohol block treatment and intercostal blocks with Cortisone treatment to relieve the symptoms of neuralgia. The treatment has been only minimally effective, and multiple rhizotomies have been suggested to permanently numb the left rib cage area.

Medical reports indicated claimant suffered a cerebral concussion/contusion with possible basal skull fracture on the left and superimposed metabolic encephalopathy. Medical reports, claimant's testimony, and claimant's wife's testimony indicate that the claimant now suffers some loss of memory and is slower to make decisions. Claimant's wife testified to a personality change in the claimant, such that from time to time he now reacts almost violently to petty inconveniences.

ORDER

The Referee's Order dated October 28, 1980 is reversed. Claimant is awarded 25% left leg disability in addition to that awarded by the Determination Order. Claimant is also awarded a 40% scheduled disability for his left arm and a 25% unscheduled disability as a result of problems in his trunk and head area.

Claimant's attorney is allowed 25% of the increased compensation awarded by this order over that awarded by the Determination Order as a reasonable attorney fee, not to exceed $2,000.

ANNE PACHE, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-3456
September 4, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Baker's order which affirmed the SAIF's denial of compensability.

The Board affirms and adopts the order of the Referee.

O R D E R

The Referee's order February 13, 1981 is affirmed.

MARILEE A. ALLEN, Claimant
Samuel Imperati, Claimant's Attorney
Bruce Bottini, Defense Attorney
Order on Review

WCB 80-03928
September 10, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee McSwain's order which affirmed a January 21, 1980 Determination Order which awarded claimant temporary total disability. Claimant contends she has permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 31, 1981 is affirmed.

ROBERT BACA, Claimant
Gary Galton, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order on Review

WCB 80-01748
September 10, 1981

Reviewed by Board Members Barnes and Lewis.

The worker's ORS 656.226 beneficiaries seek Board review of Referee James' order which denied them any additional award greater than the 40% unscheduled permanent partial disability award the deceased worker had received by stipulation before his death (which was unrelated to the compensable injury). The worker's beneficiaries filed no brief.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 14, 1980 is affirmed.

IVAN DAVIS, Claimant
Evohl Malagon, Claimant's Attorney
Guy Randles, Defense Attorney
Order on Review

WCB 79-10748
September 10, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Seifert's order which found proper claim closure by a Determination Order of February 6, 1980 and affirmed the extent of disability awarded by a Determination Order of January 9, 1978. Claimant contends that claim closure was premature or that the extent of disability awarded is insufficient.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 30, 1981 is affirmed.

WILLIAM A. DYER, Claimant
Alan Holmes, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-02384
September 10. 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee McSwain's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation as due.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 24, 1981 is affirmed.

Claimant's attorney is granted the sum of $350 for his services at this Board review, payable by the SAIF Corporation.

GEORGE L. FRAZIER, Claimant
Robert Muir, Claimant's Attorney
Brian Pocock, Defense Attorney
Request for Review by Claimant

WCB 80-02722
September 10, 1981

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Peterson's order which affirmed a Determination Order which awarded claimant 16° for 5% permanent partial disability. Claimant contends the award is insufficient.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 25, 1981 is affirmed.

TOMMY F. GRISSOM, Claimant
Robert Grant, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 78-8968 & 79-4810
September 10, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Mulder's order remanding a denied 1979 claim for aggravation of claimant's compensable January 22, 1975 knee injury (WCB No 79-4810, Claim No. PD 70480) and at the same time awarding permanent total disability effective September 27, 1978 for claimant's December 6, 1976 back injury (WCB No. 78-8968, Claim No. PD 70280). No formal disposition was made of the Occupational Disease claim, ODD No. 4595.

This case involves multiple claims for successive injuries against different employers, with alternative theories of recovery. Our de novo review was complicated by the lack of any reliable statement of the issues. No appellate briefs were filed. The parties relied instead on briefs submitted to the Referee more than a year after the actual hearing. Claimant's ten-page brief merely emphasized the extent of claimant's disabilities, contending that the combination of problems faced make it obvious that he is permanently and totally disabled. SAIF's brief stated the issues as "aggravation of denial for claimant's right knee condition and, we assume in the alternative, the extent of disability", noting that claimant had, in final argument, treated the knee condition as a "dry aggravation".

The Referee summarized the issue as being "a challenge of a denial of aggravation benefits and a request for permanent total disability", with the added note that the aggravation deals with the right knee.

Our inspection of the record reveals that three separate claims were consolidated for hearing:

1. WCB Case No. 78-8968; Claim No. TD 205741; arising out of claimant's 1976 back injury (right side) while employed by Jack Mathis General Contractor; claimant contest the November 7, 1978 Determination Order, and raises other issues;

2. WCB Case No. 79-4810; Claim No. PD 70280, arising out of claimant's 1975 injury to the right knee while employed by Jack K. James Construction, Inc., claimant contests SAIF's May 30, 1979 denial of a May 1979 aggravation claim and request for related medical services;

3. ODD Claim No. 4595; Compensability of a March 12, 1979 denied claim filed with Jack Mathis Construction for an occupational disease of the back and legs (right and left sides); Request for Hearing filed in WCB Case No. 78-8968 (back injury case).

ISSUES RAISED AT THE NOVEMBER 7, 1979 HEARING:

WCB Case No. 78-8968 (1976 Back Injury; Claim No. TD 205741)

Claimant's initial Request for Hearing, filed November 14, 1978, raised the issue of extent of disability of his 1976 back injury claim against Jack Mathis Construction Company. It contests a November 7, 1978 Determination Order--the second one issued on the claim--which increased the back disability award to 20% permanent partial disability. An Amended Request for Hearing, filed November 27, 1978, raised the issue of whether claimant's back condition was stationary, and entitlement to reopening based on an alleged worsened back condition.

ODD Claim No. 4595 (1979 Occupational Disease Claim)

On April 2, 1979, claimant's third Request for Hearing, filed under the title of Claim No. TD 205741 (the back injury case) raised the issue of compensability of the 1979 claim for occupational disease of the back and leg (both sides) first diagnosed on December 6, 1976, the date of the back injury in the other claim. This claim for occupational disease was presumably titled as Claim No. TD 205741 because SAIF's denial had included the injury claim number as well as a new occupational disease claim number. The claim was apparently filed as an alternative theory of recovery for disability, alleging back and leg problems on both the left and right sides. That Request for Hearing was filed in the 1978 contested back injury case against Jack Mathis Construction Company.

On June 4, 1979 claimant filed another Request for Hearing, this one relating to an old 1975 knee injury, for which an aggravation claim, filed in May of 1979, had been denied on May 30, 1979 on the ground that the condition was not causally related to the 1975 injury. The Request for Hearing raised the issues of entitlement to reopening based on an alleged worsening and the question of whether the knee was in fact medically stationary.

At the November 7, 1979 hearing, claimant moved to amend the Request for Hearing to include the extent of disability on a theory of a "dry aggravation" of the knee condition, should the Referee find that it had become medically stationary.

DISCUSSION:

The Referee awarded permanent total disability effective September 27, 1978. It is presumed that the Referee relied upon Dr. Matthews' September 26, 1978 opinion that claimant was medically stationary. We can only guess that the Referee believed claimant's total disability to be materially caused by his 1976 back injury, rather than by the claimed occupational disease, although no specific or general findings were made on these issues.

We do not know whether the Referee included in his considerations of the extent of permanent disability claimant's pre-existing but allegedly worsened knee condition. We do know, however, that claimant's treating physician, Dr. Matthews, took both into consideration when he evaluated the extent of claimant's physical capacity to work. We also know that in May of 1979, claimant's knee materially worsened to the point that his doctor recommended either a joint debridement or a total knee replacement. Absent medical evidence which controverts Dr. Matthews' opinion that the condition is causally related to the 1975 injury, the Referee concluded that it was related and therefore compensable.

Claimant contends that he has been unable to work since April 10, 1978, even without the worsened knee condition. Dr. Matthews saw the back condition as claimant's primary problem and authorized time loss from April 10, until the date he declared claimant to be medically stationary, September 26, 1978.

Arguably, the knee condition may not have been included in the Referee's evaluation of extent, since he remanded the separate aggravation claim for the knee for payment of benefits, although the nature of those benefits are not described. Unless it was intended that the aggravation claim be remanded for payment of "245" benefits only, another interpretation is possible: that the Referee awarded permanent total disability benefits from and after September 27, 1978, together with temporary total disability benefits from May 1979 on the aggravation claim for the knee.

In the hope of clarifying the issues, we look to the transcript of the hearing:

> REFEREE: I have not read any of the documents in this matter except for purposes of identification. Is there a denial of benefits at issue here and that's an aggravation in May 1979.
>
> MR. BROWN: (for SAIF) No. There's a denial of occupational disease claim of March 28, 1979.
>
> REFEREE: What exhibit number?
>
> MR. BROWN: Exhibit Number 36.
>
> MR. GRANT: (for claimant) I don't think we're here on a denial of an aggravation claim, are we?
>
> MR. BROWN: There's no aggravation claim.
>
> REFEREE: Well, the reason I asked this is because this is an unusual case in that it involves two anatomical areas of the body and I want to be sure to understand exactly what the relief Claimant is seeking in this matter. (TR. pages 5 and 6)

Claimant's motion to amend the hearing request on the knee aggravation claim was opposed by the defendant. SAIF objected on the grounds of surprise and their contention that it would be improper to evaluate extent until after surgery should the claim be found compensable. We agree. Nowhere can we find the Referee's ruling on that motion. We only surmise from the terms of the order that the motion was denied on the basis that the knee was not medically stationary, or that it might be materially improved through surgical procedures to be covered under the order of remand and should not therefore be evaluated until after that surgery.

Claimant's 1979 Occupational Disease claim against his 1976 employer appears to be somewhat specious in view of the fact that two accepted injury cases dealing with the same or similar parts of the anatomy were already pending. The Referee ventured no discussion of the occupational disease claim other than to note that it had been filed and denied. We are at a loss to explain why there were no specific findings on this claim, unless there was some agreement "off the record" to which we are not privy.

If the Referee reasoned that the occupational disease claim became moot once responsibility for claimant's disability was placed with the 1976 back injury, we would agree. We believe, however, that in the interest of keeping the issues at some manageable level, claimant's Motion to Consolidate the compensability issue on the occupational disease claim with the extent of disability issue on the back injury claim should have been denied. We are not surprised that there is so little in the record which might tend to prove the occupational disease theory. The result is an obvious failure of proof on that claim and we will not address it further.

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The first issue to be resolved is the extent of claimant's permanent disability resulting from his 1976 back injury. Claimant seeks an award of permanent total disability, which, if awarded, would leave as the only remaining issue the question of his entitlement to specific medical services on his knee injury claim.

If, on the other hand, claimant is entitled to something less than permanent total disability for the back condition, then it must be determined whether the aggravation claim for the knee is compensable and whether he is entitled to additional temporary total disability benefits. If a worsening is found to be causally related to the 1975 knee injury, surgery will be covered by a reopening of the claim, with the extent of any residual disability to be assessed following surgery and upon claim closure.

EXTENT OF DISABILITY ON 1976 BACK INJURY

Claimant had no reported prior injuries, industrial or otherwise, before January 24, 1975 when he fell off a scaffold, twisting and cutting his right leg. Dr. Matthews diagnosed the injury as a valgus strain of the right knee, noting tenderness of the medial collateral ligament and that the medial ligament was slightly loose. He commented that it was a "fairly pure injury to the medial collateral ligament partially stretching it." X-rays showed a few bony fragments, possibly some loose joint bodies, but the doctor said they were similar to prior X-rays taken the month before. Claimant's knee was put into a cast and he was released for work on April 14, 1975. The knee claim was closed in October of 1975 with no award for permanent disability. There followed a period of over two years when apparently no treatment was given for the knee.

Claimant suffered a second injustrial injury on December 6, 1976 while shoveling and placing concrete in a twisting and turning motion. Dr. Campagna found severe nerve root compression and in January of 1977 performed decompressive laminectomy at L3-4 for a protruded disc. Claimant was released for work in April, but continued to have back problems. Dr. Matthews gave him cortisone injections and valium, with claimant taking as much as 60 to 80mg of valium a day. Dr. Campagna was under the mistaken impression that claimant's work was fairly light, although claimant continued to work as a cement finisher at somewhat restricted duty. His work after release involved tamping of concrete, which claimant considered to be medium physical activity.

At the time Dr. Matthews again treated claimant's knee in February of 1978, he noted that claimant was also having thoracic back pain. He decided in April to give claimant injections at L5 midline. Claimant testified that the pain was such that he could not continue working and as a result he quit working on April 8, 1978. When the injections did not help, Dr. Matthews sent claimant to Dr. Campagna for a repeat neurological evaluation. Dr. Campagna was at a loss to explain the symptoms.

Both Dr. Matthews and Dr. Campagna agree that claimant was unable to work since April 10, 1978. Dr. Campagna'a April and August 1978 examinations showed that claimant's back motions were limited to 50% of normal, although there was no evidence of nerve root compression. The April exam had shown that claimant's patellar reflexes were barely obtainable on the right. Again in August, deep tendon reflexes were moderately hypoactive bilaterally. On Septeber 26, 1978, Dr. Matthews offered a comprehensive report regarding claimant's condition.

> "From a purely objective point of view, not considering age, work experience, etc., one would say this patient would be a reasonable candidate for most light types of work and some moderate types of work. Considering social and personal factors, it seems unlikely he will return to work short of starvation conditions. . . The patient's main long term problems have been related to degenerative difficulties. Various industrial injuries have created transient aggravations of these degenerative problems. . . The patient, at the present time, is essentially medically stationary. He continues on conservative treatment but there is no curative treatment being undertaken at the present time and none is planned."

On the basis of that report, the claim was again closed by Determination Order dated November 7, 1978 awarding an additional 10% unscheduled disability, for a total of 20%, and granting time loss from April 11, 1978 through September 26, 1978.

Again, on December 12, 1978, Dr. Matthews addressed the question of claimant's working capacity:

> "I would say he is, relatively speaking, totally disabled for cement finishing work. This is not to say that some individuals with similar problems would not be doing that sort of work but when one considers his medical problems, his age, and the relative difficulty of that kind of work, I would say it would not be unreasonable to think of him as totally disabled for that type of work. . . . he probably could do some type of work. Relatively light activities involving a chance to rest, an opportunity to change positions, an opportunity to stand part time or sit part time, etc., could be performed by most individuals with his capabilities."

on January 22, 1979, the doctor noted that Social Security had classified claimant as a totally disabled person.

On August 7, 1979, Dr. James E. Dunn, the neurological surgeon who took over claimant's care, advised that claimant was limited to 25 pounds lifting with no excessive bending, twisting, or turning. He commented that "apparently he is going to retire so rehabilitation efforts would be fruitless."

Claimant worked as a cement finisher since 1952, was born on an Arkansas farm in 1916, one of thirteen children, and has six years of formal education. He has been engaged in heavy or medium physical labor all of his working years. As a cement finisher, his work included placing concrete forms, tamping and trowling wet concrete, working on his knees on knee boards for hand troweling, and pulling and cleaning forms after a pour had set. He joined the union in 1955 through which he had regular employment most of the time prior to his injuries. His work was considered excellent and there was a good demand for his skilled services. Letters of recommendation are contained in the record which attest to his professionalism and motivation. Work assignments were received through the union dispatcher's office.

The business agent for the union testified that claimant had, prior to his injuries, been regularly employed but that when claimant finally retired he did not feel justified to assign him out on a job in view of his physical limitations and the nature of the work. He knew of no job in the industry where claimant could go out and simply stand around and supervise. The agent testified that had claimant been able to work another two weeks his union pension would have been higher, but that despite the reduction claimant felt compelled to retire because of his disability.

Two vocational experts testified as to opposing views concerning claimant's employability. A vocational consultant who interviewed claimant at his home on September 27, 1979, R. E. Adolph, testified that claimant had no transferrable skills and that even had he applied for re-entry assistance from Field Services Division services would not, in his opinion, have been provided due to his age and disability. Mr. Adolph's report concluded:

> ". . . In consideration of his age, behavior, subjective pain, necessity to lie down periodically and his medication regimen it should be concluded that there is no work he could do on a scheduled, full time, productive basis."

Thomas Stipek, PhD, the psychologist and vocational consultant retained by SAIF, testified from his review of the records, that there were several jobs which claimant had the aptitudes to do. His opinion was based on claimant's ability to play a guitar, prior union activities and supervisory experience. He acknowledged, however, in his deposition, that he did not personally know of any job which was open in the area where a person of claimant's age and education would actually be hired.

Claimant cannot sit for extended periods of time, cannot walk on uneven ground, bend, squat or stoop. He rides a bicycle about seven miles a day, as recommended by his physical therapist. Other activities include very light gardening, mowing the lawn with a self-propelled mower, playing dominoes and his guitar with an amateur country music group at nursing homes.

Other than contacts with the union offices, claimant has made no efforts to secure employment. Mr. Adolph's testimony generally indicates that it would be futile for claimant to look for work. Dr. Matthews apparently agrees. We conclude that claimant is entitled to a permanent total disability award in view of his physical limitations combined with his lack of transferrable skills, work experience, his age and education. See Perkins v. SAIF, WCB No. 78-09922 (June 25, 1981).

ENTITLEMENT TO MEDICAL SERVICES FOR CLAIMANT'S KNEE CONDITION

Absent controverting medical evidence on the issue of medical causation, the Board accepts Dr. Matthews' opinion that claimant's present knee condition, for which he has recommended surgery, is related to the 1975 injury. We conclude, therefore, that his claim is compensable and that he is entitled to medical services, including surgery, under the provisions of ORS 656.245.

ORDER

The Referee's Order dated December 19, 1980 is modified for purposes of clarity. Claimant is hereby awarded medical services for treatment of his right knee under ORS 656.245.

We affirm the Referee's award of permanent total disability effective September 27, 1978 for claimant's 1976 back injury.

Claimant's attorney is hereby granted an attorney fee in the sum of $50 for legal services, deemed to be a reasonable and appropriate fee in view of the limited nature of the legal services rendered on appeal.

GERTRUDE JOLLY, Claimant
W.T. Westmoreland, Claimant's Attorney
Jerry McCallister, Defense Attorney
Request for Review by Claimant

WCB 80-06994
September 10, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee James' order which affirmed SAIF's denial of compensation to claimant for a low back condition. Claimant contends the low back condition is the result of a work-related accident.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 18, 1980 is affirmed.

DENNIS KEMPLE, Claimant
Noreen Saltveit, Claimant's Attorney
Margaret Leek Leiberan, Defense Attorney
Request for Review by Claimant

WCB 78-07534
September 10, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee St. Martin's order which affirmed the January 30, 1979 denial pertaining to claimant's most recent knee problems and surgery but remanded the case to the carrier for any treatment and verifiable time loss benefits resulting from claimant's original industrial injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 10, 1981 is affirmed.

JOHN RICE, Claimant
John O'Brien, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-04971
September 10, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Ail's order which set aside its denial of compensation for claimant's back condition. SAIF contends the injury did not arise out of or in the scope of employment.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 10, 1980 is affirmed.

Claimant's attorney is granted as and for a reasonable attorney fee the sum of $350 for prevailing at this Board review, payable by the SAIF Corporation.

PATRICIA L. TAYLOR, Claimant
Larry Bruun, Claimant's Attorney
Dennis Reese, Defense Attorney
Request for Review by Claimant

WCB 80-02665
September 10, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Leahy's order which affirmed Aetna's May 6, 1980 denial of claimant's occupational disease claim and penalties therefor.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 19, 1980 is affirmed.

BILL J. SCHAEFER, Claimant
Elton Lafky, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-01431
September 15, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Nichols' order which remanded claimant's claim to it for acceptance and payment of compensation to which he was entitled.

Claimant sustained a compensable injury on March 9, 1977 to his right arm and right hip. The elbow fracture was repaired with a screw. On December 20, 1979, claimant had a recurrence of the original fracture when he slipped and grabbed a handrail to prevent falling.

After thorough review of the record, we conclude the order of the Referee should be affirmed. Claimant argues extensively the criteria set forth in Smith v. Ed's Pancake House, 27 Or App 361 (1976). Because the second injury was not caused by claimant's job, we conclude this case is not controlling here. We find the most recent case on point is Grable v. Weyerhaeuser Company, issued July 1981. The Supreme Court concluded:

> "...that if the claimant establishes that the compensable injury is a 'material contributing cause' of his worsened condition, he has thereby necessarily established that the worsened condition is not the result of an 'independent, intervening' non-industrial cause. We hold that an employer is required to pay workers' compensation benefits for worsening of a worker's condition where the worsening is the result of both a compensable on-the-job back injury and a subsequent off-the-job injury to the same part of the body if the worker establishes that the on-the-job injury is a material contributing cause of the worsened condition."

We conclude, based on Dr. Paluska's reports and deposition, that claimant has proven by a preponderance of the evidence that his claim for an injury sustained on December 20, 1979 should be compensable as a result of the March 1977 compensable injury. The order of the Referee should be affirmed.

ORDER

The order of the Referee dated February 27, 1981 is affirmed. Claimant's attorney is hereby granted as a reasonable attorney's fee the sum of $400.

GENEVA PARK, Claimant
Cliff Bentz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06536
September 17, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Gemmell's order which remanded claimant's aggravation claim to it for acceptance and the payment of benefits as required by law.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 3, 1981 is affirmed. Claimant's attorney is awarded $300 for his services at this Board review, payable by the SAIF Corporation.

GEORGE AKRES, Claimant
Donald Wilson, Claimant's Attorney
Mildred Carmack, Defense Attorney
Request for Review by Employer

WCB 80-08452
September 18, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Menashe's order awarding additional time loss benefits and permanent total disability for claimant's 1977 low back injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 31, 1981 is affirmed. Claimant's attorney is hereby granted $500 as a reasonable attorney's fee for legal services rendered in this appeal, payable by the employer/carrier.

JOHN ARCHER, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-05008
September 18, 1981

Reviewed by the Board en banc.

Claimant seeks Board review of Referee Johnson's order dismissing claimant's case with prejudice because of claimant's failure to appear for hearing. We affirm.

Claimant requested a hearing June 3, 1980. A hearing convened December 16, 1980. Claimant did not appear at the appointed time and place. The Referee issued an order to show cause. On January 13, 1981 claimant's attorney submitted an affidavit. The affidavit states that claimant had a family emergency and that "he indicated that he attempted to leave a message" for his attorney, and the claimant then assumed the hearing would be postponed. The Board finds that the language

used in the affidavit could mean claimant phoned, got a busy signal on the phone and made no further attempts to convey his message. We agree with the Referee that claimant failed to show good cause for his failure to appear.

ORDER

The Referee's order dated March 5, 1981 is affirmed.

RAY ARMSTRONG, Claimant
Dan O'Leary, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Remand

WCB 80-01476
September 18, 1981

Claimant has moved the Board for an order remanding this case to the Referee for further evidence taking, ORS 656.295(5); or, in the alternative, for an order by which the Board would accept "additional, newly discovered evidence" as part of the record on review.

The Board is doubtful of its authority, absent stipulation, to consider evidence not included as part of the record before the Referee. See Brown v. SAIF, 51 Or App 389, 393 (1981); Penifold v. SAIF, 49 Or App 1015, 1018 n.4 (1980). Accordingly, absent stipulation by the parties, we decline to consider the proferred evidence as part of the record of this review.

In keeping with our policy regarding remand based upon newly-discovered evidence, as announced in Robert A. Barnett, WCB Case No. 79-00740 and 79-11012 (Order Denying Remand, June 25, 1981), we find that claimant's request to remand is not well taken. We are not persuaded that the evidence in question "could not reasonably have been discovered and produced at the hearing," OAR 436-83-480. Claimant had the options of postponing the hearing or keeping the record open for submission of additional evidence. The evidence which has been tendered and which has been considered by the Board only to the extent necessary to determine the appropriateness of remand in this instance, indicates that claimant's symptoms were continuing, prior to and through the period of the hearing, and up until the myelogram and lumbar laminectomy was performed by Dr. Johnson.

We are not persuaded that the evidence "could not reasonably have been discovered and produced at the hearing," in the sense that the condition evidenced by the "newly discovered" medicals--"S1 nerve root compression, right, secondary to osteophytes/herniated vertebral disc L5-S1, right"--was apparently symptomatic prior to the hearing, although it had apparently not been properly diagnosed by the physicians whose evaluations were submitted as part of the record before the Referee.

Claimant cites Berov v. SAIF, 51 Or App 333 (1980) in support of his motion. That case, which was considered by the Board in its decision in Barnett, supra, unlike this case, involved evidence submitted on appeal to the Court relating to a compensable consequence of (psychological disability) claimant's injury which had been virtually medically unexplored at the time of the hearing.

ORDER

Claimant's Motion to Remand this case to the Referee and claimant's Motion in the alternative to reopen the record on review for submission of "additional newly discovered evidence" are denied.

W. LEONARD BRADBURY, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-06805
September 18, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Daron's order which found his worsened condition not related to his industrial injury and which also ruled claimant did not have good cause for requesting a hearing more than 60 days after SAIF's denial of the aggravation claim.

Curiously, claimant's brief on Board review only challenges the Referee's good-cause conclusion; even if we were to agree with claimant's position on that issue, the Referee's adverse decision on the merits of claimant's aggravation claim would still stand. In any event, on the merits we affirm and adopt the Referee's analysis and conclusion.

We agree with the Referee's conclusion on the good-cause issue, but not all of the Referee's analysis. The chronology of events is as follows:

April 21, 1980: SAIF's denial letter mailed.

April 23, 1980: The denial letter is received by claimant.

About June 15, 1980: Claimant went to the office of an attorney, Mr. Spooner, who was representing him on an unrelated matter. Mr. Spooner was out of the office. Claimant left a copy of the denial letter with Mr. Spooner's receptionist.

July 3, 1980: Claimant returned to Mr. Spooner's office and talked with Mr. Spooner. It was discovered that the receptionist had placed the denial letter in the unrelated file and not called it to Mr. Spooner's attention. Mr. Spooner immediately wrote SAIF requesting medical information.

July 28, 1980: Request for hearing filed more than 60 days but less than 180 days after SAIF's denial.

There is much ado in the briefs about who was negligent: Claimant in not seeking legal assistance sooner; or Mr. Spooner's receptionist in not calling the denial letter to his attention; or Mr. Spooner in not filing a request for hearing sooner. We generally agree with claimant's theory that the main culprit was Mr. Spooner's receptionist, and we have held that the negligence of an attorney's employee can be good cause for requesting a hearing more than 60 days after a denial. Donna P. Kelley, WCB Case No. 79-07701 (April 17, 1981).

However, what we find missing here is a causal link between the attorney's employee's negligence and the delayed request for hearing. As claimant's reply brief puts it: "The only reason the appeal was not filed within 60 days was because the receptionist erred." We disagree. Once Mr. Spooner became aware, on July 3, 1980, that claimant wanted representation and to request a hearing on SAIF's denial, Mr. Spooner waited until July 28, 1980 to request a hearing. We infer from this series of events that his employee's negligence was not the sole (or even the proximate) cause of the tardy hearing request.

Claimant has failed to show good cause.

ORDER

The Referee's order dated January 9, 1981 is affirmed.

RANDY L. BUCHANAN, Claimant
Jerry Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-08280
September 18, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of that portion of Referee Mannix's order which granted claimant's attorney a fee of $900 payable by SAIF. SAIF contends that claimant's attorney is not entitled to any fee. Claimant's attorney has filed no brief in defense of the Referee's order. We agree with SAIF and, therefore, reverse that portion of the Referee's order.

Claimant's claim for left elbow injury was initially accepted, processed and closed. This present case arose when claimant made an aggravation claim which SAIF denied. The central issue in claimant's request for hearing and at the hearing itself was whether SAIF properly denied the aggravation claim. The Referee sustained SAIF's position.

The Referee proceeded to order SAIF to continue to provide ORS 656.245 medical benefits on claimant's original accepted left elbow claim. There was no contention or evidence that claimant had claimed .245 benefits that had been denied by SAIF, nor any statement anywhere in this record that any party was raising an issue about continuing entitlement to .245 benefits. On this record, we find the Referee's order that SAIF continue to provide medical services for claimant's original accepted left elbow condition was a gratuitous restatement of the obvious, unresponsive to any issue raised by any party and, therefore, no proper basis for an award of attorney fees payable by SAIF.

ORDER

The Referee's order dated February 27, 1981 is modified. That portion of the Referee's order which granted claimant's attorney an attorney fee of $900 payable by SAIF is reversed. The remainder of the Referee's order is affirmed.

J.D. CARTER, Claimant
Malagon & Yates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Order of Remand to Evaluation Division

WCB 78-04946
September 18, 1981

The Court of Appeals, having issued its Opinion and Order on June 29, 1981, reversing the decision of the Board and remanding this case for further proceedings;

The Board now being in receipt of the Court's Judgment and Mandate issued August 24, 1981:

IT IS HEREBY ORDERED that the orders heretofore entered by the Board in this matter are vacated and this claim is remanded to the Evaluation Division of the Workers' Compensation Department for further proceedings pursuant to ORS 656.268.

BARBARA DILL, Claimant
Cash Perrine, Claimant's Attorney
John E. Snarskis, Defense Attorney
Request for Review by Employer/Carrier

WCB 80-08714
September 18, 1981

Reviewed by Board Members Barnes and McCallister.

The employer/carrier seeks Board review of Referee McCullough's order which set aside its denial of reimbursement for a water bed claimant purchased. Employer/carrier contends there is no justified need. We agree and reverse the Referee's order.

The Board adopts the facts as stated in the Referee's order as our own.

Doctors Seres and Kendricks could not identify specific benefits to the claimant or medically justify the need for a water bed for claimant's back condition. Dr. Kendricks stated in a report dated September 10, 1980: "Quite frankly, I don't think it is absolutely necessary for her therapeutically..." Dr. Seres reported January 2, 1981 that: "Obviously, there is no medical justification here, merely personal opinions."

The purchase of any household furniture, including beds, is reimbursable under the provisions of OAR 436-69-335 which provides:

> "Articles of household furniture such as beds, chairs, tubs are not reimbursable unless a need is clearly justified by report, which establishes that the 'nature of the injury or the process of recovery requires' (ORS 656.245) that the item be furnished." (Emphasis added.)

There is no report in the record that satisfies this requirement. A prescription form with the phrase "one water bed" is not an adequate report under the provisions of OAR 436-69-335. See Wayne M. Evenden, WCB Case No. 80-00700 (Order on Review, July 16, 1981). Without such a report, the employer/insurer should not reimburse claimant for the water bed.

ORDER

The Referee's order dated February 19, 1981 is reversed. The employer/carrier's denial of reimbursement to claimant for a water bed is reinstated.

RAYMOND A. HALL, Claimant
Merwin Logan, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order of Remand

WCB 79-09045
September 18, 1981

By order dated July 17, 1981, Referee Braverman dismissed claimant's request for hearing on the ground that he believed the issues raised were properly only within the Board's own motion jurisdiction. The Referee then referred this case to the Board to be considered as a request for own motion relief.

The Referee's analysis of the jurisdictional issue was reasonable. Unfortunately, it was not legal. Carter v. SAIF, 52 Or App 1027 (1981). This case is remanded to the Referee for a hearing on the merits.

IT IS SO ORDERED.

ROBERT O. HALLER, Claimant
Timothy O'Neill, Claimant's Attorney
Keith Skelton, Defense Attorney
Request for Review by Employer

WCB 79-00245
September 18, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Peterson's order which granted claimant an increased award of compensation for a total equal to 96° for 30% unscheduled disability for injury to his low back, an increase over the 5% disability award of the Determination Order. The employer contends the Referee's award is excessive.

Claimant sustained a compensable injury to his low back on March 29, 1978. He received conservative treatment from Dr. Barnes and was advised not to return to his regular work as a laborer. Claimant's work background is generally in heavy physical labor. The consensus of the medical opinion is that claimant should not lift over 25 pounds and should be rehabilitated for a job not requiring excessive lifting, bending or stooping. The evidence also indicates that claimant's physical impairment is muscular and actually very minor in degree; claimant's injury did not result in any surgery. We agree with the findings of the Referee but, based on those findings, reach a different conclusion. Applying the standards in OAR 436-65-600, et seq, we conclude the claimant would be more properly compensated with an award equal to 64° for 20% unscheduled disability.

ORDER

The Referee's order dated December 10, 1980 is modified. Claimant is hereby granted compensation equal to 64° for 20% unscheduled disability for his low back injury. This award is in lieu of that granted by the Referee and the Determination Order. The Referee's order is affirmed in all other respects.

ROBERT F. HAMMOND, JR., Claimant
Dale A. Rader, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-7799
September 18, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee McCullough's order which affirmed the SAIF's denial of August 23, 1979 which denied responsibility for a thoracic kyphosis condition and also he affirmed the Determination Order of September 21, 1979. Claimant appealed the Referee's order but did not submit a brief or state the issues. We assume all issues before the Referee are properly before this Board.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 5, 1980 is affirmed.

FREDERICK E. MERIDETH, Claimant
David Hittle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Remand

WCB 81-00781
September 18, 1981

Claimant has moved to remand to the Referee for the following reason:

> " there were many documents produced and introduced in evidence at the hearing from SAIF Corporation's records. Claimant was totally ignorant of the existence of these documents or of SAIF's intention to rely upon them until they were introduced in evidence. Those documents changed the complexion of the case entirely and, therefore, it is only proper that the claimant be allowed an opportunity to rebut that information."

The motion is denied for the following reasons: (1) The transcript reflects that when the "many documents produced and introduced in evidence at the hearing from the SAIF Corporation's records" were offered into evidence, claimant's attorney had "no objection;" (2) if claimant was surprised by any evidence offered at the hearing, his proper remedy was to then object to its admission and/or ask that the record be kept open for submission of rebuttal evidence; (3) it is not a proper remedy to await the Referee's decision, request Board review, and then for the first time raise the claim of surprise at the hearing. The material submitted with claimant's motion will not be considered at the time of Board review.

IT IS SO ORDERED.

MARILYN NICHOLS, Claimant
Jerome Bischoff, Claimant's Attorney
R. Ray Heysell, Defense Attorney
Request for Review by Claimant

WCB 80-04693
September 18, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee McCullough's order which affirmed Industrial Indemnity's denial of claimant's claim for a giant cell tumor of the tendon sheath of the left hand.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 19, 1981 is affirmed.

DAVID L. REED, Claimant
Rolf Olson, Claimant's Attorney
Don Howe, Defense Attorney
Order on Review

WCB 79-09063
September 18, 1981

Reviewed by Board Members Barnes and Lewis.

The Special Compensation Division of the Department of Justice seeks Board review of Referee Mannix's order which set aside its denial of claimant's claim that arose while he was an inmate at the Oregon State Penitentiary and awarded claimant's attorney an attorney fee. The issue is timely filing of the claim.

We recently confronted the same issue on substantially the same facts in Willie E. Williams, WCB Case No. 80-00341-IF (Order on Review, August 13, 1981). Our analysis in Williams is here applicable and controlling:

> "The Department of Justice argues that this claim is barred by the provisions of ORS Chapter 655, specifically ORS 655.520(3), which now require the filing of a written claim with the Department of Justice within 90 days after the injury. The Department fails to note that ORS 656.520(3) was amended in 1979. The earlier version in effect at the time of claimant's injury required only that the claim be filed with the State Accident Insurance Fund rather than the Department of Justice as provided by the 1979 amendment. That amendment does not apply to injuries which occurred prior to its July 1, 1979 effective date. Service of that notice upon an employer is effective service upon the insurer since the employer has a statutory duty to promptly forward all claims to the insurer. The Board concludes that timely notice was given by claimant in this case.

"The Board has considerable doubt about whether the Referee was correct in awarding attorney fees to claimant's attorney in this ORS Chapter 655 proceeding in which all payments come from the tax-supported general fund rather than a private insurance fund. However, the Department of Justice has not raised that issue so we will not disturb the Referee's award. Our doubts are serious enough to lead us to the conclusion not to award any additional attorney fee on Board review absent supplemental briefs from the parties which shall be filed within 20 days of the date of this order."

ORDER

The Referee's order dated February 27, 1981 is affirmed.

GERALDINE I. REINECCIUS, Claimant
Michael Shinn, Claimant's Attorney
Leslie MacKenzie, Defense Attorney
Request for Review by Claimant

WCB 79-10367
September 18, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's order which granted claimant an award of 20% loss of the right arm. Claimant contends she is entitled to a greater award and also is entitled to an unscheduled right shoulder disability award.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 27, 1981 is affirmed.

GEORGE L. RILEY, Claimant
Robert Udziela, Claimant's Attorney
Keith Skelton, Defense Attorney
Request for Review by Claimant

WCB 80-06988
September 18, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Danner's order which affirmed the employer/carrier's denial of an aggravation claim. Claimant contends his compensable neck condition has worsened. We affirm the Referee's order.

Claimant was found to have an 85% neck disability in our prior order, George Riley, WCB Case No. 76-04604 (September 12, 1979), which was affirmed by the Court of Appeals July 7, 1980 without opinion. Claimant filed an aggravation claim contending his condition had worsened.

Claimant's physician, Dr. Williams, expressed the opinion that claimant's neck condition is now worse but repeated only claimant's subjective story of worsening. Dr. Campagna, a consulting physician who has seen claimant since August 1974, found no worsening. Rather, Dr. Campagna's reports actually show objective improvement in neck motions:

	Flexion	Extension	Lateral Rotation
November 8, 1979 Report:	50%	50%	5%
July 31, 1980 Report:	80%	50%	50%

(% of normal motion)

Dr. Williams noted on April 28, 1980 that claimant's neck was supple and had full range of motion. The Board finds Dr. Williams' subjective observations incongruent with his objective findings. We find that objective evidence indicates that claimant's neck condition has not worsened.

ORDER

The Referee's order dated November 25, 1980 is affirmed.

JILL SCHECKELLS, Claimant
Charles H. Seagraves, Jr., Claimant's Attorney
R. Ray Heysell, Defense Attorney
Request for Review by Employer/Carrier

WCB 80-3638
September 18, 1981

Reviewed by Board Members Barnes and McCallister.

The employer/carrier seeks Board review of Referee Mannix's order which found present medical services for claimant's low back related to her November 9, 1971 injury. The employer/carrier contends there is no causal connection.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 20, 1981 is affirmed. Claimant's attorney is granted the sum of $200 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the SAIF Corporation.

KEVIN J. SCHMIDT, Claimant
David Hytowitz, Claimant's Attorney
John Klor, Defense Attorney
Request for Review by Employer

WCB 80-04284
September 18, 1981

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Knapp's order which remanded claimant's claim to it for acceptance and payment of compensation. The employer contends claimant's work activity did not pathologically worsen his pre-existing left shoulder condition and, therefore, under the rationale of Weller v. Union Carbide, 288 Or 27 (1979), it is not compensable.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 3, 1981 is affirmed.

Claimant's attorney is granted $550 for his services at this Board review, payable by the employer/carrier.

DENNIS E. SCHMITT, Claimant
Allen Murphy, Jr., Claimant's Attorney
Scott Kelley, Defense Attorney
Request for Review by Employer

WCB 80-09813
September 18, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Gemmell's order which awarded claimant 25% unscheduled permanent partial disability for claimant's occupational disease. The employer contends the award is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 18, 1981 is affirmed. The claimant's attorney is awarded $200 for his services at this Board review, payable by the employer/carrier.

THOMAS J. THOMPSON, Claimant
Cromwell & Hess, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-7289
September 18, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Daron's order which denied claimant compensation benefits for accidental injury or an occupational disease.

O R D E R

The Referee's order dated April 8, 1981 is affirmed.

GREGORY L. WILSON, Claimant
Garry Kahn, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by Employer

WCB 80-06609
September 18, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Johnson's order which granted claimant an award of 19.2° for 10% loss of his left and his right arms and an award of 32° for 10% unscheduled left shoulder disability. The employer contends that claimant is not entitled to any arm award at all but only entitled to the 5% loss of the left and right forearms as granted by the Determination Order and not entitled to any unscheduled disability.

Claimant had been pulling on the greenchain for three days for this employer when he developed symptoms of numbness in his hands and arms. He subsequently underwent bilateral carpal tunnel release surgeries. On March 16, 1978 Dr. Nathan performed a re-exploration of the right carpal canal and in May 1978 reported that he felt there was far more than an organic problem and that there was a psychological component. Dr. Nathan rated impairment as minimal or 2-1/2% both extremities based solely on subjective complaints.

The claim was initially closed by a Determination Order of July 3, 1978 which granted an award of 5% loss of the left forearm and the right forearm.

In November 1978 Dr. Misko felt that testing indicated a bilateral thoracic outlet syndrome and on November 7, 1978 claimant underwent arteriograms. On December 1, 1978 Dr. Misko did exploration surgery of the brachial plexus and resection of the first rib on the left. Nerve conduction studies performed in February 1979 and electromyography of March 28, 1978 were all within normal limits.

On August 1, 1979 Dr. Misko felt claimant was precluded from repetitive lifting, throwing or work involving heavy use of the arms. On February 15, 1980 Dr. Parsons reported there was no neurological abnormalities and subsequently circulatory problems were ruled out.

A second Determination Order of June 18, 1980 granted claimant compensation for temporary total disability only. On August 12, 1980 Dr. Parsons released claimant for any type of employment.

As noted by the above reports, the objective medical findings are minimal at best. The loss of use or function of claimant's forearms was adequately compensated by the awards granted by the Determination Order.

We find there is absolutely no justification in this record for an award to the unscheduled area. Not only is there no medical confirmation of impairment to the left shoulder, there is also no proof of any left shoulder restrictions which would affect claimant's wage earning capacity. We conclude claimant is not entitled to any unscheduled award.

ORDER

The Referee's order dated February 27, 1981 is reversed.

LILLIAN K. WINDERS, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-10576
September 18, 1981

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee McSwain's order approving as compensable, as accidental injury, claimant's respiratory infection arising on or about October 10, 1979 from conditions at her place of employment. Claimant cross-appeals that portion of the order which denied compensability of the allergic symptoms. SAIF argues that the Referee erred in finding the sinusitis and bronchitis to be accidental injuries rather than disease. Claimant contends that the worsening of her pre-existing, although previously undiagnosed, allergic condition and related symptoms should also be compensable.

Claimant worked in an office for the State of Oregon where she was exposed to cold air coming out of a forced-air vent located only a few feet from her desk. A directive to conserve energy by maintaining office temperatures at 68° resulted in uneven heat flow with air sometimes coming out of the vent which was colder than the ambient air in the room. The filters in the ventilation system are changed once a year. Removal of the vent cover one year after claimant's difficulties revealed a great amount of soot and dust inside the system. During the four years she had worked there, claimant had not witnessed anyone ever removing the vent cover before.

Claimant first exhibited symptoms of a cold which would not go away. After two weeks, she consulted her doctor. Her condition eventually developed into sinusitis and bronchitis. Claimant's treating physician, who had treated her for other problems for several years, had treated her only once before for a respiratory infection. After testing, it was determined that claimant is allergic to a number of things, including common house dust, mold, feather pillows, MRV (a bacteria that people have within their systems), grain dust, fusarium, hormodendrum and mucorracemoses.

The Referee concluded that claimant's infections are compensable if the relationship of the work environment to the infections is one of material causation. We disagree. The proper test is whether claimant's condition was caused by exposure to which claimant was not ordinarily subjected other than during a period of regular actual employment. James v. SAIF, 290 Or 343 (1980); Thompson v. SAIF, 51 Or App 395 (1981).

The Referee reasoned that claimant's condition was the result of an accidental injury rather than an occupational disease because it came on rapidly, not gradually, and because it was not necessarily to be expected among the workers in claimant's occupation. He concluded that the air vent at work caused an onset of allergic symptoms, leaving claimant more susceptible to infection and that the infection was, therefore, compensable as an accidental injury.

We find basic flaws in the Referee's reasoning. Claimant testified that her symptoms came on gradually, and she could only guess that the problems with the vent began a month earlier. In view of her testimony and the uncertainty as to the length of time she was exposed to the cold air from the heating vent before becoming ill, it is clear that she did not become suddenly ill.

There is a material distinction between a claim for an "accidental injury" and one for "occupational disease." Statutory limitations are imposed upon occupational diseases, defined at ORS 656.802(1)(a) as:

> "Any disease or infection which arises out of and in the scope of the employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein." (Emphasis added.)

Claimant's treating physician, Dr. Thomas J. Sims, testified that in terms of a reasonable medical probability he believed the precipitating cause of claimant's sinusitis and bronchitis to be the close proximity of the heat vent at work. He stated that the most common cause for sinusitis or bronchitis is pneumococcus or streptococcus, and that he diagnosed claimant's respiratory infection as a bacterial infection because she was febrile and responded to medication including antibiotics. He believed that something at work increased her allergic reaction and thereby made her more susceptible to infection. That opinion was based on the absence of symptoms at home, other than headaches which could be caused by something other than allergies. His opinion becomes less convincing when we consider claimant's testimony that she continues to take allergy medications even now to keep from getting what she calls sinus headaches at home.

Dr. Sims has never visited claimant's work place. He acknowledged that a number of other factors would cause the claimant to become more susceptible to infection: Her 15-year smoking habit would cause irritation of the mucous membranes in the nose and sinuses and would make her more susceptible; the heating system in her home would probably contain agents, including mold, to which claimant has sensitivity. Claimant had reported that a small amount of mildew--a form of mold--was present on the windows at home.

We find from the evidence presented in this case that the claimant suffered a bacterial infection rather than an accidental injury. In determining whether that disease is compensable, we must ask whether the infection arose as a result of exposure to which claimant was not ordinarily subjected other than during a period of regular actual employment. Claimant was exposed to allergens both on and off the job which could increase her susceptibility to infection. It is not contended, however, that the work exposure caused claimant's allergies, but that her symptoms were worsened by the work exposure which then caused her to be susceptible to respiratory infections.

Our fact situation is similar to that in Thompson v. SAIF, supra, where the claimant's symptoms decreased while she was away from work but worsened during the work week. In our case, claimant's condition improved when deflectors were finally placed over the air vent at work; she apparently had no allergic symptoms at home. Claimant testified, however, that as of the time of the hearing she was still taking allergy medication even though her desk had been moved further away from the vent and she can no longer feel the direct force of air from it.

As in Thompson, claimant's off-the-job exposure was substantially the same as that on the job. Yet it is possible that claimant was subjected to a greater concentration of allergies at work, where she sat directly in the path of the cold air flow. No evidence was presented which in any way proves or disproves that possibility. Claimant's doctor never visited the work place; no tests were conducted showing the nature or level of concentration of allergens to which claimant was exposed at work. Although in Thompson it was shown that the claimant's work exposure to offending substances was greater, it was not established to be the cause of the claimant's condition. Here, the work exposure was not shown to be greater, even though claimant's doctor speculated that it was.

ORDER

The Referee's order dated March 10, 1981 approving the claimant's respiratory infection as a compensable condition is reversed. That portion of the order denying compensability of the allergic symptoms is affirmed.

BARBARA HOLDER, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order of Abatement

WCB 80-00244
September 24, 1981

Claimant, by and through his attorney, requested that the Board reconsider its August 28, 1981 Order on Review, specifically the Board's failure to grant an attorney fee. The following day, the SAIF Corporation requested reconsideration on the penalty assessed against it by the Board in its order. We conclude that our Order on Review should be abated until such time as we can properly consider the allegations of both parties.

IT IS SO ORDERED.

ROBERT A. PARKER, Claimant
Milo Pope, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-00711
September 24, 1981

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Danner's order which held it responsible for claimant's medical expenses for treatment of his compensable injury (ORS 656.245) incurred after June 15, 1979, the date of a third party settlement distribution pursuant to ORS 656.593.

ORS 656.154 and 656.578 permit a worker injured in the course of employment due to the negligence of a third party to bring action against such third person. Because such an injured worker is also entitled to compensation under ORS Chapter 656, the statutes provide that the involved compensation carrier shall receive notice of the third party action, ORS 656.593(1), and must approve any settlement of it, ORS 656.593(3).

Upon settlement of the third party action or a judgment favorable to the worker, the statutes further provide that the compensation carrier is entitled to a share of the recovery. The carrier is first paid its claim costs to the date of the settlement or judgment. ORS 656.593(1)(c). The carrier is also entitled to "the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim." ORS 656.593(1)(c).

In this case, at the time of the June 15, 1979 third party settlement distribution, SAIF did receive reimbursement for its claim costs to that date but did not retain any reserve for future anticipated claim costs. Rather, SAIF followed what it calls its standard "policy" and paid the residual of the third party recovery to claimant with the "understanding" that claimant himself would pay any future expenses that would otherwise have been SAIF's responsibility. The fact that claimant did not share SAIF's "understanding" came to light less than a week later when claimant submitted a bill to SAIF for $18.50 for medical services in connection with his industrial injury. SAIF's refusal to pay that bill gave rise to this request for hearing.

SAIF's brief contends its "policy" is consistent with prior Board decisions, while at the same time noting inconsistency in those decisions. See Henry Kochen, 9 Van Natta's 95 (1972); Hilda Horn, 19 Van Natta's 138 (1976); Frank Jangula, 24 Van Natta's 387 (1978). We welcome this opportunity to correct any possible confusion created by prior decisions.

We adopt as our own the following portions of the Referee's order, with which we fully agree:

> "One of the purposes of the Workers' Compensation Law is to insure that a claimant will receive continued and adequate medical care, reasonable and necessary because of his industrial injury. This is the purpose of ORS 656.245. Simply because the Fund does not wish to encumber itself with additional bookkeeping, it is not relieved of its duty to ascertain that such provisions are made.
>
> "In this particular case, claimant sustained a very serious injury, and it is reasonable and logical to anticipate continued medical treatment. While it is true that in this particular case that claimant received a large settlement, and substantial funds beyond the amount paid to him or on his behalf by the Fund, that is not to say that the claimant would always have this money, with which to pay future medical expenses. As the carrier, the Fund is duty-bound, under the provisions of the statute, to retain sufficient funds, for this purpose, rather than placing the burden on the claimant to retain them.
>
> "In addition, while the statute contemplates that the Fund shall retain sufficient monies for future medical expenses, it makes no provision for incorrect estimating. By the silence on this point, it appears that if the Fund does not retain sufficient monies, any additional expenses still must be paid under ORS 656.245. Under the Fund's argument, the claimant would be responsible. For example, if the Fund retained $2,000.00, and the claimant, over a period of years, incurred $3,000.00 worth of .245 billings, would he or she then have to pay the difference? What if the balance of the settlement was only $2,000.00 and the Fund kept it all? Would claimant then be responsible? I think not, and the same logic must apply in this case. The Fund elected to retain zero dollars. This, then, was its estimate as to future medical expenses, and any amount over and above the figure remains its responsibility to pay.

"The statute also specifically provides for a resolution of any conflict that might arise between the Fund and the claimant, with respect to the amount that the Fund might elect to retain (ORS 656.593(1)(d)).

"There is no statutory authority for the Fund's position that the payment of the balance to claimant operates as a bar to further compensation in the claim."

We appreciate there are significant practical difficulties in determining amounts to be retained by a carrier for the present value of its likely future claim costs. See Leroy R. Schlecht, WCB Case No. 79-06304 (decided this date). But such practical difficulties cannot alter the statutory mandate that a reserve for future claim costs "shall" be retained, ORS 656.593(1)(c); nor justify SAIF's contrary "policy." We conclude that unless a carrier retains such a reserve from a third party settlement or judgment, the carrier is responsible for all future claim costs just as if there had been no third party settlement or judgment. To the extent any of the above-cited Board decisions are inconsistent, they are overruled.

ORDER

The Referee's order dated October 2, 1980 is affirmed. Claimant's attorney is awarded a fee of $100 for services on Board review, payable by the SAIF Corporation.

LEROY R. SCHLECHT, Claimant
Pozzi, Wilson, et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Third Party Distribution

WCB 79-06304
September 24, 1981

Before the Board en banc.

Presently before us is the motion of the SAIF Corporation for an order resolving a dispute concerning the proper distribution of the worker's third party recovery.

Claimant was employed as a truck driver when his vehicle was totalled as a result of a collision with another truck. Claimant elected to sue the third party involved. A settlement between the claimant and the defendant was effected. The total settlement was in the amount of $57,500.00.

SAIF approved the settlement with the understanding that the statutory distribution would be made with the balance to be placed in a trust until such time as future anticipated expenditures could be ascertained. See the letter dated January 29, 1980 marked Exhibit "A" attached hereto and made a part hereof. Pursuant to ORS 656.593, distribution of the third party settlement was made as follows:

Attorney Costs	$ 871.00
Attorney Fee	14,157.25
25% to Claimant	10,617.94
To SAIF (Reimbursement for claim costs)	16,582.89
Balance To Be Held In Trust	15,270.92

The dispute now before us concerns the balance of $15,270.92 remaining after the statutory distribution was made. From this balance, SAIF claims the sum of $5,849.55, the amount expended since distribution was made, plus the additional sum of $5,000.00 as an estimate of future anticipated costs, for a total of $10,849.55.

At the time settlement was approved, claimant's request for hearing was pending. The hearing involved an appeal from a partial denial of the claimant's claim and an appeal from a determination order mailed October 15, 1979 which did not include any permanent disability award. The referee ordered the carrier to accept the claimant's gastrointestinal and dental problems and awarded the claimant 16° for 5% unscheduled low back disability together with 22.5° for the left leg disability, being a total increase of 38.5°. He further awarded the sum of $1,000.00 as a reasonable attorney's fee, payable by SAIF.

The Referee's order was issued on April 23, 1980. Board review was requested and an Order on Review was issued December 16, 1980 affirming the order of the Referee. Since the statutory distribution was made, the SAIF Corporation has expended the total sum of $5,849.55. This sum includes the attorney's fee of $1,000.00 ordered paid by SAIF.

SAIF has solicited opinions from doctors to assist them in determining the future anticipated expenditures. Dr. J. Bart McMullan, Jr., in his letter of May 8, 1981, Exhibit "B" attached hereto and made a part hereof, states that it is conceivable that this patient could have a reoccurrence or aggravation of a prior gastritis. He estimates that the minimum cost for medical services would be $300.00 to $500.00. Dr. Gary A. Dixon, in his letter dated June 1, 1981, Exhibit "C" attached hereto and made a part hereof, was unable to determine any future expenditures and considered it a remote chance that there would be any. Dr. Francis B. Schuler, in his letter of May 26, 1981, Exhibit "D" attached hereto and made a part hereof, indicates that the claimant was having difficulty with his left knee and felt that the claimant might need surgical procedure to tighten up the knee.

We do not agree with SAIF's contention that they should be allowed the additional sum of $5,000.00 for future anticipated expenditures. The reports do not establish with certainty that there will be any future anticipated expenditures.

SAIF has expended $5,849.55 since statutory distribution was made. It is clearly entitled to be reimbursed for $4,849.55 of this amount from the third party settlement. The $1,000 in attorney fees that SAIF was ordered to pay claimant's attorney for prevailing on SAIF's partial denial presents a closer question.

ORS 656.593(1)(c) provides:

> "The paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim under ORS 656.001 to 656.794. Such other costs include assessments for reserves in the Administrative Fund and any reimbursements made pursuant to subsection (3) of ORS 656.728, but do not include any compensation which may become payable under ORS 656.273 or 656.278."

The first part of this statute, down to the term "hospital service," says that SAIF is entitled to reimbursement for "its expenditures for compensation." Were this all there was to the statute, the question would be whether carrier-paid attorney fees are a form of compensation. See ORS 656.005(9). However, the balance of the statute refers to a present reserve for "future expenditures for compensation and other costs of the worker's claim under ORS 656.001 to 656.794." (Emphasis added.) Carrier-paid attorney fees are obviously an "other cost" of the worker's claim under ORS Chapter 656. We cannot imagine the legislature intending that a carrier in this situation could maintain a reserve for future carrier-paid attorney fees but not qualify for reimbursement for previously-paid attorney fees. We, therefore, conclude that SAIF is entitled to reimbursement for the $1,000 in attorney fees it paid to claimant's attorney.

Given our reference to the "other costs" part of ORS 656.593(1)(c), for clarity we emphasize that the only recoverable costs are direct, out-of-pocket payments and do not include any of a carrier's overhead or cost of claims processing.

SAIF has established that it has expended the sum of $5,849.55 since statutory distribution was made to which it is now entitled. It has failed to establish any other claim.

ORDER

The SAIF Corporation is entitled to receive the sum of $5,849.55. The balance of $9,320.37 shall be paid to claimant.

(Exhibits follow)

January 29, 1980 (503) 378-3018

Jan Baisch
Attorney at Law
1100 SW 6th Avenue, Suite 910
Portland, Oregon 97204

RE: LeRoy Schlecht
Date of Injury: 7-6-78
SAIF Claim No.: D 306743

Dear Mr. Baisch:

This will serve as your authority to settle this matter for the gross sum of $57,500.00. A standard form of Release and Approval is enclosed. Please disburse as follows:

1.	Attorney Costs	$ 671.00
2.	Attorney Fee	$14,157.25
3.	25% to Claimant	$10,617.94
4.	To SAIF for encurred costs	$16,582.89
5.	To SAIF - ARA	$15,270.92

The final balance of $15,270.92 is to be forwarded to SAIF to be placed in the Advance Refund Account until the pending Hearing is concluded and all costs are known and paid. If any monies remain in this account after this claim is closed and all costs paid, ittwill be paid to the claimant oo operate as a bar to furkher compensation in this claim, exclusiveoof his rights under ORS 656.273 and ORS 656.278.

Please forward copies of all medical bills totaling $1,675.79, plus supporting reports in order for SAIF to determine if they are properly chargeable to this file.

Thank you for the manner in which you have handled this matter. If this office can be of further assistance, please advise.

Very truly yours,

Mickie Bochsler
Third Party Section
Legal Division

MB/mb

Enclosures

EXHIBIT "A"

SUBURBAN MEDICAL CLINIC • PHYSICIANS

INTERNAL MEDICINE
ESTILL N. DEITZ, M.D.
LEO J. FREIERMUTH, M.D.
J. BART MCMULLAN, JR., M.D.

INTERNAL MEDICINE
& GASTROENTEROLOGY
JOSEPH A. PARENT, JR., M.D.
CHARLES L. COLIP, M.D.

PEDIATRICS
RICHARD E. CAVALLI, M.D.
ROGER W. STANKE, M.D.
PAUL K. WEGEHAUPT, M.D.

ADMINISTRATOR
DONNA D. ANDERSON

INTERNAL MEDICINE
& INFECTIOUS DISEASES
PETER B. HUTCHINSON, M.D.

256-3225

256-3220

BUSINESS OFFICE

254-7351

May 8, 1981

SAIF Corporation
1220 SW Morrison
Portland, Oregon 97205

RE: LeRoy R. Schlecht
CLAIM # HD 306743

Gentlemen:

Your letter of May 6th comes as some surprise to me as I had had no contact with this case since mid-1979 and was not aware of any proceedings relative to it. As you know, our diagnosis was gastritis.

It is always possible that a condition such as this could recur or be exacerbated from a variety of causes. I therefore have to answer your question that it is conceivable that this patient could have a reoccurrence or aggravation of a prior gastritis. I feel that I cannot make any valid estimate regarding cost as I have no idea if such a problem were to occur, what kind of evaluation and treatment would be necessary nor over what period of time. I would think a minimum figure would perhaps be $300-500 and could not realistically place a maximum.

I hope this information will be of some help to you. Please feel free to contact me if I can be of further assistance.

Sincerely,

J. Bart McMullan, Jr., M.D.

cf

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MAY 12 1981
SAIF - LEGAL DIV.
PORTLAND, OREGON

RECEIVED
JUN 2 1981
DEPT. OF JUSTICE
WORKERS' COMP. DIV.

EXHIBIT "B"

GARY A. DIXON, D.M.D.
[illegible] S.E. [illegible]th AVENUE
PORTLAND, OR. [illegible] 97206
PHONE 775-0621

June 1, 1981

Mr. Michael G. Bostwick
Associate Counsel
SAIF Corporation
Terminal Sales Building
1220 S.W. Morrison
Portland, Oregon 97205

Re: LeRoy R. Schlecht
SAIF Claim No. ID 506743

Dear Mr. Bostwick,

I also am unable to determine what future expenditures, if any might be incurred with this patient. The work that has been done for Mr. Schlecht has an expected service time of more than five years from now.

Your letter asked if there is "any" chance service will be needed. Of course, there is always a chance, but I would consider it to be a very remote one.

Sincerely,

Gary A. Dixon, D.M.D.

GAD/jm

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SAIF - LEGAL DIV.
PORTLAND, OREGON

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PORTLAND, OR.

EXHIBIT "C"

FRANCIS B. SCHULER, M.D. PC
PHYSICIAN AND SURGEON
736 S.E. 60TH AVENUE
PORTLAND, OREGON 97215

May 26, 1981

SAIF Corporation
1220 S.W. Morrison
Portland, Oregon 97205

Attention: Michael G. Bostwick

Re: LeRoy R. Schlecht
Claim #HD 306743

Dear Mr. Bostwick:

The following is a report concerning LeRoy Schlecht, about whom you have recently inquired.

In answer to your questions, this patient is having more difficulty with his left knee which was an injury to the cruciate ligament, which allows for some instability of the knee in the anterior posterior plane and causes him to have to favor the knee. He gets feelings of instability in his knee. I would have to say "yes" to your question.

However, I have been thinking of sending him to Eugene to see Dr. Larson who is a knee specialist, and get an opinion from him as to whether he thought this patient's knee could be helped by surgery on this cruciate ligament. It is my feeling he might want to do some surgical procedure to tighten up this knee. If I could have permission to send him for this consultation, we would all have an opinion from someone experienced in this what might be necessary and best answer your question more accurately.

Sincerely yours,

Francis B. Schuler, M.D.

FBS:ds

RECEIVED
MAY 28 1981
SAIF - LEGAL DIV.
PORTLAND, OREGON

RECEIVED
JUN 2 1981
DEPT. OF JUSTICE
WORKERS' COMP.

EXHIBIT "D"

VINCENT BENSON, JR., Claimant
J.B. Smith, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 78-01364
September 25, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of that portion of Referee Danner's order which affirmed the denial of thoracic outlet syndrome, hernia conditions and payment of certain medical expenses. Claimant contends he is permanently and totally disabled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 29, 1980 is affirmed.

PERRY M. FRACHISEUR, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-04673
September 25, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Foster's order affirming a Determination Order which awarded 20% unscheduled low back disability for claimant's compensable 1978 injury.

Although the Referee made no specific finding concerning claimant's credibility, he particularly emphasized his own opinion that he saw no reason why claimant could not continue with his road construction business in which he had been self-employed for seven years prior to the injury. Claimant contends that whether the business could have been operated at a profit in abstentia is irrelevant to the question of lost earning capacity, and that the Referee improperly focused on the vitality of claimant's former business rather than on the extent of claimant's disability. Nonetheless, claimant points out that his inability to drive or ride for long periods or distances prevents him from doing even supervisory construction work since the job sites are a minimum of an hour's drive from his home.

Claimant's condition was initially diagnosed as a "lumbosacral sprain with right sciatic radiculitis" and "slight left sciatica." When chiropractic care failed to help, claimant was referred to Dr. Mark A. Melgard, a neurosurgeon, who believes the claimant suffers a "chronic facet irritation."

X-rays taken at the Mid-Valley Orthopedic Clinic where claimant was examined on SAIF's behalf by Dr. K. Clair Anderson in November of 1978, revealed degenerative change of the lumbar spine with sclerosis, spur formation at multiple levels and narrowing of the L5-S1 interspace with sclerosis of the superior body of S1, inferior body of L5. Dr. Anderson's impression was that claimant had osteoarthritis with degenerative disc disease and superimposed sprain.

The Orthopaedic Consultants diagnosed a chronic lumbosacral strain, degenerative joint disease, L1-2, L2-3 and functional overlay, not documented. Although they failed to rate the extent of claimant's physical impairment, they ventured the legal opinion that claimant's 20% permanent partial disability award was appropriate. It would have been more helpful had the medical experts limited their opinion to the overall extent of physical impairment, thus recognizing the legal determination of disability is an administrative function.

A myelogram administered by Dr. Melgard indicated some small defects in the spine, but no surgery was indicated. In his January 22, 1981 report, Dr. Melgard stated that he would not disagree with the Orthopedic Consultants' diagnosis of a chronic lumbar strain, superimposed upon a degenerative disc disease. In that January report, Dr. Melgard commented:

> "...I think he can do alot (sic) of things around the farm, but probably cannot lift heavy bales of hay, or do any heavy strenuous activity. As far as him going back to work as a contractor if he can work and do only work as a supervisor then I suppose he could go back to full time activities. I think it has already been documented that this patient has a significant limitation and a disability award given him by Orthopedic Consultants..."

As to the monetary amount of claimant's disability, Dr. Melgard properly declined to volunteer an opinion.

Claimant's 15-year history of episodic back pain involved no medical treatment except for a 1975 back sprain for which he received no benefits. He felt he could not afford to claim time-loss for that back problem at the risk of increased insurance premiums for workers' compensation coverage.

Prior to his 1978 back injury, claimant worked full-time operating different types of heavy equipment, either a cat, a road grader, dump truck or a back hoe. He also did most of the physical work and equipment repair on his 176-acre cattle ranch which he had purchased in 1971. When he could no longer operate the heavy equipment, he scaled down his road construction business and tried renting out the equipment. He had trouble monitoring the number of hours the equipment was used and finally phased out the business when he could no longer actively participate and could not insure that the equipment was being properly used or maintained. Since his injury, he employs one full-time person on the ranch and has a young couple do chores in exchange for their rent. He hires extra outside help for summer haying and equipment repair.

The claimant testified that in 1976 his gross income from his road construction business was in excess of $200,000. With a loss of about $12,000 on his ranch, his taxable 1976 income was $70,000. In 1979 the construction business had a net loss of $1,462 with the net income from the ranch being $254. Although actual loss of earnings is not the criteria for determining diminished earning capacity, it is material and relevant where a claimant has been self-employed for many years prior to an on-the-job injury.

Claimant is 54 years old and has an eleventh grade education. All his work experience has involved heavy physical labor. Prior to 1951, he worked in oil fields, in saw mills, on logging crews, as a truck driver, choker setter, millwright's helper and veneer lathe operator. For 20 years following 1951 he was a logging contractor. In 1971 he became involved in his road construction business and bought the cattle ranch. Had it not been for his 1978 back injury, he could earn approximately $14.00 an hour operating heavy road equipment, the wage claimant would have to pay cat or bulldozer operators.

Now restricted to "light" work, claimant can no longer twist, lift, sit, drive or stand for long periods of time. He has significant limitation of motion in the spine with 50% loss of motion on backward bending, 30% loss on sideward bending to the right and 20% to the left. He has a mild give-way weakness in the right iliopsoas and right plantar flexors and has visible atrophy of the right calf. The Orthopaedic Consultants reported that he has a prominent limp; that passive motions of both hips result in pain on the right radiating into the right buttock.

Claimant's treating neurosurgeon, Dr. Mark Melgard, reports that claimant has a "chronic facet irritation." Dr. K. Clair Anderson of Mid-Valley Orthopedic Clinic believed as early as 1978 that it was questionable whether claimant would improve enough to return to construction work or heavy equipment operation; he agreed that claimant's symptoms indicate nerve root involvement. Dr. William Duff stated that claimant "wisely gave up his construction work, since the probability of re-injury if he returned to this is quite high." Claimant has not looked for alternative employment and refused vocational assistance.

The criteria for determining the extent of disability resulting from an unscheduled injury is the permanent loss of earning capacity. Earning capacity is the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration the claimant's age, education, training, skills and work experience. ORS 656.214(5). After our de novo review, we conclude that the claimant is entitled to 40% of the maximum allowable by law for unscheduled permanent partial disability.

ORDER

The Referee's order dated February 24, 1981 is modified. Claimant is hereby awarded 40% of the maximum allowable by law for unscheduled permanent partial disability of the low back as a result of his 1978 injury. Claimant's attorney is awarded a fee equal to 25% of the increased award.

EARL F. FRAME, Claimant
Dennis Black, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-02458
September 25, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Williams' order holding that the employer failed to overcome the firefighters' presumption and remanding as compensable the denied claim for claimant's respiratory and heart conditions as a result of firefighting activities of February 12, 1980.

SAIF contends that its medical expert's opinion that the conditions "could have" been caused by the claimant's deep sea diving activities of February 9, 1980 is adequate to overcome the rebuttable presumption established at ORS 656.802(1) and (2). Claimant contends that the Referee properly relied upon Wright v. SAIF, 289 Or 323 (1980) in reaching his decision. Claimant also argues that even if the firefighters' presumption did not exist, the preponderance of the evidence clearly establishes compensability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 12, 1981 is affirmed. Claimant's attorney is awarded $500 for his services at this Board review, payable by the SAIF Corporation.

ROMELIA GONZALES de SANCHEZ, Claimant
January Roeschlaub, Claimant's Attorney
Noreen Saltveit, Defense Attorney
Own Motion Order

Claim 87-CN-17170 S
September 25, 1981

In April 1979 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury of September 3, 1970. Claimant's aggravation rights have expired.

On October 2, 1980 the Board issued its Own Motion Referring for Hearing in conjunction with another case pending before the Hearings Division on the issue of entitlement to ORS 656.245 benefits. The Board ordered the Referee to hold a consolidated hearing on these two issues.

A hearing was held on February 10, 1981 before Referee Mannix. By an Opinion and Order and Recommendation dated February 12, 1981 the Referee, in the own motion matter, recommended that the Board order the claim to be reopened upon the date that claimant is hospitalized for the recommended surgery.

We disagree with the Referee's recommendation. It is the Board's present policy in own motion matters that a worker who is not employed or available for employment is not entitled to compensation for temporary total disability. This claimant was injured in 1970 and has never returned to gainful employment or sought any such employment or vocational assistance. We find she is not entitled to have her claim reopened.

IT IS SO ORDERED.

ROMELIA GONZALES de SANCHEZ, Claimant
January Roeschlaub, Claimant's Attorney
Noreen Saltveit, Defense Attorney
Request for Review by Employer/Carrier

WCB 79-09700
September 25, 1981

Reviewed by Board Members Barnes and McCallister.

The employer/carrier requests Board review of Referee Mannix's order which ordered it to provide continuing medical services pursuant to ORS 656.245 to the claimant and reimburse her for all outstanding medical bills in regard to her low back and left leg conditions.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 12, 1981 is affirmed. Claimant's attorney is awarded $500 for her services at this Board review, payable by the employer/carrier.

THOMAS HATCHER, Claimant
Karen Fink, Claimant's Attorney
Frank Moscato, Defense Attorney
Request for Review by Employer

WCB 80-10166
September 25, 1981

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Braverman's order which awarded claimant 128° for 40% permanent partial disability for his right shoulder condition. The employer contends the award of 40% unscheduled disability is excessive and the Determination Order awarding 20% scheduled disability should be converted to 20% unscheduled disability and affirmed.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 10, 1981 is affirmed. Claimant's attorney is awarded $300 for her services at this Board review, payable by the employer/carrier.

JAMES HUBBS, Claimant
Richard Condon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-01043
September 25, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Seifert's order which affirmed the SAIF Corporation's denial of claimant's claim for an industrially caused back injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 9, 1980 is affirmed.

DAVID S. HUNTER, Claimant
Michael Royce, Claimant
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-02213
September 25, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Neal's order that this "claim be reopened as of February 13, 1980 because of [claimant's] worsened psychological condition related to his industrial injury." The issues are: (1) Whether the Referee erred in ordering claim reopening; and (2) whether SAIF should have a setoff for a period in 1979 during which claimant received temporary total disability while working.

Taking the second issue first, it is uncontroverted that claimant worked during a period of time he was receiving temporary total disability payments. SAIF thus requested that the Referee correct the November 1979 Determination Order. The Referee apparently felt she was powerless to do so. The Referee was incorrect. Our Referees have both the authority and duty to correct errors in Determination Orders when requested. Lesley L. Robbins, WCB Case No. 79-00001 (June 30, 1981).

We now correct the November 1979 Determination Order by amending it to include the underlined language: "Temporary total disability inclusively from March 20, 1979 through September 6, 1979, less time worked."

On the merits of claim reopening, the Referee found Dr. Leveque's opinion unpersuasive. So do we. In ordering reopening, the Referee found the opinion of Dr. Roberts persuasive. We do not. The inconsistencies in claimant's testimony coupled with Exhibit 45 make it clear to us that Dr. Roberts' opinion was based on an incomplete and inaccurate history. The evidence as a whole does not persuade us that claimant's work-related condition worsened, psychologically or otherwise, in February 1980.

Because the Referee ordered claim reopening, she did not reach the alternative issue of extent of disability raised by claimant's request for hearing. This case will be remanded for consideration of that issue.

ORDER

The November 1, 1979 Determination Order is amended as stated above. The Referee's order dated December 26, 1980 is reversed and this case is remanded for further proceedings consistent with this order.

BEVERLY JACOBSON, Claimant
W.D. Bates, Jr., Claimant's Attorney
Mildred Carmack, Defense Attorney
Request for Review by Claimant

WCB 80-04264
September 25, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee McSwain's order which affirmed the employer's denial of claimant's claim for a compensable industrial injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 17, 1981 is affirmed.

NANCY KIMSEY, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-05585
September 25, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Johnson's order which affirmed the SAIF Corporation's denial of compensability of her neck and low back conditions.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 13, 1981 is affirmed.

CLEATUS B. LEONARD, Claimant
Larry Bruun, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-02260
September 25, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Peterson's order which affirmed a Determination Order which awarded claimant 48° for 15% unscheduled permanent partial disability for his low back injury. Claimant contends the award is insufficient and failed to consider claimant's psychological condition. We agree and, therefore, modify the Referee's order.

The Board adopts the recitation of fact set forth in the Referee's order but would add the following.

Dr. Colbach's May 17, 1979 report stated: "I think the present treatment does still relate to his on-the-job injury of March 24, 1977." The Referee found claimant's psychological condition compensable. We agree.

The question then is, to what extent is claimant permanently impaired? Dr. Colbach stated in his report dated March 9, 1978: "To the extent that they [psychological conditions] are related to the industrial injury, I would see them as being mild to moderate." Again, the doctor's May 1979 report stated: "Men- tal examination today revealed a man very similar to the one described in my previous reports."

Considering claimant's unscheduled disabilities including psychological condition, and in view of pertinent social/vocational factors recited by the Referee, we find claimant has lost 40% of his earning capacity.

ORDER

The Referee's order dated January 26, 1981 is modified. It is ordered that claimant is awarded 128° for 40% unscheduled permanent partial disability. This award is in lieu of all others.

Claimant's attorney is allowed 25% of the increased compensation ordered herein, not to exceed $2,000.

DARYLENE M. LINDBERG, Claimant
Richard Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06821
September 25, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Peterson's order which vacated the Determination Order of July 11, 1980 because he found claimant was not then medically stationary and remanded the claim to SAIF for further processing and retroactive reinstatement of temporary total disability until closure pursuant to ORS 656.268. An alternative issue before the Referee was extent of claimant's permanent disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 20, 1981 is affirmed. Claimant's attorney is awarded $500 for his services at this Board review, payable by the SAIF Corporation.

CLARICE M. MONROE, Claimant
Gary Jones, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-06698
September 25, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of only the attorney's fee awarded by Referee Mannix's supplemental order.

The Referee's original order dated February 5, 1980 rejected claimant's argument that she was permanently and totally disabled. The Board affirmed the Referee on August 11, 1980. Claimant appealed to the Court of Appeals. Claimant also moved to submit additional evidence to that court. The Court of Appeals remanded to the Referee pursuant to ORS 656.298(6). Upon consideration of the additional evidence, by supplemental order dated January 6, 1981, the Referee found claimant was permanently and totally disabled. SAIF has not requested Board review of that finding.

Rather, the only issue raised involves attorney fees. The Referee's original February 5, 1980 order allowed claimant's attorney "25% of this increased award of compensation, not to exceed $2,000, as and for a reasonable attorney fee." The Referee's January 6, 1981 supplemental order allowed claimant's attorney an additional $2,000 in attorney fees. The Referee stated that the proceeding before him on remand was more in the nature of "a new proceeding than...a proceeding on remand," and explained his attorney fee award was "for services rendered at the Board, Court of Appeals and hearing-remand levels."

SAIF objects to the Referee's award of attorney fees on remand, although its standing to do so is far from clear. All of the Referee's awards of attorney fees are payable from claimant's compensation; the attorney fee awards do not increase SAIF's liability in any way.

Nevertheless, assuming standing, we agree with the Referee's result but disagree with his reasoning. First, we reject the Referee's "new proceeding" theory as far-fetched and artificial. Second, we hold the Referee had no authority to award ordinary attorney fees for services rendered at the Board or Court of Appeals levels.

The Referee reached a correct result because of OAR 438-47-010(2) which permits a greater award of attorney fees than otherwise permitted by our rules based upon a sworn statement of extraordinary services. Claimant's attorney did not submit such a statement to the Referee, but has submitted such a statement to the Board in connection with this review. While it would have been better practice to submit the statement of extraordinary services to the Referee, the statement before us fully documents and justifies the Referee's award of attorney fees.

ORDER

The Referee's supplemental order dated January 6, 1981 is affirmed.

Claimant's attorney is awarded $250 for services rendered in connection with this Board review, payable by the SAIF Corporation.

DONNA C. RICHARDSON, Claimant
Steven Yates, Claimant's Attorney
Keith Skelton, Defense Attorney
Request for Review by Employer

WCB 80-06004
September 25, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Baker's order awarding 30% unscheduled permanent partial disability for claimant's low back injuries sustained on July 24, 1979 when she slipped and fell down several catwalk steps where she worked. The Referee's award was in addition to a 10% award granted by Determination Order dated May 15, 1980. The sole issue on review is the extent of disability.

Claimant fell while working as a food processing supervisor. The initial diagnosis was an anterior chip fracture of the lumbar vertebra. There was some doubt that she had, in fact, sustained a fracture. Dr. Stanley commented:

> "If she is still having pain, we will consider a scan to see if there really was a fracture, not that this would make any difference in her prognosis."

New x-rays taken on August 15, 1979 showed no change in the area where a fracture had been suspected. Dr. Stanley then concluded:

> "I do not feel that this was a fracture, just a developmental problem and her main problem was a muscle ligament injury."

At the time she was discharged from the hospital, on August 1, 1979, the diagnosis was that she had sustained a soft tissue injury to the back.

Claimant's recovery was complicated by her obesity. She is 5'2" tall and had weighed around 206 pounds for about 13 years. Because Dr. Stanley did not think her back condition would improve until she lost weight, Dr. Brossart referred her for a medical weight loss program, expressing the opinion that if it failed, consideration might be given to gastroplasty.

Dr. Marva Graham, the medical examiner at the Callahan Center, reported in October 1979 a medical impression of a chronic lumbosacral strain with right sciatica. Claimant's activities were limited to no heavy lifting, bending, twisting or prolonged sitting or standing. Claimant's progress at the center was limited by her obesity and a tendency to be depressed. It was believed, however, that her chances of continuing on a modified job, arranged at her former work place, were fair to good.

Dr. Chen Tsai, to whom claimant went for treatment in January 1980, had the impression of a right L-5 radicular compression due to traumatic herniation of the nucleus pulposus at L4-5. Because of claimant's failure to respond to conservative treatment, he recommended a myelogram. The February myelogram revealed no positive findings. In April 1980, Dr. Tsai stated that no further neurosurgical, diagnostic or therapeutic procedure was indicated. He recommended placement in a sedentary job with weight bearing limited to 20 pounds below the shoulder, no repetitive twisting or turning, with squatting substituted for bending. The limitations were substantially the same as those suggested at the Callahan Center and were restated by Dr. Tsai in a medical report form completed by him on October 13, 1980 for the Employment Division.

Claimant is 33 years old, has a tenth grade education and obtained a GED in 1980. Her work experience includes raising tropical fish, smoked meat processing, molder feeder and vinyl machine operator in addition to food processing work and some experience as a free-lance writer. Claimant's test scores on a General Aptitude Test suggest that she is likely to be able to perform satisfactorily in 51 of the 62 occupational ability patterns.

In summary, we find that claimant sustained only a soft tissue injury with no fracture nor detectible neurological involvement; that her physical impairment as a consequence of this soft tissue injury (as distinguished from unrelated noncompensable conditions such as obesity) is minimal; and that claimant has numerous vocational opportunities available that are within her physical capacity.

ORDER

The Referee's order dated January 30, 1981 is modified. In lieu of the Referee's award, claimant is awarded 48° for 15% unscheduled disability in addition to the 10% award granted by the Determination Order dated May 15, 1980 for a total award of 25% unscheduled disability. Claimant's attorney is allowed an attorney fee of 25% of and out of the compensation granted by this order over that granted by the Determination Order, not to exceed $2,000; this is in lieu of the attorney fee allowed by the Referee.

DAVID TEGMAN, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-07385
September 25, 1981

Reviewed by Board Members Lewis and McCallister.

The SAIF Corporation seeks Board review of those portions of Referee Menashe's order which awarded 25% loss of the right forearm and 60% unscheduled permanent partial disability for claimant's head, brain and psychological injuries. The Referee affirmed those portions of the earlier Determination Order which awarded 100° for total loss of vision in the claimant's left eye, 19.2° for 10% loss of his left arm, and 37.5° for 25% loss of the left leg. Claimant seeks an award of permanent total disability. SAIF contends that the Referee's award is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 9, 1981 is affirmed. Claimant's attorney is granted $400 for his services at this Board review, payable by the SAIF Corporation.

NANCY THORNTON, Claimant
Gordon Stewart, Claimant's Attorney
Marcus Ward, Defense Attorney
Request for Review by SAIF

WCB 79-06568
September 25, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Nichols' order which set aside SAIF's denial of claimant's aggravation claim and proceeded to rate claimant's disability on the aggravation claim.

The Board affirms and adopts the Referee's order with the following additional observations:

Claimant's compensable low back condition was complicated by her pregnancy, as was noted by several doctors. SAIF makes much of these doctors' reports to argue that claimant failed to sustain her burden of proof that her worsened condition was causally related to her compensable injury. However, we believe that the fact that claimant's low back problems continued after the birth of her baby supports the inference of a causal relationship to her industrial injury, and we so infer.

ORDER

The Referee's order dated October 9, 1980 is affirmed. Claimant's attorney is awarded an attorney fee of $300 for services rendered on Board review, payable by the SAIF Corporation.

CLIFFORD WALDRON, Claimant
John Parkhurst, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-07436
September 25, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF seeks Board review and claimant cross requests review of Referee Menashe's order which granted claimant an award of 112° for 35% unscheduled disability. SAIF contends that the award is excessive and that the Determination Order's award of 5% unscheduled low back disability should be reinstated. The claimant contends that the award granted by the Referee is insufficient.

Claimant was employed by the City of Gresham as an equipment operator and sustained a compensable back injury on May 9, 1979 when he fell off a dump truck landing on his tailbone. The medical evidence in this record indicates very little objective findings to substantiate claimant's continuing complaints. His condition has been diagnosed as lumbosacral strain and coccydynia with a possibility of a herniated disc. The Orthopaedic Consultants found no work restrictions were necessary and no permanent impairment resulted. Dr. Patton found significant impairment and placed rather stringent work restrictions on claimant.

We find that the preponderance of evidence precludes claimant from work in heavy manual labor. He is 25 years of age with an 11th grade education. He has obtained his GED. His past work experience includes landscaping, punch press operator, sandblaster and painting parking lot stripes.

We conclude that the award granted by the Referee is excessive but further conclude the award granted by the Determination Order is inadequate. We find claimant's loss of wage earning capacity entitles him to an award of 64° for 20% unscheduled disability.

JON L. WHITE, Claimant
Olson, Hittle et al, Claimant's Attorneys
Blair, MacDonald et al, Defense Attorneys
Request for Review by Claimant

WCB 80-3644
September 25, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Foster's order awarding 20% permanent partial disability for claimant's low back injury of June 5, 1979. Claimant contends that the award is inadequate.

While helping lift a Volkswagen engine where he worked as an auto mechanic, claimant compensably injured his low back. He noted discomfort in his back but continued working. The discomfort increased over a period of time and claimant began to have pain in both legs. About a week after the lifting incident, claimant sought chiropractic treatment from Dr. Rex A. Howard who diagnosed his condition as a lumbar strain. After about ten treatments, which provided only temporary relief, claimant consulted his family doctor, Dr. Barney Saunders, who also diagnosed a lumbosacral strain. He recommended physiotherapy, heat and medication. On June 26, claimant reported pain in the left leg with paresthesis of the leg and foot. No evidence of nerve root impingement was found on examination.

Dr. J. Nicholas Fax, Jr., the orthopedist to whom the claimant was referred by Dr. Howard, noted in August of 1979 that claimant had marked symptoms and should have a myelogram. His examination and review of claimant's x-rays gave him the impression that claimant had a herniated disc in the lower lumbar spine which was most likely putting pressure on the S-1 nerve root. Orthopaedic Consultants disagreed. Their September 1979 diagnosis was simply that claimant had a chronic lumbar strain, since they found no true objective evidence of a herniated disc.

Orthopaedic Consultants did, however, recommend vocational retraining because claimant could no longer do heavy physical work and could not return to his work as a mechanic. For some unexplained reason, Field Services Division closed its file, noting that claimant had no residuals, and apparently told the claimant to contact his former employer for a modified position.

Dr. David Todd, the orthopedic surgeon who examined claimant in July of 1980, reviewed earlier x-rays taken by Dr. Moore. Because he thought the overlying pelvic shadows indicated an abnormality, he made a "cone down lateral view" of the S1 joint, for better definition. The cone down view confirmed the overlying shadow. Based on his review of the new x-ray, Dr. Todd stated the opinion that the L5/S1 disc space was "markedly diminished". Dr. Todd saw posterior spurring on the bottom of the L-5 vertebras, as shown by the cone down view. There is no indication that Orthopaedic Consultants, who again examined claimant in November of 1980, ever reviewed Dr. Todd's x-rays which had better definition of claimant's spinal condition. Their November diagnosis of a chronic lumbosacral muscle and ligamentous strain and their opinion that the narrowing of the intervertebral space at L5/S1 was developmental was based upon a review of only the chiropractor's x-rays. We conclude, therefore, that Dr. Todd's opinion was based upon a more extensive examination and represents a more developed diagnosis. He diagnosed claimant's problem as a herniated disc with posterior osteophyte formation, concluding:

> "After listening to his extensive story, watching him move and performing my examination and reviewing his x-rays, I believe this man has essentially herniated disc at the L-5, S-1 level with posterior osteophyte formation. I think the random nature of his involvement, involving one or the other leg, or both or none, is due to the fact that his herniation is central and I believe that if he were myelogramed we would find proof of this. He is not, at the moment desireous [sic] of myelography, and would rather do something else. . . I have assured him that I plan to be in practice here for a long time and that if he should get into a sudden paralytic episode or an intolerable back problem, that I would more strongly recommend further investigation and probable surgical extirpation of the L-5, S-1 disc."

Claimant was 27 years old at the time of the hearing. Since graduating from high school, claimant has worked almost exclusively as an automobile mechanic. At the time of the hearing he was working part-time at a Plaid Pantry store as a clerk and gas station attendant. When he once worked a full 40-hour week, he had increased trouble with his back. He continues to have back pain, leg pain, numbness in the feet, and may have to undergo surgery in the future to correct his back condition. Claimant's training and experience are in heavy physical work which he can no longer perform.

Straight leg raising varies from 70° bilaterally to 70° on the left and 45° on the right; dorsiflexion is positive on the right, negative on the left. There is an indication of sciatic nerve root irritation with sensory deficits in the right foot, thigh and calf. His back condition prevents any heavy lifting or repetitive bending.

After de novo review, we conclude that claimant is entitled to an award of 30% of the maximum allowable by law for his low back injury of June 5, 1979.

ORDER

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

Claimant is awarded 30% permanent partial disability for the low back, in lieu of all previous awards. Claimant's attorney is awarded an attorney fee equal to 25% of the increased award.

LEO R. WIDENMANN, Claimant
Todd Westmoreland, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-07196
September 25, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Nichols' order remanding as compensably related to claimant's 1978 industrial accident his denied claim for aggravation. There is no dispute that claimant was compensably injured on March 6, 1978 when he was buried to the shoulders in a ditch cave-in. SAIF contends, however, that claimant's present condition is a consequence of a 1968 auto injury in which he sustained a fractured pelvis and not a result of the industrial injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 23, 1981 is affirmed. Claimant's attorney is awarded $600 for his services at this Board review, payable by the SAIF Corporation.

GAIL L. DUCKETT, Claimant
Michael Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-02774
September 28, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Danner's order which set aside its denial and found claimant's claim to be compensable. The issue is whether the claim for injuries sustained in a fall is compensable when claimant fell in a parking lot neither owned nor controlled by the employer.

There is no material dispute about the facts. Claimant worked as a waitress at a restaurant, the Barbecue Pit South, located in a commercial area known as the Candalaria Shopping Center. The south boundary of that shopping center borders on a public street, Alice Street. Across Alice Street, i.e., farther south, is another commercial area that consists of school district offices and parking located closer to the restaurant, and a retail store called Waterbed Haven and associated parking located farther from the restaurant.

The management of the restaurant prohibited its employees from parking in the Candalaria Shopping Center parking lot so that more spaces would be available to customers. It was common practice for restaurant employees to use the Waterbed Haven parking lot; this custom was at least made known to new employees by the restaurant management, if not encouraged. The owner of Waterbed Haven testified that he had no formal arrangement with the restaurant to permit its employees to park in his lot but was aware that they did customarily park in his lot and had no objection to their doing so.

Claimant was injured January 11, 1980 when, after parking in the Waterbed Haven parking lot, she slipped and fell while walking toward the restaurant. The fall occurred in the Waterbed Haven lot.

Both parties rely on Rohrs v. SAIF, 27 Or App 505 (1976). In that case, the court quoted with apparent approval from 1 Larson, Workmen's Compensation Law 4-38, Section 15.41 (1972):

> "As to parking lots owned by the employer, or maintained by the employer for his employees, the great majority of jurisdictions consider them part of the 'premises,' whether within the main company premises or separated from it. This rule is by no means confined to parking lots owned, controlled, or maintained by the employer. The doctrine has been applied when the lot, although not owned by the employer, was exclusively used, or used with the owner's special permission, or just used, by the employees of this employer. Thus, if

> the owner of the building in which the employee works provides a parking lot for the convenience of all his tenants, or if a shopping center parking lot is used by employees of businesses located in the center, the rule is applicable. * * * "

Claimant relies on the "just used" language in the second sentence.

We are not persuaded by this "just used" approach to parking lot situations. First, it is inconsistent with the result in Rohrs. Second, Larson cites no cases that really go that far; rather the second sentence in the quoted material is really qualified by the illustrations given in the third sentence; this is thus an example of a treatise or supposed restatement of the law becoming the law itself if applied uncritically. Third, one of the principal reasons for injuries on the employer's premises being generally compensable, but injuries off the employer's premises being generally not compensable, is the element of control--the employer can control and thus minimize hazardous conditions on his own premises, but here the owner of the Barbecue Pit South could hardly control or minimize hazardous conditions in the Waterbed Haven's parking lot.

In Rohrs the court suggested the possibility of going beyond the concept of control:

> "In all these cases the employer had established, by ownership and control, or by custom, some form of right to use the parking facilities and that right is passed to the employe at no cost as an employment benefit." 27 Or App at 508-509. (Emphasis added.)

The Referee relies on this "right-by-custom" reasoning to conclude: "The employer had a customary right to use the parking facility, which was extended to its employees as an incident of their employment."

We conclude that this "right-by-custom" reasoning will not withstand analysis and could not have been intended by the Court of Appeals to extend to this situation. Claimant and all other restaurant employees had a customary right to park on Alice Street and other nearby streets. This would not make a fall on the street while going to or from work compensable. We fail to perceive any reason for a different result when a worker falls in a parking lot owned by a separate, distinct business while going to or from work. Rules unsupported by reason, even if supported by Larson, have no utility.

ORDER

The Referee's order dated February 18, 1981 is reversed.

MARGIE A. MILLER, Claimant
Bryan Peterson, Claimant's Attorney
Daryll Klein, Defense Attorney
Request for Review by Employer

WCB 80-07138
September 28, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of those portions of Referee Williams' order which set aside its denial and remanded the claim for payment and processing until closed pursuant to an order of the Evaluation Division of the Workers' Compensation Department, and imposing a penalty of 25% of the compensation which became due from the date of the last payment of compensation until the denial of July 28, 1980. Claimant cross-appeals, seeking additional penalties, requesting that the 25% be imposed on all compensation owing including medical expenses from June 14, 1980 until the date of the Opinion and Order or until the claim is properly submitted for claim closure.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 11, 1981 is affirmed. Claimant's attorney is awarded $250 for his services at this Board review, payable by the employer/carrier.

WILLI ARNDT, Claimant
Joseph Post, Claimant's Attorney
E. Kimbark McColl, Attorney
Marshall Cheney, Attorney
Request for Review by Employer

WCB 79-07833
September 29, 1981

Reviewed by the Board en banc.

Crawford and Company, on behalf of Nationwide Insurance Company, seeks Board review of Referee Mulder's order finding Nationwide the responsible carrier on the theory that claimant sustained a new injury rather than an aggravation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 19, 1980 is affirmed. Claimant's attorney is awarded $750 as a reasonable attorney fee for services rendered on this Board review, payable by the employer/carrier.

Chairman Barnes, concurring:

It must often be frustrating to practice law before this Board. My colleagues "adopt" the Referee's order even though it does not even discuss one of the issues raised in the appellant's brief before the Board and even though claimant concedes that the Referee's order is erroneous in one respect. I appreciate that the large volume of cases before the Board makes it tempting to "adopt" a Referee's order so long as it staggers to the correct result, but I think we can and should take the few minutes necessary to address and resolve the issues raised on Board review rather than adopting an incomplete and inaccurate Referee's order. I would do so as follows:

Crawford raises two specious procedural arguments. It first complains that claimant's request for hearing was addressed to the Workers' Compensation Department rather than the Workers' Compensation Board. It is rather courageous of Crawford to raise this issue since its own denial letter advised claimant to file a request for hearing with the Department in violation of OAR 436-83-120. In any event, I conclude that a misdirected hearing request is not a jurisdictional defect. See OAR 436-83-230.

Crawford next complains that claimant's request for hearing was signed by claimant's wife rather than claimant. ORS 656.283(2) permits a request for hearing to be "signed by or on behalf of the party" requesting a hearing. (Emphasis added.) It is obvious to me that claimant's wife was acting on his behalf. Moreover, it was reasonable for her to do so because claimant is not fluent in the English language.

On the merits, I conclude the Referee overstated the record when he said there was "no evidence" that claimant sustained other than a new injury. Nevertheless, I also conclude and agree with the Referee's statement that the medical evidence "preponderates for a new injury."

I agree with the Board's award of attorney fees because in assessing the fee to which claimant's attorney is entitled for prevailing on Board review, we should take into consideration the insubstantial nature of the procedural issues raised on appeal. See Rick A. Rabern, WCB Case No 78-10069 (March 4, 1981 and March 13, 1981).

BERTHA J. BARBER, Claimant
Jeffrey Mutnick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-04539 & 80-04540
September 29, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mongrain's order which affirmed the Determination Order of March 24, 1980 and the Determination Order of April 15, 1980, both of which granted claimant no permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 9, 1981 is affirmed.

JOHN BEASLEY, Claimant
John Svoboda, Claimant's Attorney
Larry Brown, Defense Attorney
Request for Review by Claimant

WCB 80-01299
September 29, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Pferdner's order which dismissed claimant's request for hearing with prejudice. Claimant contends he was not aware he was waiving hearing rights when he signed a lump sum agreement.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 18, 1981 is affirmed.

JUDY A. BOGNER, Claimant
Robert Norman Ehmann, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-07904
September 29, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Menashe's order which affirmed the SAIF Corporation's denial of responsibility for the recommended surgery, a repositioning osteotomy.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 24, 1981 is affirmed.

STEPHEN C. CHOCHREK, Claimant
Samuel Imperati, Claimant's Attorney
Frank Moscato, Defense Attorney
Request for Review by Claimant

WCB 80-05127
September 29, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Mongrain's order awarding 15% unscheduled low back disability as a result of his May 12, 1979 compensable injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 15, 1980 is affirmed.

LESLY A. COOKSEY, Claimant
J. Bradford Shiley, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-07912
September 29, 1981

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Braverman's order which rescinded its partial denial and remanded claimant's claim to it for payment of benefits and rescinded the Determination Order of September 3, 1980 as having been issued prematurely.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 6, 1981 is affirmed. Claimant's attorney is granted $650 for his services at this Board review, payable by the SAIF Corporation.

WESLEY E. CROOKE, Claimant
James Francesconi, Claimant's Attorney
Ronald Atwood, Attorney
Leslie McKenzie, Attorney
Request for Review by Carrier

WCB 80-04302
September 29, 1981

Reviewed by the Board en banc.

EBI Companies seeks Board review of Referee Peterson's order which found it responsible, rather than Farmers Insurance Group, for the claimant's worsened condition. The claimant cross-requests review seeking penalties and attorney fees for the failure of both carriers to request a .307 order.

The Board affirms and adopts the carrier-responsibility portion of the Referee's order with the additional observation that "could have" test of Inkley v. Forest Fiber Products Co., 288 Or 337, 344 (1980), is further support for the Referee's conclusion that EBI is the responsible carrier. We find Kizer v. Guarantee Chevrolet, 51 Or App 9 (1981) relied upon by EBI, to be distinguishable for the reasons stated in Farmers' brief; alternatively, Kizer is inconsistent with Inkley and we must follow Inkley.

We agree completely with the Referee's analysis of the penalty issue.

ORDER

The Referee's order dated November 18, 1980 is affirmed.

RAY P. CYR, Claimant
Gary Jones, Claimant's Attorney
Marshall Cheney, Defense Attorney
Roger Warren, Defense Attorney
Request for Review by Employer

WCB 79-09349 & 80-02708
September 29, 1981

Reviewed by Board Members McCallister and Lewis.

The employer, Burke Electric, seeks Board review of Referee Leahy's order which ordered it to accept claimant's occupational disease claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 5, 1980 is affirmed. Claimant's attorney is awarded $500 for his services at this Board review.

JAMES T. DAVIS, Claimant
Richard Sly, Claimant's Attorney
George Goodman, Defense Attorney
Request for Review by Claimant

WCB 80-07363
September 29, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee William's order which denied all relief sought by claimant. The issues before us and before the Referee were compensability of aggravation, a jurisdictional question, and res judicata on the issue of claimant's request for referral to the Pain Center.

The Board affirms and adopts the order of the Referee.

ORDER

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

Referee's Opinion and Order--December 3, 1980

A hearing was commenced on September 25, 1980 in Portland, Oregon, before Lou L. Williams, Referee. Claimant was present in person and through his attorney, Noreen K. Saltveit. His employer, Delta Lines, Inc., and its insurer, EBI Companies, were represented by George W. Goodman, Attorney at Law. Testimony was taken on that day and additional testimony was taken on October 1, 1980 and at the same place with the same parties being present. The hearing was recessed for written closing argument and the hearing closed October 17, 1980. The claimant seeks to have the claim reopened for time loss and to have the claimant referred for treatment to a pain center. He also seeks an award of penalties and attorney fees based on the alleged unreasonable refusal to reopen and pay time loss benefits. He seeks also to be allowed interim compensation. Claimant asserts both that his condition is not medically stationary and that a claim for aggravation was made and should be allowed pursuant to ORS 656.273.

ISSUES

1. Has claimant suffered an aggravation of his condition as contemplated by ORS 656.273 and, if so, was a claim and the verification submitted to the employer?

2. Does the referee under any theory have jurisdiction to consider claimant's request to reopen?

3. If the referee does have jurisdiction to consider claimant's request under a theory other than aggravation as set out in ORS 656.273, is claimant entitled on the merits of the issue to have his claim reopened?

4. Has the employer wrongfully failed to pay interim compensation?

5. Does the doctrine of res judicata preclude the referee from considering at this time the approval of pain center care for the claimant?

FINDINGS

Claimant suffered a compensable back injury on about October 17, 1978 which was closed by Determination Order published October 23, 1979 awarding claimant, in addition to temporary disability, permanent disability equivalent to 20 percent of the maximum allowed by law for unscheduled disability involving claimant's back. A request for review was subsequently filed listing the issues as whether or not claimant's condition is medically stationary, whether further treatment of the claimant should be admission to the Portland Pain Center, and in the alternative, the extent of claimant's permanent disability. The claimant's condition was found by the referee to be medically stationary on the date in question, that he was entitled to an increase in his permanent disability award to 30 percent of the maximum allowable by law and that there was no "...benefit which would now inure to claimant from admission to the Pain Center, as the claimant is learning to cope with, and reduce his pain by virtue of the treatment he is receiving from the clinical psychologist, and he has already been weaned from his medication." The referee at that hearing felt that the claimant was a manipulative person who had made a conscious effort to deceive the referee. That Order was published on January 2, 1980 and resulted from a hearing on December 13, 1979. On de novo review it was approved by the Workers' Compensation Board by Order on Review published July 28, 1980.

Claimant has been enrolled in a program of vocational rehabilitation and continued to receive treatment from his psychologist as needed. His psychologist referred him to a physiatrist, Dr. Eric Long, for evaluation and treatment of claimant's physical complaints. The claimant was afforded considerable physical therapy and it was the opinion of Dr. Long that claimant's pain was not radicular in nature and resulted from injury to the muscles and other soft tissue. There is no demonstrable evidence that claimant's physical condition is in any way worse than on the date of the previous hearing, the date of the Opinion and Order, or the date of the Order on Review. Claimant's emotional condition has fluctuated from time to time, but on an overall basis his condition has improved during the period from August, 1979 until the date of this hearing. Claimant's depression had been exacerbated with periods of back pain and, one suspects, other disappointments. I find that when claimant visited his psychologist on July 18, 1980 the psychological treatment was enabling him to maintain his goal-oriented direction in schooling and that from the use of deep relaxation training, hypnosis and meditation, the claimant was at that time successfully able to pursue his studies (Exhibit 49). By August 1, 1980 claimant decided "...to withdraw temporarily (from school) to devote time to his rehabilitation." (Exhibit 50). During that period of time claimant had again suffered pain, but it is also probable that he had received the Board's Order on Review of July 28, 1980 in which the Board refused to approve either of claimant's positions that he had not been medically stationary at the time that his claim was closed or that time loss at the Portland Pain Center was the indicated treatment for him.

Although claimant's psychologist and physiatrist believe that there are merits to the multiple modality approach of the Pain Center, the physiatrist (Exhibit 53[b]) has felt that resolution of claimant's pain problem required that all contingencies should reinforce productive activity rather than pain behavior. For that reason he does not feel that time loss compensation simultaneous with medical treatment or the cessation of work or training activities would be in the claimant's best interest. From the record as a whole, I agree.

Claimant's Request for Hearing in this matter was received on August 14, 1980, substantially less than one year after the publication of the Determination Order on October 23, 1979. On August 20, 1980 claimant's attorney mailed the original of Exhibit 52[a] to the employer's designated agent. With the accompanying medical reports that letter could well constitute a claim of aggravation under ORS 656.273 along with medical verification. It should be noted that Exhibit 50, the August 1, 1980 letter from the treating psychologist to claimant's school was not received by the employer until after the date of the filing of the Request for Hearing as to the issues concerning claimant's condition of medical stability and the need for further medical treatment and time loss. The employer has never refused or omitted paying for the services of the psychologist or physiatrist and has made those payments as benefits due the claimant under ORS 656.245. The claim has been closed as to temporary disability benefits but has been active for the payment of medical expenses.

The claimant has twice dropped out of school, and it is the opinion of the treating psychologist that his grades were, at least in some instances, marginal. Claimant's emotional condition has on an overall basis been improving and his need for the services of the Pain Center are not so great now as they were prior to the previous hearing on that question.

OPINION

Both attorney's in this case have done a superior job of briefing the issues and submitting authority. The briefs have been most helpful.

It is the employer's position that the issue as to Pain Center treatment is res judicata; that claimant has failed to make or prove an aggravation claim; and that the referee lacks jurisdiction to reopen on any other basis. The employer moved to dismiss the proceeding on the basis of lack of jurisdiction. There is a great deal of symmetry in reasoning concerning his position, but to rule in his favor on the procedural matters would require a hypertechnical approach inconsistent with the statutory purposes articulated for administration of the Workers' Compensation Law so as to allow claimant's case to be decided on its merits.

The doctrine or res judicata is limited in its operation when sought to be applied to a worker's physical condition which constantly changes. Alfred West, claimant, WCB No. 72-3514, September 25, 1973, 10 VanNatta 232. The claimant can, based on his experience within one year from the date of the Determination Order, show that his claim was prematurely closed and that he is in need of further medical treatment. He is entitled to show a change in his condition, short of that required to prove aggravation. That is correct although he had already been afforded a hearing, for the reason that the test as to whether the claim should be reopened for time loss is whether a prior finding whether by the Evaluation Division or a referee was proper as amplified by the claimant's experience within one year. It is unnecessary in this case to give consideration as to whether that period of one year would be extended by virtue of an Opinion and Order following the Determination Order. Both requests for hearing in this specific case were filed within one year following the Determination Order of October 23, 1979. The rationale and legislative history concerning this matter is found in the Alfred West case which largely incorporated and amplified the case of Cecil B. Whiteshield, Claimant, WCB No. 69-641, decided March 17, 1970, 4 Van Natta 203.

Claimant's attorney has properly preserved her claimant's right to have his case considered in the light of those two cases and those rights are derivative of the Determination Order of October 23, 1979. In so doing she elected to pursue the remedy requiring a lesser degree of proof than would have been required on a claim for aggravation. Assuming, without deciding, that claimant filed a valid claim for aggravation which was medically verified, that claim was made after the request for hearing was filed seeking the same substantive relief. The employer under the rules articulated in Smith v. Amalgamated Sugar Company, 25 Or App 243 (1976) and Vandehey v. Pumilite Glass and Building Company, 35 Or App 187 (1978) is not obliged to pay interim compensation or deny the "claim" within 14 days.

Claimant, having prevailed on the issue of whether he has the right under Whiteshield and West to have his request for reopening for payment of time loss, nevertheless does not prevail on the merits. I do afford weight to the previous finding of the referee and Workers' Compensation Board as to the suitability of Pain Center treatment at the time the evidence was received by the Referee on December 13, 1979. Allowing for changes in condition and weighing the medical evidence which has become available since that date, I find that the claimant has failed to establish that Pain Center treatment is either more necessary or desirable at this time than it was at the time of the previous hearing.

ORDER

IT IS HEREBY ORDERED that the request which claimant seeks is denied.

ERVIN EDGE, Claimant
David Vandenberg, Claimant's Attorney
R. Ray Heysell, Defense Attorney
Order of Remand

WCB 79-04080
September 29, 1981

The Court of Appeals having issued its opinion in this matter and the Board having now received the Court's mandate:

THIS MATTER IS REMANDED to the Hearings Division for further proceedings in accordance with the Court's opinion.

IT IS SO ORDERED.

PATRICK ELLIOTT, Claimant
David Vandenberg, Jr., Claimant's Attorney
Brian Pocock, Defense Attorney
Margaret Leek Leiberan, Defense Attorney
Order on Reconsideration

WCB 80-01598 & 80-04905
September 29, 1981

The Board's Order on Review dated August 13, 1981 concluded that EBI was the responsible carrier on an aggravation theory rather than Argonaut on a new injury theory. We adhere to that conclusion.

Our Order on Review also affirmed the Referee's assessment of a 25% penalty. That portion of our order merits reconsideration.

The basis of the Referee's order was as follows:

> "...it is clear from the record that claimant did not suffer a new injury. EBI Companies did not have good reason, if any, to deny claimant's claim. Therefore, I find that EBI Companies unreasonably refused to pay compensation in denying the claim."

Whatever may have been "clear" at the time of the hearing was not necessarily clear at the time EBI issued its January 23, 1980 denial. At that time, the information available to EBI consisted of Dr. Scheer's January 15, 1980 letter referring to claimant's "re-injury/aggravation" (Exhibit 29) which enclosed copies of earlier reports (Exhibits 24a, 25, 25a, 26 and 27) that Dr. Scheer had submitted to Argonaut on a new injury theory.

We now conclude that the information available to EBI on January 23, 1980 was not then of sufficient quantity or quality to make its denial unreasonable. Dr. Scheer's term, "re-injury/aggravation" is certainly ambiguous. Even if Dr. Scheer had more directly stated that there had been an "aggravation" for which EBI would be responsible, that word is not a talismatic phrase in medical reports because we know that doctors often use it in a different sense than do compensation attorneys. Moreover, further compounding the ambiguity, Dr. Scheer's January 15, 1980 letter to FBI enclosed copies of numerous reports he had previously submitted to Argonaut claiming a new injury.

A denial can be wrong without being unreasonable. We have found EBI's denial to have been wrong. However, it was not unreasonable based on the then-available information.

The Board's August 13, 1981 Order on Review affirmed the Referee's imposition of a 25% penalty on a basis other than that used by the Referee. We previously saw this case as a situation where EBI should have applied for a 307 order:

> "The Board finds that EBI had full knowledge that a situation existed which required both insurers to request the Compliance Division to issue a .307 order, but that it failed to take appropriate action as required by law to insure that the worker receive compensation benefits in a timely manner." Order on Review at page 6.

We now conclude that analysis was erroneous.

The version of OAR 436-54-332 in effect in January 1980 when EBI issued its denial, quoted in our Order on Review at page 6, was long on hortatory platitudes and short on specific duties of insurers. It was for precisely this reason that OAR 436-54-332 was amended April 29, 1980 (temporary rule) and September 5, 1980 (permanent rule). A specific duty is now imposed by the amended version of OAR 436-54-332(6):

> "Upon determining an issue exists as to the responsibility for an otherwise compensable injury, an insurer or self-insured employer shall request a paying agent be designated by application in letter form to the Compliance Division."

Had this version of OAR 436-54-332 been in effect in January 1980 when EBI issued its denial, the penalty imposed might be well warranted. However, because the version of OAR 436-54-332 that was actually in effect in January 1980 did not impose any clear or specific duty to apply for a .307 order, the reasoning in our prior Order on Review cannot be sustained.

ORDER

The Referee's order dated August 13, 1981 is readopted and republished except as follows:

The Referee's order dated September 12, 1980 is modified to eliminate the 25% penalty imposed on EBI Companies.

MICHAEL W. FLOETER, Claimant
Robert Van Natta, Claimant's Attorney
Rdigway Foley, Jr., Defense Attorney
Request for Review by Employer

WCB 80-06986
September 29, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Pferdner's order which affirmed its denial of responsibility for carpal tunnel syndrome but found it was responsible for claimant's tendonitis condition of the right wrist.

The facts as recited by the Referee are adopted as our own.

We concur with the Referee's conclusion that the right carpal tunnel syndrome was not related to claimant's industrial injury of June 12, 1980. We reverse on his conclusion that the tendonitis is related.

The diagnosis of "tendonitis" was made by an osteopath, Dr. Ackerman, at the emergency room of the hospital. Dr. Ebert, who had treated claimant for many years, indicated that any "tendonitis" had cleared up by June 25, 1980. The evidence indicates there are other possibilities as a causative basis for claimant's right wrist condition and, therefore, other possible diagnoses: (1) He suffers from a pre-existing right wrist deformity likely due to an old, ununited fracture of the right wrist; (2) claimant told the emergency personnel on June 13, 1980 that his right wrist had been painful for two or three days (alleged injury occurring the day before, June 12); and (3) claimant told Dr. Ebert on June 25, 1980 he had been recently involved in a "scuffle" but made no mention of any alleged industrial injury.

We find that claimant has failed to prove by a preponderance of evidence that any condition of tendonitis arose out of his alleged injury of June 12, 1980.

ORDER

The Referee's order dated February 20, 1981 is affirmed in part and reversed in part. That part setting aside the denial of July 11, 1980 is reversed and the denial is reinstated. The balance of the Referee's order is affirmed.

J.D. GRESSETT, Claimant
John Stone, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by Employer

WCB 80-00402
September 29, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee McCullough's order which, among other things, found claimant's request for hearing was timely filed even though filed more than a year after the Determination Order sought to be reviewed. We disagree with the Referee's timeliness finding and reverse.

The relevant chronology is as follows:

October 1977: Claimant filed his claim.

December 1977: Claimant's employer denied the claim.

December 1977: Claimant filed a request for hearing on the employer's denial which was assigned WCB Case No. 77-07892.

July 1978: A Referee's order entered in WCB Case No. 77-07892 found the claim to be compensable.

December 29, 1978: The claim then being in an accepted status by virtue of the Referee's order, a Determination Order was issued by the Evaluation Division of the Workers' Compensation Department.

January 5, 1979: Claimant filed a request for hearing on the Determination Order which was assigned WCB Case No. 79-00184.

February 1979: The Board's order, entered in response to the employer's request for review, reversed the Referee in WCB Case No. 77-07892 and held claimant's claim is not compensable.

March 20, 1979: Claimant's attorney requested dismissal of the pending request for hearing in WCB Case No. 79-00184 (the extent case): "We hereby withdraw our request for hearing on this claim, without prejudice, to re-file within one year from the date of the Determination Order, as provided for by law."

March 23, 1979: WCB Case No. 79-00184 was dismissed.

December 1979: On appeal from the Board's February 1979 order in WCB Case No. 77-07892, the Court of Appeals reversed the Board and found claimant's claim to be compensable. Gressett v. Weyerhaeuser, 43 Or App 787 (1979).

January 14, 1980: Claimant filed another request for hearing on the December 29, 1978 Determination Order which was assigned WCB Case No. 80-00402 and is this case.

In summary, this case involves a January 14, 1980 request for hearing on a December 29, 1978 Determination Order.

ORS 656.319(2) is plain and unambiguous: A request for hearing on a Determination Order must be filed within one year of the mailing date of the Determination Order. Despite the rule that requires us to construe statutory doubts in the worker's favor, we do not see any room for statutory construction in this case. One year means one year.

Even if it were possible to read ORS 656.319(2) as allowing one year to mean more than one year, there is no sound reason to do so in this case. The claimant voluntarily sought an order dismissing his request for hearing in the pending extent case (No. 79-00184) when he decided to pursue an appeal on the compensability issue at the Court of Appeals. At that time, claimant's attorney recognized that a subsequent request for hearing had to be filed within a year of the Determination Order "as provided by law." Had he wished to preserve his hearing rights, the proper procedure would have been to seek a postponement at the hearing rather than a dismissal, or to ask that his pending case be placed in inactive status. Since claimant chose dismissal, any hardship created by this decision was self-inflicted.

ORDER

The Referee's order dated September 19, 1980 is reversed.

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.

PHYLLIS E. HALL, Claimant
Peter Hansen, Claimant's Attorney
Frank Moscato, Defense Attorney
Request for Review by Employer

WCB 80-08467
September 29, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Fink's order awarding permanent total disability for claimant's October 1975 compensable back injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 26, 1981 is affirmed. Claimant's attorney is granted $700 for his services at this Board review, payable by the employer/carrier.

DON D. HELVIE, Claimant
Jeffrey Mutnick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-10435
September 29, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Knapp's order which (1) denied claimant's claim for permanent and total disability, (2) granted him an award of 45° for 30% loss of the left leg in lieu of prior awards and (3) granted him an award of 64° for 20% unscheduled upper back and chest disability. Claimant, on appeal, argues he is permanently and totall disabled, or in the alternative is entitled to greater awards of permanent partial disability. The SAIF Corporation did not cross appeal or file a brief, and we assume their silence means agreement with the Referee's findings.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 15, 1980 is affirmed.

RON KNIFFEN, Claimant
Joel Reeder, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-02979
September 29, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Nichols' order which affirmed the carrier's denial of his claim for an injury allegedly sustained on March 5, 1980.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 17, 1981 is affirmed.

CHARLES E. KRAMER, Claimant
Frank Susak, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-04555
September 29, 1981

Reviewed by Board Members Barnes and McCallister.

Claimant's attorney seeks Board review of that portion of Referee Mongrain's order which awarded him a carrier-paid attorney fee of $300 for prevailing in part on the carrier's partial denial. In addition, claimant's attorney was also awarded a fee of $75 for establishing the carrier's tardy payment of some temporary total disability compensation and allowed a fee of 25% of the Referee's 10% unscheduled permanent partial disability award.

The test for attorney fees is efforts expended and results obtained. OAR 438-47-010(2). On this record it is difficult to segregate efforts expended in prevailing in part on the carrier's partial denial and efforts expended in securing increased permanent partial disability compensation, for which claimant's attorney has already received the maximum allowable attorney fee. The result on the partial denial was obtaining payment for: (1) "Medical expenses required to treat the claimant's chronic obstructive pulmonary disease while he was hospitalized after the accident of February 27, 1980;" and (2) "additional medical expenses required to control the claimant's diabetes while he was hospitalized after the accident of February 27, 1980."

There is limited basis in this record for a valuation of these results. We know claimant was hospitalized from February 27 to March 4, 1980. We know claimant was given insulin for his diabetes condition during this period. We know claimant was given oxygen and drugs referred to generally in the record as "broncho dilators" for his respiratory condition during this period. We find no basis in the record for concluding that the cost of these medical services was, at least relative to the cost of medical services generally these days, other than insubstantial.

ORDER

The Referee's order dated May 22, 1981 as amended by the Referee's order dated June 16, 1981 are affirmed.

TIMOFEI KVOKOV, Claimant
Paul Lipscomb, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-02499
September 29, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Baker's order which granted claimant additional compensation for temporary total disability but found claimant was not entitled to any award of permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 24, 1980 is affirmed.

MARGARET J. MOSBRUCKER, Claimant
Keith Tichenor, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Order

WCB 80-07558
September 29, 1981

In April 1980 claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an alleged worsened condition related to her August 21, 1964 industrial injury. Claimant's aggravation rights had expired.

On August 21, 1980 the carrier, SAIF Corporation, advised that it was opposed to any claim reopening. In the interest of all parties the Board referred this matter to the Hearings Division by an Order of September 4, 1980.

A hearing was held on July 16, 1981 before Referee James. The Referee issued his recommendation on August 14, 1981 wherein he recommended that the Board exercise its own motion jurisdiction and reopen claimant's claim when she is hospitalized for the recommended hip surgery.

We disagree in part with the Referee's recommendation. We concur with Dr. Hopkins that claimant's condition is related to her 1964 industrial injury and has materially worsened. However, the evidence before us indicates that claimant has not been employed since the 1964 industrial injury some 17 years, and therefore she is not entitled to compensation for temporary total disability. Claimant is entitled to all medical benefits for the hospitalization and surgery under the provisions of ORS 656.245.

IT IS SO ORDERED.

JAMES A. OWEN, Claimant
David Hytowitz, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by SAIF

WCB 80-09965
September 29, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of that portion of Referee Mannix's order which granted claimant 64° for 20% unscheduled disability "...attributable to trauma to portions of his face surrounding his right eye." SAIF contends that claimant has been adequately compensated by prior Determination Orders.

Claimant sustained a traumatic injury to his right eye on April 15, 1977. This injury eventually resulted in the need to replace the eye with a glass eye and claimant has been granted compensation equal to 100° for 100% loss of vision in the right eye as a scheduled injury. See ORS 656.214(2)(h). The only issue before the Board concerns whether claimant is entitled to additional compensation for unscheduled disability.

We disagree that claimant has shown entitlement to an additional unscheduled award. OAR 436-65-575 states that loss of vision is rated with reference to central visual acuity, integrity of the visual fields and ocular motility. These criteria were considered by the Evaluation Division and resulted in the 100% scheduled award. OAR 436-65-575 goes on to state:

> "Certain findings are to be rated as unscheduled disabilities. These may include excessive or diminished tearing, photophobia, irritability, nervousness and headache."

It is implicit in this rule which permits consideration of factors other than loss of visual acuity in the assessment of disability resulting from an eye injury that such other factors must produce a loss of wage-earning capacity.

We agree with the Referee that claimant sustained destruction of some of the bone under the eye which required reconstructive surgery and damage to the tear ducting system of the eye. However, we do not agree that claimant has suffered any loss of wage-earning capacity due to these problems. Dr. Flaxel did indicate that claimant was precluded from certain jobs, but it is evident that the loss of his eye with concomitant loss of peripheral vision, etc., is the reason for this, not the ancillary, albeit, annoying problems of tearing, headaches, light sensitivity, etc. We conclude claimant has been properly compensated by the Determination Orders' scheduled award of 100% loss of the right eye.

ORDER

The Referee's order dated March 27, 1981 is modified. The award of 20% unscheduled disability is reversed. The Determination Orders of March 14, 1980, September 19, 1980 and January 21, 1981 are affirmed. That portion of the Referee's order which deals with penalties and attorney fees is affirmed.

JENNESS PARKS, Claimant
Alan Scott, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-01261
September 29, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Gemmell's order which set aside SAIF's denial of compensability for claimant's respiratory condition and found SAIF's failure to pay interim compensation unreasonable, entitling claimant to penalties and attorney fees. We affirm and adopt the Referee's well written order. On the issue of compensability we add the following:

Claimant was employed as a punch press operator and racker at Anodizing, Inc. Claimant's work consisted of putting parts on racks before and after they were dipped in various chemical-filled tanks which stripped, cleaned or coated the parts in an aluminum extrusion process. While performing these tasks, the claimant was exposed to caustic and irritant fumes, including fumes from caustic soda, phosphoric and nitric acid, sulphuric acid and sodium hydroxide. At times the fumes became so bad that the building had to be evacuated and production halted.

Since the Court of Appeals' decision in Thompson v. SAIF, 51 Or App 395 (1981), which involved an occupational disease claim for a respiratory condition, we have considered similar respiratory disease claims in several cases. In Donald R. Anderson, WCB Case No. 80-03165 (May 21, 1981), the worker's chronic obstructive pulmonary disease could have been caused by particulates and fumes to which he was exposed while working at a smelting company, or could have been caused by his cigarette smoking. We found the claim was not compensable under Thompson.

In Walter J. Dethlefs, WCB Case No. 79-04604 (June 19, 1981), the worker's vasomotor rhinitis could have been caused by dust, smoke, fumes and particulate matter to which he was exposed at work, or could have been caused by his allergies to such things as house dust and freshly-mown grass. We concluded:

> "It is impossible to separate the effects of on-work and off-work exposure in causing claimant's condition. But it is inescapable that both on-work and off-work exposures contribute to that condition. Under Thompson, this is not enough for the condition to be compensable."

In Barry B. Turnbull, WCB Case No. 80-02231 (August 28, 1981), the worker, who had a long history of respiratory allergies, claimed that work exposure to air pollutants caused or aggravated his condition. The evidence indicated that the worker reacted adversely to a number of items such as coffee, cigarette smoke and various species of trees. We concluded that claimant had failed to prove that work exposure caused his respiratory condition.

In Lillian K. Winders, WCB Case No. 79-10576 (September 18, 1981), the worker claimed her respiratory problems were caused by exposure to a forced-air duct at work. We found that the evidence indicated that the claimant's condition could have been the result of a number of other factors such as claimant's home heating system and her 15-year smoking habit. Because the off-work exposure was substantially the same as the on-work exposure, the claim was denied.

In all of our post-Thompson cases, Anderson, Dethlefs, Turnbull and Winders, we concluded that respiratory conditions were not compensable under the standards of ORS 656.802(1)(a), which requires the condition result from circumstances to which an employee is not ordinarily exposed other than during employment, as that statute was interpreted in James v. SAIF, 290 Or 343 (1981), and Thompson v. SAIF, supra. See also Steven K. Gottfried, WCB Case No. 80-01702 (July 29, 1981).

The facts of this case are distinguishable from our prior cases discussed above. The air pollutants to which the claimant was exposed in this case were both unique in nature and unusual in quantity. We do not know of any off-work situation--and none is suggested by this record--in which a person is ordinarily exposed to fumes of phosphoric acid, nitric acid and sulphuric acid in quantities that require evacuation of a building. The Referee found that claimant had no respiratory problems prior to her employment with Anodizing, Inc. and that the medical evidence attributing her condition to work exposure was clear and uncontroverted. We agree. These facts are in contrast to the above discussed cases in which off-work factors could have been or were contributing causes. The Referee correctly concluded that claimant's condition is compensable as an occupational disease.

ORDER

The Referee's order dated December 3, 1980 is affirmed. Claimant's attorney is awarded $250 as a reasonable attorney fee for services rendered on this Board review, payable by the SAIF Corporation.

RAMONA J. RINGO, Claimant
Richard Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-06334
September 29, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Howell's order which affirmed the SAIF Corporation's denial of responsibility for claimant's alleged injury or injuries of January 1980.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 6, 1981 is affirmed.

JON WAKEFIELD, Claimant
Gary Allen, Claimant's Attorney
William Beers, Defense Attorney
Request for Review by Claimant

WCB 80-09768
September 29, 1981

Reviewed by the Board en banc.

Claimant seeks Board review of Referee McCullough's order which upheld the insurer's denial of responsibility for medical bills incurred in connection with a pre-employment physical examination conducted at the request of a potential employer. Claimant contends that these bills should be the insurer's responsibility under ORS 656.245.

The Board agrees with and adopts the following from the Referee's order:

> "ORS 656.245(1) requires the carrier to provide medical services for conditions resulting from the injury, both before and after claim closure. This statutory requirement is not limited to treatment, either curative or palliative. The statutory language uses the term "services." I think it is reasonable to interpret this term as involving examinations/evaluations for diagnostic purposes regardless of whether any treatment is ultimately provided by the physician. If the statute were limited to treatment per se, presumably the work (sic) "treatment" would have been used rather than "services."

"The question remains, however, whether examinations such as the one provided in this case--which are not done for diagnostic purposes to determine the nature of the medical problem and whether or not treatment is necessary--are contemplated as medical services pursuant to ORS 656.245. The presence of another section in the Workers' Compensation Act suggests a negative answer.

ORS 656.806 provides that a prospective employer, as a prerequisite to employment, may require the applicant to submit to a physical examination at the expense of the said employer. It is true that this section refers to preemployment physical examinations in general and that claimant's examination was not a general physical examination, but one specifically performed because of the prospective employer's concern about the possible effects of claimant's previous back injury. But I think this statutory section embraces the type of physical examination required of claimant in this case. The purpose of a preemployment physical examination is to satisfy the prospective employer that the applicant is fit to do the job for which he has applied, taking into consideration his health in general as well as the effects of any previous work and/or non-work activities."

ORDER

The Referee's order dated May 7, 1981 is affirmed.

DELOISE WILLIAMS, Claimant
Donald Beer, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-07438
September 29, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Mulder's order which affirmed a Determination Order which awarded 16° for 5% permanent partial disability and temporary total disability. The Referee also imposed a 10% penalty and attorney fees for late payment required by a prior Referee's order. Claimant contends that the permanent partial disability award is insufficient.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 16, 1981 is affirmed.

PROPERTY OF
WORKMEN'S COMPENSATION BOARD
SALEM, OREGON

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IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Boyd Bault, Claimant.

BAULT,
Petitioner,
v.
TELEDYNE WAH-CHANG,
Respondent.

(WCB No. 77-6376, CA 18811)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 16, 1981.

Robert W. Muir, Albany, argued the cause for petitioner. With him on the brief was Emmons, Kyle, Kropp & Kryger, P.C., Albany.

Margaret Leiberan, Portland, argued the cause for respondent. With her on the brief was Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Before Joseph, Chief Judge, and Buttler and Warden, Judges.

JOSEPH, C. J.

Affirmed in part; reversed in part.

JOSEPH, C. J.

The issue is whether claimant proved that his back condition was aggravated by his work. The referee ordered the claim accepted. The Board reversed, holding that claimant had failed to establish the aggravation by a preponderance of the evidence, but awarded penalties for unreasonable delay in denying the claim and temporary total disability benefits from the date claimant quit work to the date the claim was denied. Claimant appeals. The issue is purely factual.

Claimant's job required him to move barrels of coke weighing about 450 pounds. One day, as he was moving a barrel, his back wrenched. That is the only incident to which he could later attribute his problem. He continued to work and did not report the incident until 5 days later. He saw Dr. Neal, who diagnosed low back strain and treated him with exercises and pain medication. On May 19, 1976, claimant was released for light duty; he was assigned to lighter work for six weeks. On July 1 his X-rays were normal and no permanent impairment was found. After an original denial of the claim, a determination order issued awarding time loss, but finding no permanent disability.

Claimant returned to his old work, where it was no longer necessary for him to move barrels, but in December he began stockpiling ground coke. That again required him to put barrels onto pallets but did not entail removing them from pallets, which was harder on his back. That lasted six weeks. While claimant noted some effect on his back pain, he continued to work without reporting the pain. In June, 1977, he began work stockpiling oxide in barrels, which required similar exertion.

In early July claimant's union went on strike. That was settled on August 27, but he did not immediately return to work. On September 5, claimant, who had been at the coast attending his sick mother-in-law, quit his job, saying only that he had decided to move to the coast. He told the Employment Division he quit because of his back, which was found to constitute good cause to quit and to

entitle him to unemployment benefits.[1] The order allowing unemployment compensation was sent to the employer on September 14.

On September 7, claimant contacted Dr. Neal and told him he was unable to return to his job. It was later learned by deposition that he had not been examined then, but had merely telephoned and described his complaints, saying there had been no specific traumatic incident but that lifting barrels and walking 100 yards on concrete to and from his work station had made his back condition too painful to continue. Based on this conversation, Dr. Neal reported to claimant's attorney that claimant

> "* * * came in on 9/7/77 saying that he was quitting the job and trying to get some lighter work because his back was continuely */sic/* aggravated by the kind of work he was doing at Wah Chang, which at times was quite heavy. It involved stooping and lifting barrels which weigh 450 pounds.
>
> "He was advised that I felt he should probably go through vocational rehabilitation to be retrained for a lighter type of work. I don't think that any further treatment would be beneficial for his back. It has been bothering him for over a year, and in chronic back conditions the prognosis is poor for a complete recovery."[2]

Later, in answer to an inquiry from claimant's attorney, Dr. Neal responded affirmatively to a question whether the back condition attributable to the 1976 injury was "materially aggravated or worsened following his return to work."

On October 13, 1977, the employer denied the aggravation claim:

> "This request comes as a surprise since you had advised that you were leaving * * * to live on the Coast near relatives. Since you are alleging that your condition at this time is due to your employment, we must conduct a medical and factual investigation and, therefore, are not in the position to extend benefits to you at this time pending the

[1] Claimant testified he quit on the advice of his doctor, which was neither corroborated nor denied by Dr. Neal, who was not questioned on the matter.

[2] He wrote essentially the same thing in January, 1978, to the Vocational Rehabilitation Division.

results of that work-up. Thus, we must advise that your case presently is denied and by copy of this letter, those interested in this decision are so being advised."

In March, 1978, Dr. Neal examined claimant and noted some slight objective changes in his back X-rays, although his complaints were mainly subjective. Range of motion was 80 percent of normal "in all modalities." Dr. Neal testified that the objective manifestations of chronic back strain are present in only about 10 percent of such cases. Therefore, it is customary to rely on subjective complaints. He found claimant was "hurting in the right places." In May, 1978, he again noted that claimant's complaints were mostly subjective.

On January 30, 1978, Dr. Kaye diagnosed chronic sacroiliac strain. He recommended intensive physical therapy and exercises and opined that the condition could be improved, but not entirely cured, by that treatment. In May, 1979, at the employer's request, claimant was examined by Dr. Martens, who diagnosed lumbosacral strain and restricted claimant's subsequent work activities to those involving no bending, twisting or lifting of more than 30 pounds.

Following quitting work, claimant did very little for a year. In the fall of 1978, he obtained work baling firewood for Fred Meyer, Inc. Apparently that job was not permanent. Since then, he and his wife have earned money gathering and drying moss, which is seasonal and less than full-time work. Claimant testified that he rakes moss from trees and rests while his wife gathers it. That occupies a typical morning; both nap when they return home and dry and bale the moss in the afternoon. He said that walking on soft ground is not nearly as bothersome as walking on concrete.

Claimant is an avid hunter, has done some hunting each year since 1976 and plans to continue. His hunting expeditions are all in the vicinity where he lives and do not require a lot of walking, but he testified that restrictions on his hunting have increased with the severity of his back problem. He has ridden horses three times since his May, 1976, injury, each time painfully, and has also taken three long automobile trips. His other travels have been in the

local area, with an occasional trip to Albany where he formerly lived.

His former supervisors testified that no mention had ever been made of claimant's back problem after the original injury and his return to work. They testified he said nothing about his back when his termination was discussed; the only reason given was the illness of his mother-in-law. One also stated that, after he took over the job (in April, 1977), he asked if the men in his department would prefer to rotate jobs. Claimant voted not to change.

The referee observed that the unanimous and unequivocal medical testimony, including one report from the doctor who examined claimant for the employer, was that claimant's back condition had become chronic and necessitated the imposition of restrictions on lifting and bending. It is undisputed that the claim for the 1976 injury was accepted and a determination made of no permanent disability. Dr. Neal stated that prognosis for complete recovery was poor, and Dr. Kaye questioned whether treatment of any kind could totally cure him. Dr. Neal's opinion was weakened somewhat by the fact that it was based almost entirely on subjective complaints, but his diagnosis was confirmed by two other doctors. Furthermore, the referee considered claimant credible and concluded his reports of pain were not exaggerated.

The evidence establishes permanent disability where there was none after the original injury, which was concededly work-related. It is compensable as an aggravation. ORS 656.273(1). Lack of substantial objective signs of the condition and Dr. Neal's failure actually to examine claimant in September, 1977, do not detract from our conclusion.

The order of the Board is reversed insofar as it reversed the referee's order that the aggravation claim be accepted, that benefits be paid accordingly and that claimant's attorney be paid a fee. In all other respects, the order is affirmed.

Affirmed in part; reversed in part.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

FLYING SCOTSMAN, INC.,
Appellant,
v.
LEACH, et al,
Respondents.

(No. 78-7706, CA 17404)

Appeal from Circuit Court, Lane County.

Edwin E. Allen, Judge.

Argued and submitted January 14, 1981.

David Brewer, Eugene, argued the cause for appellant. With him on the briefs were Herb Lombard and Lombard, Gardner, Honsowetz, Brewer & Schons, Eugene.

Edward V. O'Reilly, Eugene, argued the cause and filed the brief for respondents.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P.J.

Affirmed.

RICHARDSON, P.J.

The issue in this case is whether an employer whose employee suffers a compensable injury under the Workers' Compensation Law as a result of the negligence of a third party tortfeasor is entitled to indemnification from the tortfeasor for a resulting increase in the employer's workers' compensation insurance premium. The trial court concluded that the plaintiff employer was not entitled to indemnification damages. We affirm.

A related issue was recently before the Supreme Court in *Ore-Ida Foods v. Indian Head,* 290 Or 909, ___ P2d ___ (1981), where an employer sought damages from a tortfeasor for survivorship benefits which the employer was required to pay under the workers' compensation law to the "unmarried cohabitant" of a worker who died as a result of an on the job injury caused by the tortfeasor. The court held that the employer could not recover on either its negligence or its indemnity theory. With respect to the latter theory, the court noted that a right to indemnification requires proof, *inter alia,* that "[t]he person against whom indemnity is claimed must also be liable to the third person." 290 Or at 919; *see Fulton Ins. v. White Motor Corp.,* 261 Or 206, 493 P2d 138 (1972). Because the defendant tortfeasor in *Ore-Ida* could not have been liable to the worker's survivor, the employer could not recover indemnification from the defendant.

This case differs from *Ore-Ida* in that plaintiff's insurer could conceivably have a cause of action against the defendants pursuant to ORS 656.576 *et seq.,* while the worker's survivor in *Ore-Ida* had no possible cause of action against the tortfeasor. However, the damages which the insurer here could seek from the defendants could not include the insurance premiums owed by plaintiff. For a party to have a right to indemnity from another, they must have a "common duty * * * mutually owed to a third party." *Citizens Ins. v. Signal Ins. Co.,* 261 Or 294, 298, 493 P2d 46 (1972); *see also, Fulton Ins. v. White Motor Corp., supra,* 261 Or at 210-11. Because the defendants are not liable to

plaintiff's insurer for the increased premium, plaintiff is not entitled to indemnification from defendants.[1]

Affirmed.

[1] In this case, unlike *Ore-Ida,* the plaintiff employer does not seek to recover damages from defendants on a negligence theory. In *Ore-Ida* the court applied its earlier decision in *Snow v. West,* 250 Or 114, 440 P2d 864 (1968), and concluded:

> "* * * So far as the legislative policy is concerned, it is clear that the statutes do not now permit recovery. Whether the omission reflects a conscious legislative decision to disallow the recovery of such damages or is simply a legislative oversight, we do not know. The legislature has the power to create a remedy. In view of our precedent in *Snow v. West, supra,* the absence of statutory authority, the substantial body of caselaw from other jurisdictions, and concern for potential consequences flowing from the recognition of liability in such cases, we are reluctant to extend relief to Ore-Ida on a common law negligence claim." (Footnote omitted.) 290 Or at 919.

In our view, the same factors which led the court in *Ore-Ida* to conclude that an employer has no common law negligence remedy against a tortfeasor for the payment of workers' compensation benefits would also lead to the conclusion that employers have no such remedy for the recovery of workers' compensation insurance premiums. The relationship among the employer, the tortfeasor, the employee and the injury producing events are identical whether the damages sustained by the employer take the form of benefit payments or increased premiums.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of William E. Hopson, Claimant,
FARMERS INSURANCE COMPANY,
Petitioner,
v.
HOPSON, et al,
Respondents.

(WCB Nos. 77-5580-E, 78-6309, CA 19560)

Judicial review from Workers' Compensation Board.

Argued and submitted April 15, 1981.

Margaret H. Leek Leiberan, Portland, argued the cause for petitioner. With her on the brief was Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Allen T. Murphy, Jr., Portland, argued the cause for respondent William E. Hopson. With him on the brief was Richardson, Murphy & Nelson, Portland.

No appearance by respondent State Accident Insurance Fund.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

THORNTON, J.

Reversed and remanded.

THORNTON, J.

This appeal presents a novel question: Is an insurer who timely requested a hearing on a determination order declaring claimant permanently and totally disabled barred in that hearing by *res judicata* where the hearing was not held until after the Board, pursuant to ORS 656.206(5), issued an order, two years after the original determination order, declaring that claimant was still totally disabled? The referee concluded the employer was not barred, and the Board, by a 2-1 majority, reversed that decision. We reverse.

Claimant was originally a logger and had a history of back injuries not directly material here. He retired from that occupation and went into the insurance business. Thereafter he sustained a back injury on November 5, 1973, while visiting the home of a prospective customer. On August 31, 1976, a determination order was issued declaring him permanently and totally disabled. On August 31, 1977, the final day of the appeal period (ORS 656.319(2)), the insurer requested a hearing on the determination order.

Before the hearing was held on the determination order, claimant left the insurance field and developed a consulting service in the sale of small real estate parcels and mobile homes. On February 10, 1978, he slipped on a ramp while getting off an airplane on a business trip and has been unable to work since. That injury was covered by a second insurer (SAIF), and the claim was accepted by determination order dated January 29, 1979. Claimant received compensation for time loss less payments made on the prior permanent total disability award. No appeal was taken from that determination.

On February 22, 1979, pursuant to ORS 656.206(5) and OAR 438-24-025(1), the first insurer "requested" Board reexamination of claimant's status. On March 29, 1979, the Board issued an "Order on Reconsideration" continuing that status. OAR 438-24-030(3) authorizes a claimant whose award is reduced to appeal from such an order, but not an insurer. Consequently, neither party could appeal.

On January 8, 1980, the hearing was held on the 1977 request for hearing on the determination order, and

the referee ruled that the employer was entitled to a hearing on the extent of disability pursuant to its initial request.[1] The apparent basis for this ruling was that, whether the order on reconsideration is treated as an order of the Board under its "own motion" jurisdiction (ORS 656.278)[2] or an order made pursuant to the insurer's election to have claimant's status reviewed per ORS 656.206(5), no such order on reexamination should have issued until the initial hearing was held on extent of disability, to which the insurer, having complied with ORS 656.219(2), had an absolute right, was held. All parties appealed, and the Board reversed, stating:

> "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

[1] Prior to the time set for that hearing, however, following claimant's objection that the redetermination at that point of claimant's disability status was barred by *res judicata*, the parties agreed that that would be the sole issue at the hearing.

[2] There was apparently some contention at the hearing that the Board's order on reconsideration was issued pursuant to its "own motion jurisdiction" as prescribed in ORS 656.278, which reads:

> "(1) The power and jurisdiction of the board shall be continuing and it may, upon its own motion, from time to time modify, change or terminate former findings, orders or awards if in its opinion such action is justified.
>
> "(2) An order or award made by the board during the time within which the claimant has the right to request a hearing on aggravation under ORS 656.273 is not an order or award, as the case may be, made by the board on its own motion.
>
> "(3) The claimant has no right to a hearing, review or appeal on any order or award made by the board on its own motion, except when the order diminishes or terminates a former award or terminates medical or hospital care. The employer may request a hearing on an order which increases the award or grants additional medical or hospital care to the claimant."

Because we hold that the procedure set forth in ORS 656.206(5) is mandatory, both as to the insurer and the Board, we do not regard it as being an adjunct of "own motion" jurisdiction. The confusion probably resulted from the similarity of OAR 438-24-030(3), which precludes insurers from appealing Board orders on reexamination, and ORS 656.378(3), which authorizes employers to appeal "own motion rulings" if they increase the award or grant additional medical services. We do not regard the latter as the source of the former. Consequently, the cases cited to us involving the conclusive effect of "own motion orders" are not relevant. *See, e.g., Buell v. S.I.A.C.*, 238 Or 492, 395 P2d 442 (1964); *Coombs v. SAIF*, 39 Or App 293, 592 P2d 242 (1979).

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." (Emphasis in original.)

ORS 656.206(5) reads:

"Each insurer shall reexamine periodically each permanent total disability claim for which the insurer has current payment responsibility to determine whether the worker is currently permanently incapacitated from regularly performing work at a gainful and suitable occupation. Reexamination shall be conducted every two years or at such other more frequent interval as the director may prescribe. Reexamination shall include such medical examinations and reports as the insurer considers necessary or the director may require. The insurer shall forward to the director the results of each reexamination."

In 1978, rules were adopted to implement this section. Each insurer is required to notify the Evaluation Division each year of the current address of any permanently and totally disabled person and to send each such individual a form for reporting income for the preceding year. OAR 438-24-015(3) and (4). Upon return of this form, the Division must determine whether the injured worker is presently gainfully employed or engaged in suitable work. OAR 438-24-025(2). It may request the insurer to undertake additional investigations. *Id.* Thereafter, the results of any investigations are forwarded to the Division along with "such medical examinations and reports as the insurer considers necessary or the Board may require." OAR 438-24-025(3).

OAR 438-24-030 reads:

"(1) The Evaluation Division shall evaluate the information received and submit a recommendation to the

Board which shall include supporting documentation and the recommendation received from the insurer.

"(2) The Board shall consider available evidence and shall issue an order if a reduction or suspension of benefits is determined appropriate.

"(3) Upon receipt of a Board order, the claimant has 30 days to request a hearing.

"(4) If the claimant does not request a hearing within 30 days, the order shall be considered final."

We cannot read ORS 656.206(5) and the rules promulgated thereunder as giving an insurer any choice whatsoever as to whether it desires to proceed with a reexamination of a claimant's status prior to a hearing on the original determination order. The language of the statute and the rules is mandatory and if, in practice, an insurer may elect not to have a particular claimant's status reviewed, the basis for such an election is not apparent in the statute or rules. An insurer does have authority to recommend to the Evaluation Division that permanent total disability payments continue in a given case, OAR 438-24-025(3), but it is just that, a recommendation, and the Division may proceed with reexamination despite an insurer's preference. We therefore conclude that there was no "election of remedies" upon which to predicate a finding in this case that the insurer waived its right to a hearing on the extent of disability.

We also disagree with the Board that its order on reconsideration is *res judicata* on the issue of claimant's status. Generally stated, the doctrine of *res judicata* applies where a subsequent action is brought involving the same parties (or their privies) and the same claim or cause of action. Its effect is to preclude relitigation of any issues which were determined or which could have been determined in the initial case. *Waxwing Cedar Products v. Koennecke,* 278 Or 603, 610, 564 P2d 1061 (1977). This terminology is not directly analogous to the administrative proceedings involved here; it is perhaps more useful to inquire whether the issues to be determined on reconsideration are identical or necessarily include the issues which would be determined at the hearing on extent of disability. *Shannon v. Moffett,* 43 Or App 723, 604 P2d 407 (1979), *rev den* (1980). Admittedly, the focal point of the inquiry in

each instance appears the same — the extent of claimant's disability. On closer examination, however, it is more accurate to say that the issue at the hearing on the original determination order is whether or not the worker is permanently and totally disabled, and the issue in the reconsideration proceeding is whether a claimant *continues* to be disabled to that extent. In other words, analysis on reconsideration begins with the assumption that the worker is in fact permanently and totally disabled and focuses on whether any change has occurred during the intervening period to suggest improvement in that condition. Hypothetically, the Board could have before it the original determination order (which, in the normal course, will have become final through passage of time or exhaustion of appeal rights), the worker's income statements and a report from one doctor stating "the worker's condition is the same" and decide that no modification was justified. The point is that, in the usual course of events, the Board would not — indeed, *could* not — reexamine the evidence that led to the initial determination, because that determination would be *a priori* conclusive.

Here, there is no such conclusive determination. This fact would make no difference, arguably, if the insurer were afforded the opportunity on reconsideration to offer all the evidence it could have offered to challenge the initial determination, because the insurer's request for hearing on the determination order was still pending. In this case, it appears that, in accordance with the permissive language of ORS 656.206(5), the insurer submitted medical reports covering the 1973 injury and developments leading up to the determination order of August 31, 1976, as well as reports on claimant's subsequent medical history. On reconsideration (which is an *ex parte* proceeding), an insurer has no right to offer testimony or to cross-examine claimant or his witnesses. There is no opportunity to make oral argument to the Board.[3] These restrictions on the type of

[3] As a practical matter, the need for such testimony, lay or expert, may not be as critical where, as here, a claimant is totally disabled in terms of physical capacity as opposed to falling within the odd lot category of permanent total disability, because the Evaluation Division's determination was probably based entirely on medical reports. We cannot categorically state that this was true, however, nor that the insurer would not be prejudiced by being unable to offer oral evidence and argument.

evidence that can be presented preclude a finding that the insurer had a "full and fair opportunity to contest the issue" of the extent of claimant's disability. *Shannon v. Moffett, supra,* 43 Or App at 730-31. The order continuing claimant on permanent total disability status gives no indication that any evidence antedating August 31, 1976, was considered.

Finally, an insurer has no right of appeal to this court from a reconsideration order which continues claimant's status, OAR 438-24-030(3), as it would from Board review of a referee's determination. In the normal situation, this makes good sense, because an order continuing the status quo does not prejudice an insurer whose obligation to pay maximum disability benefits has been previously finally determined. Even if it could be assumed that the insurer is not prejudiced in this case because the extent of disability has been determined by the Board (the same body which would review the case were it appealed from a hearings officer), to hold the reconsideration order *res judicata* as to any order which could issue on appeal from the original determination order would deprive the insurer of its right of appeal to this court and, potentially, to the Supreme Court. *See Holmes v. State Ind. Acc. Comm.,* 227 Or 562, 580, 362 P2d 563 (1961). For the foregoing reasons, we hold that the Board erred in concluding that its reconsideration order barred the insurer's right to a hearing on the initial determination order, and we remand for that hearing.

Reversed and remanded.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Earl W. Perdue, Claimant,

PERDUE,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 79-6785, CA 19342)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 15, 1981.

Quentin D. Steele, Klamath Falls, argued the cause and filed the brief for petitioner.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent. With him on the brief were K.R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

THORNTON, J.

Reversed and remanded.

THORNTON, J.

The principal question in this case is whether claimant suffered an aggravation of a January 13, 1977, lumbar strain or a new injury when, on April 9, 1979, he wrenched his back while turning over to climb out from under a house where he had been tearing out a rotted floor joist. The former injury occurred while claimant was employed by a contractor covered by SAIF. The second occurred while he was self-employed and uninsured. The referee found that the medical evidence pointed to the conclusion that a new injury had occurred, and the Board adopted this determination. We conclude to the contrary and reverse. Claimant also seeks penalties and attorney fees for alleged unreasonable delay in payment of compensation and in denying his claim.

The first injury was sustained when he fell off an icy roof and landed on his back. That injury was diagnosed as "lumbar-lumbosacral paravertebral strain" by Dr. Davis, claimant's chiropractor. He was treated for three months and released, first for light labor and then entirely. The claim was accepted, and no permanent disability was awarded. Between the first and second injuries, claimant was not completely symptom-free; he bought a waterbed and on occasion used a back support. He was able to work but paid particular attention to the manner in which he lifted things or avoided lifting altogether if he could.

The second injury happened just as he turned to crawl out from under the house. His legs were temporarily paralyzed and he dragged himself out by his hands. Presently, he cannot do some of the tasks he was able to do after the first injury *(e.g.,* lifting a pre-hung door or carrying roof shingles up a ladder). He was given the same treatments by Dr. Davis as for his first strain, and Dr. Davis wrote to SAIF stating:

"* * * * *

"Mr. Perdue had a previous industrial injury on January 13, 1977. In my opinion, his condition is worse since the last arrangement of compensation. His impairment is more severe, in that he was medically stationary on April 11, 1977, and is now suffering from exacerbation of previous symptoms; pain in the lumbar-lumbosacral spine.

"* * * * *

"In my opinion, these symptoms are a *reaggravation of his original injury of January 13, 1977.* Mr. Perdue is claiming no time loss, and is under treatment in this office." (Emphasis added.)

On May 22, 1979, at SAIF's request, claimant was examined by Dr. Casey, an orthopedist, who reported:

"* * * * *

"Today [claimant] states that his back is essentially back to normal, but he does not do any lifting due to his desire not to reinjure it. However, he can do his work, other than lifting, and can do various recreational activities without discomfort.

"* * * * *

"Repeat x-rays were taken as his last set taken by Dr. Davis was in early 1977, and show a normal lumbar spine.

"Impression: Normal spine exam."

On July 26, SAIF, which had previously accepted the claim as an aggravation, denied further payment on the ground that it was a new injury. On September 25, claimant was examined by Dr. Campagna, a neurologist, who stated, following a review of claimant's medical records:

"* * * * *

"Most recently, the patient has had recurrence of his low back pain which started approximately two weeks ago without trauma. He has been seeing Dr. Davis three times a week and is continuing to work. He complains of low back pain that has improved somewhat with the treatments. He will have sharp pains down the posterior aspect of the right leg occasionally. He denies left leg problems. No numbness has been noted. Bending, stooping and lifting will aggravate the back pain. He notes coughing aggravates his back pain. He denies bowel or bladder problems. Sleeping in a water bed gives relief, and a back brace gives relief while he is working.

"* * * * *

"X-rays: Normal chest. Normal lumbar spine.

"IMPRESSION: Chronic lumbar sprain secondary to industrial accident of January 13, 1977.

"RECOMMENDATION: The present conservative therapy should be continued."

The referee concluded a new injury had occurred:

"The claimant was engaged in rather strenuous work activities, lying on his back, reaching up to pull out rotten

pieces of floor joists, then rolling over to crawl out from the obviously limited space."

He relied on *Smith v. Ed's Pancake House,* 27 Or App 361, 364, 556 P2d 158 (1976), in which we quoted from 4 Larson, *Workmen's Compensation Law,* § 95.12 (1976):

"* * * * *

" '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. This is consistent with the general principle of the compensability of the aggravation of a pre-existing condition.' " (Emphasis added.)

The evidence in this case seems to coincide exactly with the emphasized language from *Larson.* Both Drs. Davis and Campagna stated plainly that the April 9, 1979, injury was an aggravation of the earlier compensable back condition. All doctors agreed that back x-rays showed a normal spine. The symptoms,[1] diagnoses and treatments were virtually identical for both injuries and the symptoms

[1] The referee noted that Dr. Casey's report states that the pain felt by claimant when rolling over to crawl from beneath the house did not radiate down his legs, contrary to claimant's testimony at the hearing. We have found no testimony by claimant that the April 9, 1979, injury caused pain to radiate down his leg. Even so, we cannot tell what inference the referee drew from the purported conflict *(e.g.,* that claimant was not credible). Claimant did testify with regard to the first injury that it produced cramps and numbness in his right leg. Whether or not he had similar symptoms in his right leg as a result of the second incident might bear on the likelihood that a new injury to another part of claimant's body had occurred, but that is irrelevant in this case.

persisted between the two incidents. There is no evidence in this case that claimant sustained any additional trauma to his back. It shows only that he suffered a sudden aggravation of symptoms, worse than the first time, suggesting that his chronic back sprain has worsened and might now limit his ability to work to some extent. We conclude an aggravation occurred and remand the claim for acceptance on that basis.

On the question of penalties, neither the Board nor the referee addressed the matter, although a determination of the point was requested by claimant at both levels. ORS 656.262 (5) requires an insurer to accept or deny a claim within 60 days after obtaining notice. On April 17, 1979, SAIF received Dr. Davis' initial letter report stating the claimant sustained a "re-aggravation" of his original injury, which qualified as a claim for aggravation. ORS 656.273(3). ORS 656.262(8) authorizes imposition of penalties and attorney fees (to the extent recoverable under ORS 656.382(1)) where an insurer "unreasonably delays acceptance or denial of a claim * * *." Dr. Casey's report was written on May 22 and apparently received by SAIF on May 29. Thereafter, insofar as the record shows, SAIF neither received nor requested additional medical evidence. Nevertheless, it did not deny the claim until July 26, about 40 days beyond the 60 days after April 17 allowed by statute, although compensation was apparently paid in the interim as required by ORS 656.262(4). We conclude that that constituted unreasonable delay in denying the claim, and we assess a ten per cent penalty to be reckoned on the benefits to which claimant is found to be entitled on remand.

We conclude claimant is entitled to no additional attorney fees under ORS 656.382(1)[2] because the failure to deny the claim within 60 days does not, in this instance,

[2] ORS 656.382(1) states:

"If a direct responsibility employer or the State Accident Fund Corporation refuses to pay compensation due under an order of a referee, board or court, or otherwise unreasonably resists the payment of compensation, the employer or corporation shall pay to the claimant or his attorney a reasonable attorney's fee as provided in subsection (2) of this section. To the extent a contributing employer has caused the corporation to be charged such fees, such employer may be charged with those fees."

amount to unreasonable resistance in the payment of compensation. Interim payments were being made.

Reversed and remanded.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Harry Gettman, Claimant.

GETTMAN,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB Nos. 77-4221 & 78-4222, CA 19923)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 8, 1981.

Richard A. Sly, Portland, argued the cause for petitioner. With him on the brief was Bloom, Marandas & Sly, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

PER CURIAM.

Affirmed.

PER CURIAM.

This Workers' Compensation case is here for the second time. On the first appeal, *Gettman v. SAIF,* 44 Or App 295, 605 P2d 759 (1980), we affirmed without opinion the order of the Board determining claimant's permanent disability to be equal to 60 percent. On review, the Supreme Court remanded the case to the Board because it felt the Board might have misconstrued ORS 656.206(1)(a)[1] by referring in its order to claimant's "potential for retraining" when the record indicated that claimant had been found ineligible for vocational rehabilitation services. For this reason, the court stated it could not ascertain from the Board's order whether it would have reached the same result, in the exercise of its factfinding function, had it applied the correct rule of law. *Gettman v. SAIF,* 289 Or 609, 616 P2d 473 (1980).

On remand, the Board affirmed its prior order without speculating as to claimant's "potential for retraining." We agree that the medical evidence by itself does not support an award of permanent and total disability, and that, even though claimant was precluded from returning to his former employment, he was able to perform other work within his training or experience, albeit with limitations on lifting and bending.

Claimant has the burden of proving permanent total disability, that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment. ORS 656.206(3). We agree with the Board that claimant failed to sustain his burden.

Affirmed.

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[1] ORS 656.206(1)(a) provides:

"(1) As used in this section:

"(a) 'Permanent total disability' means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. As used in this section, a suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which he is able to perform after rehabilitation."

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Michael Grable, Claimant.
GRABLE,
Petitioner,
v.
WEYERHAEUSER COMPANY,
Respondent.
(CA 16671, SC 27174)

On Review from the Court of Appeals.*

Argued and submitted November 3, 1980.

Thomas A. Huntsberger, of Ackerman & DeWenter, Springfield, argued the cause and filed the briefs for petitioner.

J. W. McCracken, Jr., Eugene, argued the cause and filed a brief for respondent.

Before Tongue, Presiding Justice, and Howell **, Lent, Linde, Peterson and Tanzer.

LENT, J.

Reversed and remanded.

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*Appeal from Order of Workers' Compensation Board (WCB No. 79-866) 47 Or App 1, 614 P2d 635 (1980)

**Howell, J. retired November 30, 1980.

LENT, J.

The issue in this workers' compensation case is whether the employer is required to pay benefits to a claimant for worsening of the worker's condition where the worsening is the result of both an original compensable back injury and a subsequent off-the-job back injury.

Background

The claimant suffered a back injury on February 21, 1978, while lifting heavy blocks of wood in his employer's mill. His claim under the workers' compensation law was accepted by the employer. He was released by his treating doctor for light work on April 3, 1978, and for full duty on May 8, 1978. That doctor was of the opinion at that time that claimant had sustained some mild permanent partial disability in his low back as a result of the accident of February 21, 1978.[1]

From April to October of 1978 claimant was employed at the same mill. He presented evidence by way of his own testimony and that of other witnesses that he continued to have an annoying, dull ache in his low back and hips and that he complained of that pain once or twice a week both on and off the job. On October 28, 1978, while on the roof of his home and pulling to the roof a steel pipe, claimant felt a sharp pain in the part of his back injured in February. Claimant did not return to work and on January 22, 1979, sent a letter, through his lawyer, to the employer asking that his claim be "reopened" for payment of medical expenses and compensation for temporary total disability from the date of the incident on the roof.[2] The employer promptly denied "claim re-opening."

[1] In his brief in the Court of Appeals, claimant asserted that no determination order, ORS 656.268, "has ever been issued for claimant's February injury." The employer has not disputed that assertion. As a consequence, we do not deal with a case in which the workman received an award of compensation for permanent partial disability that may have reflected a consideration of vulnerability to future trauma.

[2] The claimant had filed a claim with a fringe benefit off-the-job disability insurer as the result of the incident on the roof. He testified that he did so because his foreman told him that he could not file a workers' compensation claim for that incident and refused to give him a form to fill out for workers' compensation benefits.

The claimant requested a hearing, and the referee wrote that the matter was before him on appeal from a denial of claimant's request for "reopening his claim from a low back injury on February 21, 1978. * * * The issue is compensability." Following the hearing the referee issued his written Opinion and Order. That writing contains the melange of findings and discussion of the evidence which is apparently customarily issued by referees in workers' compensation cases. It is truly difficult to determine what are the findings of fact, as distinguished from a discussion of the evidence.[3] In that portion of his writing entitled "OPINION," the referee stated:

> "The rule generally applied is that once a work connected character of an injury has been established, the subsequent progression of that condition remains compensable as long as the worsening is not shown to have been produced by an independent non-industrial cause. Claimant suffered a low back injury in February 1978, was able to work without apparent difficulty for almost six months until October 28, 1978, when lifting a pipe onto a roof he became incapacitated.
>
> "In successive injury cases, liability is placed on the carrier covering the risk at the time of the most recent injury which bears a causal relationship to the disability. If the second injury merely takes the form of a recurrence of the first, and if the second injury 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. If the second injury 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 condition contributed to the major part of the final condition. See in this connection, *Smith v. Ed's Pancake House,* 27 Or App 361 (1976). *I find this theory controlling.* It cannot be said that the October injury was a recurrence of the February injury although medical evidence indicates that the location and severity of the pain were

[3] Compare what we said in our opinion in *Rogers v. SAIF,* 289 Or 633, 637, 616 P2d 485, 487 (1980), and cases there cited. Apparently because, in workers' compensation cases, the Court of Appeals reviews de novo on the record, the court does not require the kind of findings of fact it would require of other administrative agencies; however, it appears to us that it would be of benefit to the parties, the Workers' Compensation Board, the courts, and even the referees if they were required to set forth their findings of fact, as such.

> identical. The October incident precipitated the need for further medical treatment and is not the responsibility of the employer." (Emphasis added.)

He then ordered that the employer's denial of the request to reopen be affirmed. On review, the Workers' Compensation Board affirmed and adopted the referee's Opinion and Order.

The Court of Appeals affirmed without opinion. *In the Matter of the Compensation of Grable v. Weyerhaeuser Company,* 47 Or App 1, 614 P2d 635 (1980). We allowed claimant's petition for review, ORS 2.520, 289 Or 731 (1980), to consider whether the Court of Appeals has adopted conflicting rules of law for the disposition of successive injury cases and, more particularly, whether this case should have been disposed of on the authority of *Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976).[4]

Has the Court of Appeals Adopted Conflicting Rules of Law in Various Successive Injury Cases?

Claimant urges that one rule of law has been established in a line of cases culminating in *Standley v. SAIF,* 8 Or App 429, 495 P2d 283 (1972), that where there is a worsening of the worker's condition resulting from a compensable injury following an off-the-job activity, and the worsening requires medical services or results in disability, the claimant makes out a compensable claim for benefits for that worsening if the claimant establishes that the prior compensable injury was a "material contributing cause" of the worsened condition. Claimant interprets the

[4] Once again we are confronted with being unable positively to determine whether the Court of Appeals affirmed because of its agreement with the Workers' Compensation Board on the law or because the court's de novo review of the evidence resulted in a finding against the claimant on the facts. *See, Gettman v. SAIF,* 289 Or 609, 612-613, 616 P2d 473, 474-475 (1980), and Linde, J., concurring, 289 Or at 615-616, 616 P2d at 476-477; *Rogers v. SAIF,* 289 Or 633, 616 P2d 485 (1980). We would not have allowed review had we believed that the decision of the Court of Appeals turned on an exercise of its fact-finding function under a correct rule of law. We are concerned as to whether the Board and the Court of Appeals may have applied erroneous rules of law and thereby prejudiced the factfinding function. *Compare,* what we said recently in *Inkley v. Forest Fiber Products Co.,* 288 Or 337, 345-346, 605 P2d 1175, 1179 (1980):

> "The factual questions in any case depend, of course, on the law to be applied. In this case the Board's misinterpretation of the last injurious exposure rule may have prejudiced its findings of fact."

Court of Appeals decision in *Christensen v. SAIF,* 27 Or App 595, 557 P2d 48 (1976), as standing for a conflicting rule that a claimant has the burden to establish that the worsening of the condition resulting from the prior compensable injury was not the result of an independent, nonindustrial cause.

The employer seems impliedly to agree as to the state of the law for, on oral argument before this court, the employer urged that the issue presented is whether the rule in *Christensen v. SAIF, supra,* is to be adopted by this court.

Claimant contends that the first rule is established by our decisions in *Olson v. State Ind. Acc. Com.,* 222 Or 407, 352 P2d 1096 (1960), and *Lorentzen v. Compensation Department,* 251 Or 92, 444 P2d 946 (1968), and the Court of Appeals' decisions in *Lemons v. Compensation Department,* 2 Or App 128, 467 P2d 128 (1970), and *Standley v. SAIF,* 8 Or App 429, 495 P2d 283 (1972).

Lemons v. Compensation Department, supra, was a case in which the worker had a considerable history of low back troubles prior to September, 1966, when he had an onset of pain in his low back and left leg while lifting a tire at work. His claim was accepted for medical benefits only because he did not lose time from work. He consulted a neurosurgeon, who diagnosed nerve root compression resulting from a herniated intervertebral disc between the fourth and fifth lumbar vertebrae and prescribed conservative treatment. The claim was closed in November, 1966. In May, 1967, the worker had an off-the-job fall with immediate pain in the low back and leg and was hospitalized. The neurosurgeon performed surgery at the site of the herniated disc he had theretofore diagnosed. The Court of Appeals posed the issue as follows:

> "[This case] involves the question of whether there was causal connection between an accident-aggravated low back condition and a subsequent operation to repair an intervertebral disc in the low back where a fall intervened between the aggravation accident and the operation."

2 Or App at 129. The Court of Appeals held that in order to prevail the claimant had to show that the accident of September, 1966, "was a *material contributing cause* to the

plaintiff's condition which necessitated surgery" (emphasis added) and that the accident need not be shown to be the sole cause. For that holding, the Court of Appeals cited this court's decisions in *Lorentzen v. Compensation Department* and *Olson v. State Ind. Acc. Com.*, both *supra*.

In *Standley v. SAIF, supra*, the worker sustained a compensable low back injury in June, 1966. He had a congenital defect not specified in the reported decision and had sustained low back injury in other accidents unrelated to his employment occurring both before and after the on-the-job injury of June, 1966. In 1970 his back condition required surgery, and he claimed that the workers' compensation insurance carrier should pay for the surgery and other attendant benefits. That claim was resisted. The Court of Appeals quoted the holding of *Lemons v. Compensation Department, supra,* that the worker need only show that the on-the-job accident was a "material contributing cause" of the need for surgery, and applied the holding to the case as follows:

> "Here not only was the causal connection between the covered injury of June 1966 and claimant's surgery in 1970 shown by expert medical evidence, but the state produced no contrary expert medical evidence, and by the appeal in effect challenges the medical opinion of its own designated expert.
>
> "We agree with the circuit judge and find that the claimant has established that the accident of June 1966 was a *material contributing cause* to the 1970 condition resulting in the required surgery." (Emphasis added)

8 Or App at 433.

The rule to be drawn from *Lemons* and *Standley* is that where a worker suffers an on-the-job injury and thereafter the condition resulting from that injury is worsened by an off-the-job injury, the compensation insurance carrier will be required to afford workers' compensation benefits for the worsened condition if the worker shows that the on-the-job injury is a material contributing cause of the worsened condition.

The *Lemons* court appeared to believe that it was not establishing a new rule but simply applying a rule already established by this court in *Olson v. State Ind. Acc.*

Com., and *Lorentzen v. Compensation Department,* both *supra*. That belief was inaccurate.

This court was concerned in *Olson* with a widow's claim for benefits for the death of her husband resulting from a coronary occlusion allegedly resulting from on-the-job activity. In exploring whether the claim was compensable, this court was faced with determining whether there was evidence that the decedent's injury was one "arising out of" his employment.[5] In that context, this court stated:

> "Reduced to its simplest form 'arising out of' as used in the act means the work or labor being performed was a causal factor in producing the injury suffered by the workman. *Ramseth v. Maycock,* 209 Or 66, 304 P2d 415; *Brazeale v. State Ind. Acc. Comm.,* 190 Or 565, 227 P2d 804; *Larsen v. State Ind. Acc. Com.,* 135 Or 137, 292 P 195. It need not be the sole cause, but is sufficient if the labor being performed in the employment is a *material, contributing cause* which leads to the unfortunate result. *Elford v. State Ind. Acc. Comm.,* 141 Or 284, 17 P2d 568." (Emphasis added)

222 Or at 414-415.[6] This court went on to hold that there was evidence from which the trial court could find[7] that the work activity materially contributed, along with the worker's pre-existing coronary artery disease, to his death.

In *Lorentzen v. Compensation Department, supra,* this court was concerned with a case much like *Olson*. In *Lorentzen* a widow sought benefits for the death of her husband. She contended that his work activity raised his blood pressure to the extent that it caused a rupture of an

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[5] At the time Olson's claim arose, the statutes were differently numbered and worded than now, but then, as now, one of the requirements of compensability has been that the worker shall have sustained an accidental injury 'arising out of and in the course of' employment. *Compare* Or Laws 1957, ch 718, § 3, with present ORS 656.005(8)(a).

[6] In *Elford v. State Ind. Acc. Comm.,* 141 Or 284, 17 P2d 568 (1932), the worker's physical exertion on the job was found materially to have aggravated a pre-existing condition in that the exertion caused a rupture of a "malignant cancerous growth" in the worker's abdomen. This court found compensability, but it appears that the court's attention was not focused on the "arising out of issue"; rather, the court was concerned with whether the worker sustained a personal injury "by accident * * * caused by violent or external means." Oregon Code 1930, § 49-1827. That was not the same issue presented in *Olson v. State Ind. Acc. Comm.,* 222 Or 407, 352 P2d 1096 (1960).

[7] At the time Olson's claim was being litigated, workers' compensation cases were tried in circuit court in the same manner as other civil cases.

aneurysm of an artery, thus producing a cerebral hemorrhage, from which he died. This court stated that the factual question[8] was whether the worker had sustained an accidental injury arising out of and in the course of employment. This court said:

> "More specifically, the question is whether there is a causal connection, both legal and medical, between plaintiff's work activity and the injury he suffered."

251 Or at 93. The court went on to search the record for evidence that the exertion at work was a material factor in producing the rupture and found such evidence in the testimony of a medical doctor. The opinion concluded as follows:

> "Our appraisal of the evidence leads us to conclude that Lorentzen's exertion was a *material contributing factor* in causing his injury and death." (Emphasis added.)

251 Or at 97.

This review of our cases relied upon by the Court of Appeals in *Lemons* and *Standley* discloses that the respective courts were not faced with the same issue. That does not necessarily mean that the rule adopted by the Court of Appeals in *Lemons* and *Standley* is to be rejected; however, as our later discussion will reveal, Professor Larson[9] contends that the issue of compensability is not properly analyzed in the same way in the situation presented in *Lemons* and *Standley* as in the situation presented in *Olson* and *Lorentzen*. Before that discussion, however, we shall examine the decision of the Court of Appeals in *Christensen v. SAIF*, 27 Or App 595, 557 P2d 48 (1976).

In *Christensen* the Court of Appeals was faced with the same kind of problem as that presented in *Lemons* and *Standley*. "The issue in the case is the difficult one of ascribing causation for a lumbar spine problem leading to a fusion." 27 Or App at 597. Claimant had a congenital anomaly in his low back which had been asymptomatic at

[8] The procedure for obtaining compensation had changed from the time of Olson's accident to that of Lorentzen's accident. In *Lorentzen v. Compensation Department*, 251 Or 92, 444 P2d 946 (1968), this court reviewed the evidence de novo on the record and acted as judge of both the facts and the law.

[9] 1 Larson's Workmen's Compensation Law 3-348 *et seq.* (1978).

the time of his first compensable injury in 1966. He was treated intermittently for low back pain from 1966 to late 1970. From that time until August, 1972, he did not seek medical attention. In August, 1972, he sustained another compensable low back injury, and following that his doctor discussed with him the possibility of surgery, namely, a laminectomy and fusion. Surgery was not performed, and that claim was closed in July, 1973, with an award of five percent unscheduled permanent partial disability. In February, 1974, claimant slipped and fell in a bathtub at home. He testified before the Workers' Compensation Board referee that as he was sitting down in the tub, his feet slipped out from under him, causing him to fall about eight to ten inches. Four or five days later he consulted the same doctor, who "concluded from the consultation that claimant had a chronic recurrent lumbosacral strain with contusions at the base of the spine." 27 Or App at 597. Claimant was unable to work for the next three months and then worked for five months until low back pain caused him to quit work. After some conservative treatment, he had a fusion in December, 1974.

His application for increased compensation on account of worsened condition, ORS 656.273(1),[10] was denied, and he requested a hearing. Upon judicial review, the Court of Appeals stated the background of the case:

> "Following a hearing on claimant's aggravation claim, the referee, in a comprehensive opinion, concluded that claimant failed to establish a causal relation between his present condition and the August 1972 injury and that circumstantial evidence indicates that claimant's present condition may be attributable to an independent nonindustrial cause. Both the Board and the circuit court agreed, but gave greater emphasis to the bathtub fall and less emphasis to the lack of an established causation."

27 Or App at 598. The Court of Appeals then reviewed the testimony of the same doctor. The tenor of that testimony was that claimant's condition which necessitated the surgery and attendant disability were not related to the

[10] ORS 656.273(1) provides:

> "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."

bathtub fall, but were mainly on the basis of his compensable injury of August, 1972. The Court of Appeals then stated:

> "The rule generally applied in this kind of case is that once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause. The issue in cases involving the range of compensable consequences flowing from a primary injury is nearly exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. 1 Larson, Workmen's Compensation Law 3-279, § 13.11 (1972)."

27 Or App at 599. The court then found that the claimant had produced the necessary evidence to establish the causal connection required by ORS 656.273(1) and held his claim for increased compensation on account of worsened condition should be allowed.

It will be perceived that in *Christensen* the court stated a rule which, in its terms, is not the same rule as that stated and applied in *Lemons* and *Standley*. The rule stated in *Christensen* is drawn from an analytical approach for which Professor Larson contends. There is nothing in the *Christensen* opinion to indicate that the Court of Appeals considered that it was adopting a new rule for deciding claims for increased compensation on account of worsened condition. The older cases of *Lemons* and *Standley* were not mentioned; the rule stated in those cases was not disapproved.[11]

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[11] Neither party's brief in *Christensen v. SAIF*, 27 Or App 595, 557 P2d 48 (1976), referred to either *Lemons v. Compensation Department*, 2 Or App 128, 467 P2d 128 (1970), or *Standley v. SAIF*, 8 Or App 429, 495 P2d 283 (1972). Oregon Briefs, Vol. 2281.

The employer has also cited to us *Myers v. SAIF*, 34 Or App 13, 577 P2d 546 (1978), as being "the case most closely in point." The employer's brief discusses what the referee, "citing the rule in Christensen, held" and states that the Workers' Compensation Board adopted the Opinion and Order of the referee. The brief tells us that the Court of Appeals affirmed without opinion. We assume that the employer would have us conclude that the Court of Appeals likewise applied its holding in *Christensen*. We are unable with any confidence to do so. The Court of Appeals' per curiam opinion in *Myers* does not cite *Christensen*; rather, *Bowman v. Oregon Transfer Co.*, 33 Or App 241, 576 P2d 27 (1978), is cited as the authority on which the case was decided by the Court of Appeals. This leads us to

As noted above, in *Christensen* the Court of Appeals drew upon Professor Larson's conceptualization of the proper analytical approach to the range of compensable consequences flowing from the "primary" injury. In the blackletter, Professor Larson states:

> "§ 13.00 When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct."

1 Larson's Workmen's Compensation Law 3-348, § 13.00 (1978). The author elaborates on the blackletter in § 13.11:

> "A distinction must be observed between causation rules affecting the primary injury * * * and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment. * * *"

Looking back, we see that this court in *Olson* and *Lorentzen* was concerned with causation rules affecting the primary injury. In *Lemons* and *Standley* the Court of Appeals applied those same rules to determine how far the range of compensable consequences should be carried. In doing so, the Court of Appeals did not employ what Professor Larson would consider to be a proper analytical approach. In *Christensen,* on the other hand, the Court of Appeals analyzed the issue as would Professor Larson, who in § 13.11 went on to say:

> "But when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of 'direct and natural results,' and of claimant's own conduct as an independent intervening cause." Larson, *supra* at 3-348.

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believe that the Court of Appeals' decision was the result of its function as fact finder. *See, Gettman v. SAIF* and *Rogers v. SAIF,* both *supra* n 4.

On the other hand, claimant, in his brief, has sought to distinguish *Myers* despite the fact that the Court of Appeals did not rely upon that case. The points of distinction all have to do with facts, not law, and we do not see any reason for further consideration of the decision in *Myers.*

In connection with the rule stated by the Court of Appeals in *Christensen,* 27 Or App at 599, above quoted, Professor Larson cites a decision of the Mississippi Supreme Court in a case similar to the one at bar. In *Medart Div. of Jackes-Evans Mfg. v. Adams,* 344 So2d 141 (Miss 1977), claimant injured her low back while lifting at work. A few months later she had surgery for the condition. She continued to have soreness in her back, and about three and a half months after the surgery experienced "severe pain" in her back while picking up clothes from a laundry basket at home. Eventually this led to further surgery at the same site as the first operation. The court stated the issue as follows:

> "The only question in this case that merits discussion is whether claimant's injury of July 2, 1972, resulting from bending over to pick up some clothes in her home is an independent intervening nonindustrial cause."

344 So 2d at 143. The Mississippi court then quoted from Professor Larson's text a passage illustrating his view as to what kind of activity is not an independent intervening cause:

> "* * * [Benefits should be awarded] if the triggering episode is some nonemployment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances. * * *" Larson, *supra* at 3-353, § 13.11.

The court held, applying the quoted text, that the complications following the laundry basket episode were not the result of an independent intervening cause, and the disability resulting from that episode was compensable as flowing from the primary injury.

There is no doubt that the Court of Appeals in *Christensen,* in stating the law, focused on the approach urged as being proper by Professor Larson; however, if that court had examined the evidence under the rule to be drawn from *Lemons* and *Standley,* the claimant in *Christensen* apparently would still have prevailed. Immediately following the statement of the rule espoused by Professor Larson, the Court of Appeals turned to its application:

> "We think that in this case the claimant has produced the requisite medical evidence sufficient to establish the causal connection between his present condition and the 1972 injury. * * * Further, we do not think that the circumstantial evidence that claimant consulted Dr. Lynch four or five days after his bathtub fall establishes an independent nonindustrial cause for claimant's condition in light of the medical opinion to the contrary."

27 Or App at 599. The first sentence is more in tune with the rule stated in *Lemons* and *Standley* than the rule paraphrased from Professor Larson's text.

We have come to the conclusion that, while the Court of Appeals has stated differing rules for decision of the subsequent off-the-job injury cases discussed above, the rules are not in conflict. We do not perceive that the result in any of those cases would have been different if the court had interchanged the rules. We believe the same is true with respect to *Medart Div. of Jackes-Evans Mfg. v. Adams, supra*. Had the Mississippi court inquired whether the primary injury was a "material contributing cause" of the claimant's condition following the laundry basket episode, the result would clearly have been the same.

We consider the distinction urged by Professor Larson to be more apparent than real. He expresses his rule in two different sets of words, but without in any manner indicating that he believes there to be any difference flowing from the manner of expression. At one place he speaks of the requirement that the subsequent off-the-job injury be the "direct and natural result" of the primary compensable injury; at another, he focuses upon whether the later injury is an "independent intervening cause." The approach he criticizes is in that of inquiring whether the compensable injury is a "material contributing cause" of the worsened condition.

We believe that the compensability of a worsened condition following an off-the-job injury may be determined equally as well under the rule stated and applied in *Lemons* and *Standley* as that stated by Professor Larson and paraphrased in *Christensen*. We conclude that if the claimant establishes that the compensable injury is a "material contributing cause" of his worsened condition, he has

thereby necessarily established that the worsened condition is not the result of an "independent, intervening" non-industrial cause. We hold that an employer is required to pay worker's compensation benefits for worsening of a worker's condition where the worsening is the result of both a compensable on-the-job back injury and a subsequent off-the-job injury to the same part of the body if the worker establishes that the on-the-job injury is a material contributing cause of the worsened condition.

Application of the Last Injurious Exposure Rule

The referee and the Board, by adopting the referee's Opinion and Order, found this claim to be governed by the theory applied to allocation of responsibility for the payment of compensation, as represented by the decision of the Court of Appeals in *Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976). The issue in that case was stated by that court to be:

> "The issue in this appeal is *which of two compensation carriers* must bear the cost of claimant's workmen's compensation claim." (Emphasis added.)

27 Or App at 363. The mere statement of the issue demonstrates that the *holding* of the case is not directly applicable to the case at bar.

In *Smith* the claimant injured her low back in May, 1973, while working for the first employer. In July, 1973, she was declared to be medically stationary. She worked for that employer for about eight months longer and quit for reasons unrelated to her job. About a month after leaving the first job she had an on-the-job fall in the employ of a second employer. She again complained of pain in the low back. It was found on conflicting evidence that she had low back pain prior to the fall at work but that the condition was more severe after the fall. The Court of Appeals accepted the testimony of the treating doctor that the fall while in the employ of the second employer was "a material contributing cause" of claimant's worsened condition. On that basis the Court of Appeals placed the responsibility for payment of compensation on the carrier for the second employer.

In doing so, the Court of Appeals applied a rule stated in Professor Larson's treatise dealing with the general subject of "RIGHTS BETWEEN INSURERS." It is clear that the author is concerned with successive worker's compensation insurers, not with a compensation carrier on the one hand and an off-the-job insurer on the other hand. The blackletter of the text is as follows:

> "When a disability develops gradually, or when it comes as the result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation. In some jurisdictions apportionment has been worked out by judicial decision, or provided for by express statute, when events within the coverage periods of successive insurers contribute causally to the final disability."

4 Larson's Workmen's Compensation Law 17-70, § 95.00. The author, in discussing this allocation of responsibility among worker's compensation carriers, goes on to state:

> "The 'last injurious exposure' rule in successive-injury cases places full liability on the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability."

4 Larson's Workmen's Compensation Law 17-71, § 95.12. The policy underlying this rule is to free the worker from the burden of assigning or allocating responsibility when it is difficult or impossible to determine which injury caused the condition giving rise to the claim for benefits. *Compare, Inkley v. Forest Fiber Products Co.,* 288 Or 337, 605 P2d 1175 (1980) and *Holden v. Willamette Industries,* 28 Or App 613, 560 P2d 298 (1977), both of which were occupational disease claims, but discussed the policy considerations.

Such policy considerations have no bearing upon the kind of successive injury situation presented in the case at bar. Contrary to the finding of the referee, the Board and, presumably, the Court of Appeals, not only do we not believe the theory of the last injurious exposure rule to be controlling,[12] we find it to be not appropriate.

[12] *See,* the emphasized sentence of our quotation from the referee's opinion at p _____ (slip opinion p 3).

As in *Inkley v. Forest Fiber Products Co.* and *Gettman v. SAIF,* both *supra,* we are concerned that the fact-finding function of the Worker's Compensation Board may have been prejudiced by misinterpretation of the law. In those cases, we remanded to the Court of Appeals to remand to the Board for the Board to consider the circumstances in light of this opinion. Because of the de novo review function of the Court of Appeals, we have decided to remand to the Court of Appeals and to allow that court to decide whether to remand further.

Reversed and remanded.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Jess A. Giger, Claimant.

NEAL'S TRUCK STOP,
Petitioner,
v.
GIGER,
Respondent.

(WCB No. 78-9716, CA 19649)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 24, 1981.

Margaret H. Leek Leiberan, Portland, argued the cause for petitioner. With her on the brief was Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Steven Yates, Eugene, argued the cause for respondent. On the brief were Evohl F. Malagon, and Malagon, Velure & Yates, Eugene.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

ROBERTS, J.

Affirmed in part; reversed in part and remanded for further proceedings.

ROBERTS, J.

The issues in this workers' compensation case are whether claimant has proved a causal connection between his injury and his disability and whether the attorney fee awarded by the referee was reasonable.

Claimant suffered an injury to his right leg in August, 1975, when it was struck by a piece of metal while he was performing general labor for petitioner employer. Subsequent to the injury the leg became ulcerated, and claimant suffered persistent drainage from the ulcer. He was admitted to the hospital for treatment of these conditions a few days following the accident and since that time has had numerous operations performed on the leg to correct the persistent opening and closing of the wound. By a determination order entered April 5, 1977, claimant was awarded time loss benefits to the date of the accident. Claimant has not worked since his initial hospitalization. He is 67 years old. Prior to the accident he had been steadily employed as a mechanic, truck driver and millworker.

By letter of October 27, 1978, petitioner's insurer denied claimant payment for further medical benefits. A hearing was held August 23, 1979; the referee found "the need for further medical care and treatment is certainly obvious [from photographs of claimant's leg.]" The referee's opinion stated:

> "* * * [C]laimant's pre-existing osteomyelitis was aggravated pathologically both in tissue and in function by the industrial injury of August 19, 1975 * * *. The aggravation has occurred since the last arrangement of compensation on April 5, 1977. Carrier's denial was incorrect."

The referee ordered the claim reopened and payment of all medicals and time loss benefits retroactive to the date of the determination order. Claimant was awarded a $2,250 attorney fee in addition to the compensation. The Workers' Compensation Board (Board) affirmed the referee on the merits. The Board left the attorney fee award intact. It said:

> "It is the Board's policy to handle attorney fee issues under the provisions of ORS 656.388(2). Therefore, it will not make a determination of the reasonableness of the fee

in this case, but will leave it for the employer to proceed as it wishes."

The employer appeals. Our review is *de novo*. ORS 656.298(6).

On our review of the record, we agree with the referee and the Board that claimant has proved by a preponderance of the medical evidence that there is a causal connection between his injury and the resultant disability. *Mandell v. SAIF*, 41 Or App 253, 597 P2d 1281 (1979). There were reports from three orthopedic surgeons regarding claimant's condition: Dr. Balme, the Klamath Falls physician who treated claimant for and following the August 29, 1975 injury; Dr. Parker, of Oroville, California, who treated claimant beginning eight months after the injury in 1976 and 1977, when claimant returned to California to look for work, and who had previously treated claimant in 1966 for a similar condition; and Dr. Oberlin, also of California, who apparently saw claimant only once, in June, 1977. Dr. Oberlin was the only one of the three to find the claimant's leg ulcer to be related to an earlier 1937 injury and not the injury sustained in 1975 while working for this employer.[1]

In a series of letters to employer's insurer over the four-year period from September, 1975, to September, 1979, Dr. Balme repeatedly stated that the 1975 injury had caused "acute exacerbation" of the chronic osteomyelitis in claimant's right leg. He noted that for approximately ten years preceding the 1975 injury claimant had suffered no drainage problems with the leg.[2] His last letter stated unequivocally that the injury at issue caused "an aggravation of a pre-existing condition." Dr. Parker, who performed several operations on claimant's leg during 1976, stated in a letter to the insurer following these operations that the 1975 Oregon injury caused a "flare-up" of claimant's chronic osteomyelitis and that there was, therefore, in his mind, a medical causal relationship between the two. Thus, two of

[1] In 1937, claimant was involved in an automobile accident in which he suffered a fracture of the right tibia. All the doctors who examined claimant agreed he suffered from chronic osteomyelitis as a result of this injury.

[2] The last open ulceration of the leg occurred, claimant said, in 1966, when he struck the leg with a hoist while employed at a service station.

the three doctors agreed that claimant's continuing problems with his leg, extending into 1977 and 1978, were related to the 1975 industrial accident. The only doctor who disagreed had only examined claimant once, simply did not believe claimant's version of his medical history and was of the opinion that he was malingering. Claimant's proof clearly met the *Mandell* test.

As to the attorney fee issue, the question of the Board's refusal to consider the reasonableness of the award has been settled by *SAIF v. Anlauf,* 52 Or App 115, 627 P2d 1269 (1981). As noted there, the governing statute is not ORS 656.388(2)[3], but ORS 656.295, providing for Board review of referee orders. We said in *Anlauf:*

> "[W]hile ORS 656.388(2) might arguably make circuit court review the exclusive method in a case where an attorney fee is ordered to be paid out of compensation, no such requirement exists in a case where the fee is ordered to be paid by SAIF in addition to compensation under ORS 656.386(1)." 52 Or App at 119.

Petitioner was here ordered to pay the fee in addition to compensation. Circuit court review is not mandatory. SAIF had the right to request Board review of the referee's order, and the Board erred in refusing to consider the question of the reasonableness of the fee. Accordingly, the case is remanded for further proceedings on the attorney fee issue.

Affirmed in part; reversed in part and remanded for further proceedings.

[3] ORS 656.388(2) provides:

> "If an attorney and the referee or board cannot agree upon the amount of the fee, each forthwith shall submit a written statement of the services rendered to the presiding judge of the circuit court in the county in which the claimant resides. The judge shall, in a summary manner, without the payment of filing, trial or court fees, determine the amount of such fee. This controversy shall be given precedence over other proceedings."

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Anthony Landriscina, Claimant.

LANDRISCINA,
Petitioner,
v.
RAYGO-WAGNER, et al,
Respondents.

(No. 79-1775, CA 19195)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 15, 1981.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, Kahn & O Leary, Portland.

Margaret H. Leek Leiberan, Portland, argued the cause for respondents. With her on the brief was Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judge.

RICHARDSON, P.J.

Reversed and remanded.

RICHARDSON, P.J.

Claimant appeals an order of the Workers' Compensation Board determining that he had waived his right to contest a determination order by accepting a lump sum payment of the award. ORS 656.304. Claimant also contends that if he has not waived his right to contest the award, he is entitled to permanent total disability benefits. The referee determined there was no waiver and that claimant was permanently and totally disabled. The Board reversed the referee's order regarding waiver and did not discuss the merits of claimant's disability claim. We reverse and remand.

Claimant is presently 60 years old. He was born on the Isle of Rhodes and lived in Italy until 1962, when he immigrated to the United States. He had some formal education beyond the high school level in Italy, but the extent of that education is difficult to discern. He apparently speaks English quite well and has an elementary ability to read and write English.

Claimant sustained a compensable injury to his back on April 17, 1975, while employed by Raygo-Wagner, which was insured by United Pacific Insurance Company (United Pacific). He received medical treatment, including surgery, and ultimately a determination order was issued on November 3, 1978, awarding him 35 percent unscheduled disability. Immediately after receiving the determination order, claimant called William Slater, a disability determination specialist for the Evaluation Division of the Workers' Compensation Department. Claimant told Slater he disagreed with the award and that current medical reports showed he was permanently disabled. Slater informed claimant that he did not have the current medical reports and that if claimant sent in the reports his claim would be reevaluated. Claimant's doctors submitted several additional medical reports to the Evaluation Division, and the Division began the process of reconsideration.

United Pacific, upon receiving the determination order, mailed the first monthly check for the award to claimant early in November, 1978. Claimant called the claims manager for United Pacific on November 13, 1978, and indicated that he disagreed with the award and did not

want to accept the monthly checks. The claims manager informed him that by accepting and cashing the monthly checks he did not waive his right to contest the award.[1] There was no discussion regarding a lump sum payment.

On November 21, 1978, claimant called United Pacific and requested forms in order to obtain a lump sum payment of his award. There was no discussion regarding the effect of accepting a lump sum payment. Claimant completed the forms with the assistance of his ex-wife and returned them to United Pacific on November 27, 1978. The application form contained the following statement in the same size type as the balance of the form:

> "I further understand that I will have waived my right to a hearing on this award by applying for and accepting an advance lump sum payment. * * *."[2]

United Pacific submitted the forms to the Compliance Division of the Workers' Compensation Department for approval pursuant to ORS 656.230.

Jean Howard, Claims Examiner for the Compliance Division, received claimant's application for lump sum payment and found it inadequate. On December 1, 1978, she wrote to claimant requesting additional information regarding the reasons for the request. Claimant responded in a letter of December 7, 1978, that he wanted the money to pay off his mortgage.

Howard had gone on vacation prior to the time claimant's response was received in the Compliance Division. Her supervisor, Wanda Meithof, reviewed the file and approved the application. Meithof testified that she assumed Howard had completed investigation of the application and that she was not aware at the time that the

[1] Two other individuals, including a member of then Congressman Duncan's staff, called United Pacific on claimant's behalf and were given the same information.

[2] This warning was required by Department regulation. The regulation was subsequently amended to require the following language to be prominently displayed in bold face type:

> "I UNDERSTAND THAT BY APPLYING FOR AND ACCEPTING A LUMP SUM PAYMENT OF MY PERMANENT PARTIAL DISABILITY AWARD, I WAIVE THE RIGHT TO APPEAL THE ADEQUACY OF THE AWARD." OAR 436-54-250.

Evaluation Division was in the process of reconsidering the initial determination. She stated that if she had had that information, she would not have approved the lump sum payment because it would have been contrary to Department regulations. The approved request was transmitted to United Pacific on December 19, 1978, and a check for the total amount of the award was sent to claimant the next day. He deposited the check in his bank account.

Shortly after depositing the check, claimant became aware that acceptance of the lump sum award assertedly prevented him from contesting the determination order. On December 26, 1978, he called the claims manager for United Pacific and told him he had been deceived by United Pacific regarding his right to dispute the award and would return the lump sum payment. The following day he went to the United Pacific claims office and gave the claims manager his personal check for the amount of the lump sum payment. That check was returned to claimant the next day.

On January 10, 1979, claimant was informed by the Evaluation Division that because he had accepted the lump sum payment, the original award could no longer be reevaluated. He requested a hearing and again tendered the amount of the lump sum award.

The issue in this case is the application of ORS 656.304 to the facts of the case. That statute provides:

> "A claimant may accept and cash any check given in payment of any award or compensation without affecting his right to a hearing, except that the right of hearing on any award shall be waived by acceptance of a lump sum award by a claimant where such lump sum award was granted on his own application under ORS 656.230. * * *"

ORS 656.230 states:

> "(1) Where a worker has been awarded compensation for permanent partial disability, and the award has become final by operation of law or waiver of the right to appeal its adequacy, the director may, in the director's discretion, upon the worker's application order all or any part of the remaining unpaid award to be paid to him in a lump sum. Any remaining balance shall be paid pursuant to ORS 656.216.
>
> "* * * * *."

The Director of the Workers' Compensation Department is given discretion to approve or disapprove an application for lump sum payment of an award. In carrying out this function, the Department has promulgated rules setting forth guidelines and criteria regarding the exercise of discretion. OAR 436-53-005, which was in effect at the time claimant submitted his application, provided:

> "(1) A worker who has been awarded permanent partial disability compensation may apply to the Compliance Division for an order directing the paying agency to pay all or part of his remaining unpaid award to him in a lump sum, if the worker was injured after October 4, 1973. The applicant shall state the part of the award that he wishes to be paid in a lump sum and the reasons for his request. The Compliance Division shall not process or approve an application, in those cases where the award is not final by operation of law, unless it receives from the claimant a statement clearly indicating he understands that he waives his right to appeal the adequacy of his award by accepting the lump sum payment of all or part of the award.
>
> "(2) The Compliance Division shall make an investigation of the circumstances of the worker and the reasons given for the application. If adequate reasons exist for the request, the Division shall approve an application when it appears to the Division in a particular case that a payment of all or part of the award in a lump sum:
>
> "(a) Is an appropriate means of carrying out the general purpose of the Workmen's Compensation Law to foster the ability of the injured worker to adjust to his new status as a permanently partially disabled worker; or
>
> "(b) Would not jeopardize the future care and support of the worker and his dependents or be likely to cast their future care and support on the citizens of this state."[3]

Waiver, as that term is used in ORS 656.304, is not defined other than that a lump sum payment given pursuant to ORS 656.230, and accepted by the worker, constitutes a waiver of a right to a hearing on the amount of the award. Waiver has been traditionally defined as an intentional relinquishment of a known right. We conclude that

[3] This regulation was amended on January 11, 1980. Because the amendment occurred subsequent to the approval of claimant's application, we apply the regulation in effect at the time the application was processed. The amendment did not change the substance of the previous regulation quoted above.

the same analysis should apply in the context of an asserted waiver under ORS 656.304. The right to contest the amount of compensation for a compensable injury is a valuable right. The right is valuable, not only to the worker, but also to the public which may be required to support a worker and his dependents if proper compensation is not provided. Compensation for industrial injury is determined pursuant to a comprehensive statutory scheme that seeks to spread the results of industrial injury over a broad base. Compensation is not simply determined in a private adversary process between the worker and the employer. In keeping with the public policy fostered by the Workers' Compensation Act, the rights of a worker and the public to adequate compensation for injury once compensability is determined ought to be jealously guarded. When a timely application to set aside a lump sum payment and the attendant waiver of hearing is made, a factual issue arises as to whether the worker intentionally and knowingly waived the right to contest the award.

The employer and its carrier argue that claimant was fully informed of the consequences of accepting a lump sum payment by the warning paragraph on the application form. The written warning is one factor to be considered in determining if claimant intentionally relinquished his right to contest the amount of compensation awarded. There are other factors present in this case that militate against a finding that there was a knowing waiver.

After receiving the determination order, claimant immediately informed the Evaluation Division and United Pacific that he disagreed with the award and considered himself permanently and totally disabled. He requested reconsideration of the award and submitted additional medical evidence to support his request. ORS 656.268(4). The Evaluation Division commenced reevaluation of the award. Claimant consistently and steadfastly maintained that he wished to contest the amount of compensation awarded and submitted additional medical reports even after he had applied for a lump sum payment. This clearly indicates he did not consider that receipt of the lump sum payment would prevent the reconsideration he had requested.

When claimant received the first monthly payment of the award, he and two other individuals called United Pacific to express concern that the award was inadequate and that cashing the checks would deny him the right to contest the award. The callers were correctly informed that cashing the *monthly* checks would not waive that right. It is doubtful claimant made the distinction between monthly payments and a lump sum payment in terms of a waiver of his right to a hearing. Despite the written warning on the application, we find that claimant did not knowingly and intentionally waive his right to a hearing on the extent of his disability.

There is an additional basis for setting aside the lump sum payment and attendant waiver. As noted, ORS 656.230 and the implementing rule require the Department to investigate an application for lump sum payment and determine if approval will carry out the purposes of the Workers' Compensation Act and will not jeopardize the future support of the worker and his dependents. It is clear that the Compliance Division carried out an incomplete investigation. At the time the application was approved, the Compliance Division was unaware that the Evaluation Division was in the process of reconsidering the award under ORS 656.268(4). The application was approved under a mistaken belief that the determination award process was completed. The supervisor of the Compliance Division testified that, had this fact been known, the lump sum payment would not have been approved. There was a material mistake of fact which led to an erroneous approval of the application. We are not authorized to substitute our judgment for the discretionary judgment of the Director pursuant to ORS 656.304. However, in reviewing the order of the Board, we can determine if the Director's discretion was exercised pursuant to the statute and regulations. The Department has admitted it did not follow its regulations in approving the application. In that circumstance, the decision to approve the application, admittedly erroneous, should be set aside.

Because the Board concluded claimant had waived his right to a hearing, it did not discuss the merits of claimant's disability claim. We conclude that the Board should have an opportunity in the first instance to review

the portion of the referee's order finding that claimant is entitled to permanent total disability benefits. Accordingly, we reverse the order of the Board and remand for a determination by the Board of the extent of claimant's disability.

Reversed and remanded.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation
Earl L. Harris, Claimant.

HARRIS,
Petitioner,
v.
FARMERS' CO-OP CREAMERY,
Respondent.

(WCB No. 80-2710, CA A20206)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 15, 1981.

Michael B. Dye, Salem, argued the cause and filed the brief for petitioner.

Katherine H. O'Neil, Portland, argued the cause for respondent. On the brief were Elizabeth K. Reeve, and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

ROBERTS, J.

Reversed.

ROBERTS, J.

The issue in this workers' compensation case is whether claimant's heart attack, which occurred while he was driving a company car during his employment as a route supervisor for a milk distribution company, was job-related. The referee found that it was. The Workers' Compensation Board (Board) reversed. On *de novo* review, ORS 656.298(6), we find that the preponderance of the evidence supports legal and medical causation and we reverse.

The incident at issue occurred on December 28, 1979, after claimant had driven from McMinnville to Milwaukie to deliver a 30-pound crate of whipping cream. On his return trip, he suffered pains deep in his chest and began to sweat so heavily that water dripped from his hair and his clothing was soaked. He stopped in Sherwood, telephoned his office and asked them to send someone to get him. When no one showed up, he began to drive again, but pulled off the road again near Newberg. He was picked up and taken to the Newberg Hospital by his immediate supervisor. He was diagnosed as having suffered an acute myocardial infarction. The treating physician's report states that there was no previous history of exertional chest pain or "definite heart disease."[1] Claimant was transferred to St. Vincent's Hospital in Portland for further care by a cardiologist, Dr. Sutherland. On his initial examination of claimant, Dr. Sutherland confirmed that he had suffered an acute myocardial infarction, with coronary artery disease. Claimant was treated at St. Vincent's for eleven days and discharged. Subsequently, he suffered a recurrence of symptoms and was hospitalized in McMinnville for nine days. He was readmitted to St. Vincent's on February 11, 1980, for angiography. At that time, Dr. Sutherland diagnosed coronary artery disease with a recent myocardial infarction. A coronary bypass operation was performed. The final diagnosis by Dr. Sutherland was coronary artery disease, with recent myocardial infarction, angina pectoris and congestive heart failure. In a letter to employer's

[1] Claimant testified at the hearing that he had suffered chest pains approximately a year before this incident, and had been given an electrocardiogram and was found not be suffering from heart problems, but from "nerves."

insurer on March 6, 1980, Dr. Sutherland stated: "From what I know at the present time I do not believe that Mr. Harris' work was the etiology of his coronary artery disease or myocardial infarction." Based on this letter, the insurer denied the claim.

To recover compensation for an on-the-job heart attack, claimant must show, first, that he exerted himself in carrying out his job and, second, that the exertion was a material contributing factor in producing the heart attack. The first is a question of legal causation; the second determines the issue of medical causation. *Coday v. Willamette Tug & Barge Co.,* 250 Or 39, 440 P2d 224 (1968). The proof is the same whether the exertion is physical or emotional, *see Clayton v. Compensation Department,* 253 Or 397, 454 P2d 628 (1969), and claimant must prove both legal and medical causation by a preponderance of the evidence. *Carter v. Crown Zellerbach Corp.,* 52 Or App 215, 627 P2d 1300 (1981). In cases where the claim is based on physical exertion, a showing of unusual exertion is not required. The usual exertion of a claimant's regular job is sufficient to establish legal causation. *Coday v. Willamette Tug & Barge Co., supra; Carter v. Crown Zellerbach Corp., supra; Riutta v. Mayflower Farms, Inc.,* 19 Or App 278, 527 P2d 424 (1974); *Anderson v. SAIF,* 5 Or App 580, 585 P2d 1236 (1975). Legal causation in cases of emotional stress can likewise be established by a showing of chronic emotional stress or an episode of acute stress. *Schwehn v. SAIF,* 17 Or App 50, 520 P2d 467 (1974).

Both the referee and the Board agreed that claimant had established legal causation. The record clearly shows claimant was, in the days immediately preceding his heart attack, subject to physical stress, as well as substantial emotional stress. Claimant testified that, while his normal duties were basically management and sales, during holiday seasons[2] his job responsibility changed to include product loading and deliveries. He said that on December 24 he had worked a 15 and one-half or 16 hour day, hauling dairy products to drivers and to stores. He testified

[2] Claimant stated these holiday periods were Fourth of July, Labor Day, Thanksgiving, Christmas, New Years and Memorial Day.

he was "extremely tired," "exhausted" at the end of the day and looking forward to Christmas Day and rest. On Christmas, however, he was called out on an emergency to deliver milk to a store in Salem and worked about half a day. This precipitated a family quarrel, which he testified created tension in the home all evening. Claimant returned to work the next morning at about 6:30 a.m. and worked 14 or 15 hours. On that day he delivered milk to various stores and picked up empty cases. He testified that he went to work tired and went home tired.

The next day, December 27, claimant went to work at 4 a.m. and drove a tractor and 35-foot trailer of products from McMinnville to Eugene. Upon his return to McMinnville he was called in by his immediate supervisor and told he had to discipline a driver about whom the firm had received complaints.[3] Claimant testified disciplining employes caused him a "a lot of anxiety." He then had to hand load a truck and deliver products to Lincoln City and Newport. He loaded and unloaded 50 to 60 30-pound cases of milk and returned home at 10 p.m., after completing an 18-hour day. He was, he said, "exhausted." He spent a restless night and when he woke up he said he "felt like I'd worked all night." He was bothered and upset about the upcoming confrontation with the driver. He went to work at 6:30 the morning of December 28 "uptight," "upset" and "nervous." That morning, when he had to deliver the 30-pound crate of whipping cream to Milwaukie, claimant testified "I was exhausted, and it was — just felt like almost more than I could handle." It was on claimant's return from Milwaukie to McMinnville, where he was to meet with the errant driver, that he suffered the heart attack.

The facts thus amply demonstrate that claimant was suffering from a high degree of emotional stress: he was subject to "a lot of anxiety" over the disciplining of the driver, whom he himself had hired from another employer and whom he had previously felt to be an exceptional worker; his work hours were the cause of confrontations with his wife and tensions at home; and he was also

[3] Such discipline, according to applicable union procedures, involves counseling of the employe and a written reprimand.

family tension over his working hours, the heavy loading work done on the day preceding the attack and his fitful sleep that night. When Dr. Rosencrans was posed a hypothetical question synopsizing claimant's testimony at the hearing, he responded in this manner:

> "[Claimant's attorney]: Now, Doctor, based upon a reasonable, medical probability, do you have an opinion as to whether or not the man's work activities and the stress that they produced on him — the working hours and also the situation, as far as firing this gentleman and the pressures of his job, as far as keeping products on the table — was a major, contributing factor to his myocardial infarction?
>
> "Dr. Rosencrans: Yes, I agree. It would be a major, contributing factor. I think the man was overworked. This was an excessive load sort of thing I would not recommend to any patient that had coronary artery disease, and he did. He did a lot of heavy lifting, and he was under this anxiety, which works synergistically, which increased the stress upon him, so I think it was a major, contributing factor and I think that — that would be the most likely — you know — if you want to theorize about why he had the heart attack at that particular time, that would be my theory."

The Board found claimant had failed to establish medical causation and that the referee erred in relying on the opinion of Dr. Rosencrans, because he was not a board-certified cardiologist and had not examined the claimant. The Board found the opinion of Dr. Sutherland most persuasive, because he was the treating physician, and stated "Dr. Sutherland did not believe the claimant's work was the cause of his coronary artery disease or of his myocardial infarction." We disagree. None of the three doctors said claimant's work could not be the medical cause of his heart attack, and no other equally plausible theory was advanced. *Compare Raines v. Hines Lbr Co.*, 36 Or App 715, 585 P2d 721 (1978). Dr. Sutherland said only that based on what he knew on March 6, he did not believe work was the cause of claimant's heart attack. He apparently was not aware of all of the stress to which claimant had been exposed. Dr. Griswold, whom the Board said was "also a well-known cardiologist," based his opinion on the same inadequate information and said that he could *not* say that there was no relationship between claimant's work and his

heart attack. The only physician to consider all of claimant's testimony as to physical and emotional stress was Dr. Rosencrans, and he found a clear causal relation as a medical probability between claimant's work and his heart attack.[4]

While the opinion of the treating physician is generally given great credence because of that doctor's opportunity to see and treat the patient during the initial phases of disability, this is not a case in which such deference is appropriate. We said in *Hammons v. Perini Corp.*, 43 Or App 299, 602 P2d 1094 (1979), a case involving disease resulting from a collapsed lung, that where a case involves expert *analysis* rather than expert *observation,* there is no need to give special credit to the opinion of treating physicians to the extent of discrediting evidence by consulting physicians. As in the case of a collapsed lung, in determining the etiology of a heart attack, "[t]here is nothing about the nature of the treatment which would enhance one's diagnostic abilities by virtue of having examined and treated the claimant." *Hammons v. Perin Corp., supra,* 43 Or App at 301.

We find Dr. Rosencrans' testimony, because it was based on more complete information, to be the most persuasive of that offered by the three physicians. The testimony of the other two doctors does not refute Dr. Rosencrans' view that claimant's work activity was a causative factor in his heart attack. On *de novo* review, we must determine which medical hypothesis is correct. *Coday v. Willamette Tug & Barge, supra,* 250 Or at 49. We find by a preponderance of the evidence that the physical and mental stress claimant was suffering were within the realm of medical probability as material contributing factors in his heart

[4] Both the Board and the employer, on appeal, expend a significant effort in "credential squabbling" over Dr. Rosencrans and Dr. Griswold. Though the Board found Dr. Griswold to be a "well-known cardiologist" and Dr. Rosencrans not to be board certified, the record before us shows only that both are certified by the American Board of Internal Medicine. Dr. Sutherland's resume indicates that he is also certified in cardiovascular disease by that Board. In any event, Dr. Rosencrans, who is at least a practicing cardiologist, was formerly a resident in psychiatry; thus his added expertise in considering the impact of emotional stress upon the body's physical system may give his opinion added credibility.

attack. *Coday v. Willamette Tug & Barge, supra.; Carter v. Crown Zellerbach Corp., supra.*

Reversed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Shirley B. Johnson, Claimant.

JOHNSON,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 79-7925, CA A20259)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 15, 1981.

Samuel A. Hall, Jr., Eugene, argued the cause for petitioner. On the brief were Allan H. Coons, and Coons & Hall, P. C., Eugene.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

ROBERTS, J.

Affirmed.

ROBERTS. J.

The issues in this workers' compensation case are, first, whether claimant timely filed her occupational disease claim and, second, whether claimant established by a preponderance of the evidence that her disease was compensable. The referee found that claimant had established a compensable occupational disease but held that her claim was not timely filed under ORS 656.807(1), because it was filed more than 180 days following the date claimant became disabled or was informed by a physician that she was suffering from an occupational disease. The Workers' Compensation Board (Board) found that claimant had timely filed her claim but had not demonstrated that her occupational disease was worsened by her work for the subject employers. On *de novo* review, ORS 656.298(6), we find the referee was correct on the timeliness issue. We therefore do not reach the compensability issue.

Claimant is a 34-year old nurse's aide who injured her back while employed in a California hospital on November 6, 1973. She suffered three fractured vertebrae, underwent an operation for a spinal fusion and missed a year of work. She then resumed work as a nurse's aide at another hospital, where she had continuing back pain and missed two weeks of work in the next year. She then moved to Roseburg, Oregon, and went to work at Douglas Community Hospital in July, 1976. Her work there involved the lifting, turning and bathing of patients, some wearing casts which weighed as much as 40 pounds. She first consulted a physician in Oregon concerning her back pain in June, 1977. Sometime around the end of February or early March, 1978, claimant suffered extreme pain after one lifting incident and was advised by her physician, Dr. Streitz, an orthopedic surgeon, not to return to work.

Dr. Streitz had submitted his bills and reports to the California insurer responsible for claimant's 1973 claim. He wrote to the insurer, Safeco, on March 17, 1978, that claimant had been unable to continue her nursing activities since February 26, 1978, and was "terminated or quit." He advised them "I consider her disabled from 2/26/78 on until she can be evaluated by Orthopaedic Consultants in Portland." After reviewing the report from

Orthopedic Consultants, Dr. Streitz wrote to Safeco, on November 8, 1978, advising them he concurred in the consultants' diagnosis of pseudoarthrosis. He found claimant "medically stable and stationary" and freed her to return to work in her former capacity, with a limitation on heavy lifting.

In February, 1979, at claimant's mother's request, Dr. Streitz referred claimant to an orthopedist in Medford, Dr. Wilson. He performed additional surgery on claimant in June, 1979. She then filed an occupational disease claim with the Oregon Workers' Compensation Department on July 30, 1979, apparently on the advice of her attorney. The California insurer had denied any payment after November 7, 1978, five years following her injury in that state. SAIF denied the claim on September 7, 1979.

ORS 656.807(1), which establishes the time frame for filing of claims for occupational disease, provides that:

> "*Except as otherwise limited for silicosis*, all occupational disease claims shall be void unless a claim is filed with the State Accident Insurance Fund Corporation or direct responsibility employer within five years after the last exposure in employment subject to the Workers' Compensation Law and 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 referee found that claimant became disabled on February 26, 1978, and that March 17, 1978, was the date on which she was informed by her physician that she was suffering from an occupational disease. Finding claimant did not come within the exceptions to the 180-day filing requirement for occupational diseases,[1] allowed in *Inkley v. Forest Fiber Products Co.*, 288 Or 337, 605 P2d 1175 (1980),

[1] In *Inkley*, the Supreme Court held that ORS 656.265(4), providing that failure to timely file notice does not bar a claim where the employer has knowledge of the injury or the insurer has not been prejudiced by the failure to provide notice, applies to occupational disease claimants as well as workers filing a claim for an accidental injury. The referee here found the employer did not have knowledge of the claimant's condition and found that, although SAIF had not specifically claimed prejudice, it had been prejudiced by the passage of time alone.

the referee then held claimant had a duty to file a claim by September 13, 1978, which she had failed to do.[2]

The Board, relying on *Templeton v. Pope and Talbot, Inc.,* 7 Or App 119, 490 P2d 205 (1971), held that claimant "was never given enough information to render her responsible for the filing of an Oregon claim." It stated:

> "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."

In *Templeton,* we held that the claimant had timely filed an occupational disease claim even though he had suffered from shoulder and neck problems for about two years before filing because, while the record disclosed

> "[T]hat during this period he had been told by doctors that there was a relationship between his work and his physical difficulties, [it] fails to disclose any evidence that any doctor at any time prior to the filing of the claim specifically told him, simply and directly, that his conditions arose out of his employment, or anything clearly to that effect." 7 Or App at 120-121.

Following *Templeton,* in *Frey v. Willamette Industries,* 13 Or App 449, 509 P2d 861 (1973), we said that the limitations on an occupational disease claim ran from the date claimant, who was diagnosed as having high blood pressure and hypertension, was told by his doctor that he should not return to his employment. The record in the case before us shows that claimant admitted that Dr. Streitz told her in March, 1978, that she had an occupational disease or

[2] In addition, the order of the referee awarded claimant temporary total disability from July 30, 1979 to September 7, 1979, a 15 percent penalty for unreasonable refusal to pay, and a $150 attorney fee. The Board affirmed that portion of the order and that is not appealed.

disability[3] that was brought on by her work at Douglas Community Hospital:

"Q Did Dr. Wilson ever tell you you had an occupational disease?

"A Well, yes, he said — that's what it was.

"Q How about Dr. Streitz, did he ever tell you that?

"A Yeah, he said that my pain was brought on by my employment.

"* * * * *

"Q Did Dr. Streitz say your pain was brought on by your employment at Douglas Community Hospital?

"A Yes.

"Q Did Dr. Streitz ever tell you that you were disabled?

"A Well, I don't think he put it like that. I think he said that he told me that I should not go back to work because of my disability.

"Q When did he tell you that?

"A March.

"Q Of what year?

"A '78.

"Q When did Dr. Streitz first tell you that you had an occupational disease?

"A Probably in March because he sent me to Portland in August."

She had earlier testified:

"Q What advice did Dr. Streitz give you in terms of continuing your employment?

"A He told me not to go back to work.

"Q When was that?

"A In March.

"Q Of '78?

"A Yeah."

The claimant's own testimony indicates she was told by her treating physician that the disability and her then-current employment were linked. In addition, the first letter from Dr. Wilson to Dr. Streitz following the latter's referral notes that "[A]t your direction she quit her job at the hospital and since that time has been working part-time as a bartender for one of her friends." This letter was dated March 27, 1979. The record indicates Dr. Streitz last saw claimant on November 8, 1978. Sometime before that date, most likely between August and November of that year, claimant was told she had pseudarthrosis. The referee was correct; claimant knew, in March, 1978, that her problems with her back arose out of her employment at Douglas Community Hospital. She was diagnosed in August, 1978 as having pseudoarthrosis and discussed this with Dr. Streitz no later than November of 1978. Her occupational disease claim, filed in July, 1979, was not timely.

[3] On redirect examination, claimant said Dr. Streitz spoke of her condition as a "disability," not an "occupational disease." It is not clear that *Frey* requires such [illegible]

Although for different reasons, the Board's order is affirmed.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Olive Hermann, Claimant.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Petitioner.
v.
HERMANN,
Respondent.

(No. 79-4231, CA 19515)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 15, 1981.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for petitioner. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

J. Burdette Pratt, Nyssa, argued the cause for respondent. With her on the brief was Stunz, Fonda & Pratt, Nyssa.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P.J.

Reversed and remanded for further proceedings.

RICHARDSON, P.J.

The State Accident Insurance Fund (SAIF) appeals an order of the Workers' Compensation Board affirming the referee's opinion and order which required SAIF to accept claimant's workers' compensation claim. SAIF had denied the claim on the ground that the Vocational Rehabilitation Division (VRD) failed to notify SAIF that claimant was involved in a work experience program at VRD as required by ORS 655.615(4). The issues are whether VRD complied with ORS 655.615(4) and, if not, whether claimant is entitled to compensation on the theory that VRD was a noncomplying employer. We reverse.

Claimant had been forced to discontinue her previous employment because of a disability not connected with her employment. She was enrolled by VRD in a work experience program and was assigned to the Malheur County Drug and Alcohol Rehabilitation Center. She received no salary from the Center, but VRD paid her a monthly salary equal to the minimum hourly wage for the time spent in the program. Claimant was injured in the course of her duties as a counselor-trainee at the center.

At the time of claimant's injury, ORS 655.615 provided:[1]

> "(1) All clients participating in a work evaluation or work experience program of the division [VRD] are considered as workmen subject to ORS 656.001 to 656.794 for purposes of this section.
>
> "* * * * *
>
> "(4) The division shall furnish the fund [SAIF] with a list of the names of those enrolled in its work evaluation or work experience program and shall notify the fund of any changes therein. Only those clients whose names appear on such list prior to their personal injury by accident are entitled to the benefits of ORS 656.001 to 656.794 and they are entitled to such benefits as provided in ORS 656.156 and 656.202 while performing any duties arising out of and in the course of their participation in the work evaluation or work experience program * * *.
>
> "* * * * *."

[1] ORS 655.605 and 655.615 were amended in 1979. The amendments became effective subsequent to claimant's injury. For the reasons stated in *Miner v. City of Vernonia*, 47 Or App 393, 614 P2d 1206, *rev den* 290 Or 149 (1980), we conclude

ORS 655.605 *et seq.* specifically includes clients of VRD within the coverage of the Workers' Compensation Act. As a prerequisite to coverage by SAIF as an insurer, VRD is required to submit a list of clients engaged in the described programs. In *Miner v. City of Vernonia,* 47 Or App 393, 614 P2d 1206, *rev den* 290 Or 149 (1980), we construed a similar statute, former ORS 656.031(4), to require notification of the workers to be covered by SAIF in order for SAIF to be liable as a workers' compensation insurer. The primary issue in this case is whether the required notification was given to SAIF.

The testimony indicated that normally VRD satisfied the statutory notification by submitting a list of its clients on SAIF's standard form 190. No list with claimant's name on it was submitted to SAIF in this case. VRD listed claimant on another form, which was an internal memorandum containing the names of clients to be insured by SAIF. This list was not given to SAIF. A VRD official testified the latter list was prepared by VRD branch offices and sent to the central VRD office. He stated SAIF had indicated that list should be kept in the VRD main office and be available for inspection by SAIF. VRD paid a premium to SAIF based on the names listed on the internal memorandum.

Claimant argues that the existence of the internal memorandum available to SAIF and the fact a premium covering her was paid is substantial compliance with ORS 655.615(4). The statute does not require any particular form of list to be submitted to SAIF, but it does require that SAIF be provided a list of the clients of VRD subject to coverage for workers' compensation benefits. The internal memorandum, which was not given to SAIF, does not satisfy the statutory requirement. In *Miner v. City of Vernonia, supra,* we rejected the city's argument that by paying the required premium, a contract for coverage by SAIF was created, even though SAIF was not notified that the particular worker was to be insured. That same rationale would apply under ORS 655.615(4). We conclude that VRD did not comply with the statute, and SAIF properly denied responsibility for the claim on that basis.

Claimant argues that if her injury was not covered because SAIF was not provided proper notification as required by ORS 655.615(4), she nevertheless is entitled to compensation benefits paid by SAIF because VRD is a noncomplying employer. ORS 656.054. Claimant raised this issue in her brief filed with the Workers' Compensation Board and in her brief in this court. Because the Board determined that VRD had complied with the notification requirement, it did not address the issue as to whether VRD was a noncomplying employer.

There are a number of consequences which flow from a determination that an employer has not complied with the Act. SAIF is required to administer the claim and may seek reimbursement from the noncomplying employer. ORS 656.054. In addition, the Director may assess penalties against that employer. The employer is entitled to notice of the charge of noncompliance and may request a hearing. We conclude this issue should be addressed in the first instance by the Board.

Reversed and remanded for further proceedings.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Olive H. Morris, Claimant.

MORRIS,
Petitioner,
v.
DENNY'S RESTAURANT, et al,
Respondents.

(WCB No. 78-6247, CA 18174)

Judicial Review from Workers' Compensation Board.

On claimant's petition for attorney fees filed March 9, 1981; on respondents' motion for clarification of decision filed March 12, 1981.

Robert K. Udziela, Portland, for the petition.

Margaret H. Leek Leiberan, Portland, for the motion. With her on the motion was Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Before Joseph, Chief Judge, and Thornton and Warden, Judges.

WARDEN, J.

Remanded with instructions.

Thornton, J., concurring in part; dissenting in part.

WARDEN, J.

This proceeding involves two separate petitions in the same case, which we have consolidated. In the first claimant moves for an award of an attorney fee of $1600 payable out of the compensation due claimant. She asserts that the same is authorized under ORS.656.386(2).[1] In the second petition, respondents seek clarification as to the effective date of claimant's permanent total disability award.

This was an accepted claim. By a stipulated order approved by the Board, claimant had previously been awarded 50 percent unscheduled permanent partial disability for injury to her low back. Following a Determination Order on July 20, 1978, which failed to increase prior awards for claimant's disability, claimant requested a hearing, and the referee increased claimant's permanent disability to 75 percent, unscheduled. Out of that award, the referee awarded claimant's attorney 25 percent of the benefits, which brought about an award of an attorney fee of $1400, which has been paid.

On appeal to the Board, claimant contending she was permanently and totally disabled, the opinion and order of the referee was affirmed, and claimant's attorney received no fee. On appeal to this Court, we awarded claimant permanent total disability benefits. *Morris v. Denny's,* 50 Or App 533, 623 P2d 1118 (1981).

The allowance of an attorney fee on this award is covered by ORS 656.388(4)[2] and an administrative rule adopted by the Workers' Compensation Board. The rule is OAR 438-47-045, which provides:

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[1] ORS 656.386(2) provides:

"In all other cases attorney fees shall continue to be paid from the claimant's award of compensation except as otherwise provided in ORS 656.382."

See Gainer v. SAIF, 50 Or App 457, 623 P2d 1093 (1981).

[2] ORS 656.388(4) provides:

"The board shall, after consultation with the Board of Governors of the Oregon State Bar, establish a suggested schedule of fees for attorneys representing a worker under ORS 656.001 to 656.794."

> "(1) If claimant appeals the extent of temporary or permanent disability to the Court of Appeals, an additional fee of 25 percent of any increase awarded by the appellate court shall be approved.
>
> "(2) If a denied claim, also denied by the referee, and the board is appealed to the Court of Appeals and on appeal is reversed and accepted, the court shall allow claimant's attorney a reasonable fee."

ORS 656.388(4) directs the Workers' Compensation Board to "establish a *suggested* schedule of fees for attorneys representing a worker under ORS 656.001 to 656.795." (Emphasis added.) OAR 438-47-005 states:

> "Rules [438-]47-000 through [438-]47-095 apply to the establishment of a *suggested* schedule of fees for attorneys representing workers under ORS Chapter 656." (Emphasis added.)

Hence, the schedule is not mandatory, but merely suggestive, and it does not determine who applies it.

As to OAR 438-47-045 specifically, while the rule could be interpreted as authorizing or directing this court to award attorney fees in a specific amount, we construe it as meaning that, in such a case, the *Board* shall approve an additional fee of 25 percent of any increase awarded by the appellate court. In essence, as we construe rule 438-47-045, it would read:

> "If claimant appeals the extent of temporary or permanent disability to the Court of Appeals, an additional fee of 25 percent of any increase awarded by the appellate court shall be approved by the Board."

Accordingly, we remand this petition to the Board for resolution of the question of attorney fees.

We next consider respondents' petition for clarification of the effective date of claimant's permanent total disability award. In *Wilke v. SAIF,* 49 Or App 427, 619 P2d 950 (1980), we held that the date upon which a claimant is permanently and totally disabled is a matter for proof and that there the injured worker showed such condition as of the date of the psychologist's report which, along with the treating doctor's earlier report on claimant's back, established permanent total disability.[3]

[3] *See also Leedy v. Knox,* 34 Or App 911, 581 P2d 530 (1978).

The determination that an injured worker is permanently and totally disabled is a legal conclusion of which medical testimony is only one part. Other factors including psychological disability, age, training, aptitude, adaptability to nonphysical labor, mental capacity, conditions of the labor market and motivation must also be examined. In *Wilke* both medical and psychological elements were involved. A claimant is entitled to offer evidence and testimony as to disability up to and including the time of the hearing to prove the case. It is not until the hearing that all the elements of the case have been considered and claimant's disability is finally determinedand adjudged.

After reviewing the issue, we now conclude that the rule announced in *Wilke* is the proper rule, namely, that when an award has been modified, the effective date of that modification is the earliest date that claimant's permanent total disability is proved to have existed.

Applying the *Wilke* rule in this matter, we find claimant to have established that she was permanently and totally disabled as of October 3, 1979. That is the date of her followup examination at Woodland Park Hospital in the Northwest Pain Center Program. From that examination, the doctor found that there was "definite deterioration in her level of physical functioning." (She had been admitted to the Pain Center Program on April 23, 1979, and discharged on May 11, 1979.) In his report of the followup examination, he expressed "our feeling * * * that further medical or surgical efforts to deal with her problem will not be successful * * * ." A clinical psychologist at the Center concluded after the followup examination that further therapy would not benefit claimant and that she was not a candidate for vocational rehabilitation. The record is devoid of any evidence relevant to determining claimant's disability after October 3, 1979. She was permanently and totally disabled at that date.

Remanded with instructions.

THORNTON, J., concurring in part; dissenting in part.

I concur with the majority's analysis and decision as to the first petition, namely, the issue of the award of attorney fees in this case.

With respect to the second petition, which deals with determining the effective date of permanent and total disability, I disagree.

The entire purpose of our reconsidering this issue and requesting supplemental briefs on this point was to establish an all-inclusive rule for determining the effective date of modifications awarding permanent and total disability. The rule proposed in the majority opinion is acceptable as far as it goes, but it does not go far enough. Moreover, as explained below, the proposed rule is mistakenly applied by the majority in the case at bar. While I agree with the majority that the rule in *Wilke v. SAIF,* 49 Or App 427, 619 P2d 950 (1980) should be adhered to where applicable, this rule does not cover the following fact situations 1) where there is no evidence, or insufficient evidence, in the record establishing a specific date of claimant's permanent and total disability; and 2) where new evidence has been considered on review by the Workers' Compensation Board or court following the decision by the hearing officer.

The majority opinion says:

> "The determination that an injured worker is permanently and totally disabled is a legal conclusion of which medical testimony is only one part. Other factors including psychological disability, age, training, aptitude, adaptability to nonphysical labor, mental capacity, conditions of the labor market and motivation must also be examined. In *Wilke* both medical and psychological elements were involved. Claimant is entitled to offer evidence and testimony as to his disability up to and including the time of the hearing to prove his case. It is not until the hearing that all the elements of the case have been considered and claimant's disability is finally determined and adjudged."

After expounding the above sound and salutary propositions of workers' compensation law (with which I wholeheartedly agree), the majority opinion then proceeds to ignore them in deciding the point in issue.

As pointed out in *Wilson v. Weyerhaeuser,* 30 Or App 403, 409, 567 P2d 567 (1977):

> "There are two types of permanent total disability: (1) that arising entirely from medical or physical incapacity—such cases are easier to determine and seldom find their way to us on appeal—and (2) that arising from physical conditions of less than total incapacity plus nonmedical conditions, which together result in permanent total disability. Typically, such nonmedical evidence relates to age, training, aptitude, adaptability to nonphysical labor, mental capacity and emotional condition, as well as the condition of the labor market. * * *"

In my view, the proposal in the majority opinion is defective and incomplete in failing to deal with the two fact situations described above.

In the case at bar, the majority declares:

> "Applying the *Wilke* rule in this matter, we find claimant to have established that she was permanently and totally disabled as of October 3, 1979. That is the date of her followup examination at Woodland Park Hospital in the Northwest Pain Center Program. * * *"

I disagree with the majority's conclusion on the facts as well as the law. A reading of this court's original opinion on the merits in this case (50 Or App 533, 623 P2d 1118 (1981) shows that this court there determined that claimant was permanently and totally disabled as a result of her physical condition *plus* nonmedical elements of age, training, aptitude, adaptability to non-physical labor, mental capacity, emotional condition and conditions of the labor market. 50 Or App at 537. Contrary to the assertion in the majority opinion, no doctor at any time ever stated that claimant was permanently and totally disabled.

For the foregoing reasons it is impossible either from the medical reports or other evidence in this case to fix a date when it can be said that the evidence established that claimant was permanently and totally disabled. Only pure speculation can be used by a court to set a date on which claimant became permanently and totally disabled.

The majority's position that the *Wilke* rule can be applied in the instant situation is totally untenable.

My review of this matter persuades me that the rule should be as follows:

When an award has been modified to award permanent and total disability, the effective date is to be determined as follows:

1) Where the injured worker has proven that he was permanently and totally disabled as of a certain date, then that is the effective date. *Wilke v. SAIF, supra.*

2) Where there is no evidence, or insufficient evidence, in the record establishing a specific date of claimant's permanent and total disability, then the effective date of that modification should be the date of the first hearing at which the latest evidence bearing on that issue was offered, and upon which a correct determination of that disability could have been made, by the referee, Workers' Compensation Board or court.

3) In those instances where new evidence has been considered on review by the Workers' Compensation Board or court following the decision by the referee, and the previous award has been modified, then the date of the Board or court's hearing shall be deemed the effective date of disability.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of James Ohlig, Claimant.

OHLIG,
Petitioner-Cross-Respondent,
v.
FMC MARINE & RAIL EQUIPMENT DIVISION,
Respondent-Cross-Petitioner.

(CA 15985, SC 27224)

On Review from the Court of Appeals.*

Argued and submitted January 6, 1981.

Burton J. Fallgren, Portland, argued the cause and filed briefs for petitioner/cross-respondent.

Katherine H. O'Neil, Portland, argued the cause for respondent/cross-petitioner. With her on the briefs were Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Denecke, Chief Justice, and Lent, Linde, Peterson, Tanzer and Campbell, Justices.

LENT, J.

Reversed and remanded.

Peterson, J., filed a dissenting opinion.

* Appeal from Judicial Review of Workers' Compensation Board (WCB # 77-1741) 47 Or App 363, 614 P2d 146 (1980).

LENT, J.

The issue in this worker's compensation case is whether the Court of Appeals should have allowed a reasonable attorney fee to the claimant's attorney to be paid by the direct responsibility employer under ORS 656.386(1) or if the claimant's attorney fees must be paid from his award of compensation under ORS 656.386(2).

> "656.386(1) In all cases involving accidental injuries 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; however, in the event a dispute arises as to the amount allowed by the referee or board, that amount may be settled as provided for in subsection (2) of ORS 656.388. Attorney fees provided for in this section shall be paid from the Industrial Accident Fund as an administrative expense when the claimant was employed by a contributing employer, and be paid by the direct responsibility employer when the claimant was employed by such an employer.
>
> "(2) In all other cases attorney fees shall continue to be paid from the claimant's award of compensation except as otherwise provided in ORS 656.382."

Background

The case arises out of claimant's compensable industrial accident of January 10, 1975. In the accident claimant sprained his right ankle. He also suffered injury to an intervertebral disc, but this injury was not diagnosed until much later. The direct responsibility employer accepted the claim for worker's compensation, and the claim was closed by a Determination Order of July 8, 1975, which awarded permanent partial disability for five percent loss of claimant's right foot.

Claimant suffered recurrent problems with his right leg. Periodically it would give out, causing him to fall.

All doctors concerned continued to diagnose and treat the problem as stemming from the ankle injury. Claimant eventually underwent surgery on his ankle and was fitted with a brace. Employer accepted liability for this medical treatment, and a second Determination Order was entered on February 28, 1977. This Determination Order did not increase claimant's permanent disability compensation. At that time both the employer and the claimant, upon available medical opinion, believed that this claim concerned nothing but injury to the right ankle. Claimant's falling persisted.

On March 15, 1977, claimant requested a hearing, stating the issue in the following terms:

"1. Had Claimant received all of the TTD to which he is is [sic] entitled?
"2. Is Claimant's condition stationary?
"3. The amount of permanant [sic] disability to which claimant is entitled."

Finally, in May, 1977, after the request for hearing was filed, Dr. John Blosser, a consulting physician for the employer's insurance carrier, began to suspect that the true cause of claimant's leg difficulties was a back condition. In June, 1977, Dr. Blosser sent a letter to the carrier, in which he detailed claimant's back condition, and opined that claimant could have injured an intervertebral disc in his original fall. On August 26, he sent another letter to the carrier, stating that claimant definitely had a back problem and that he was unable to work because his leg kept giving out. On October 3, the carrier received the physician's full reports on the claimant's case to that point. These included an entry of September 30, 1977, in which the doctor stated that a laminectomy was necessary.

On September 26, 1977, Dr. Blosser addressed a letter to claimant's attorney in which he stated:

"From the description of his original accident, I can only conclude or be of the opinion that most likely this disc trouble arose as a result of that accident."

Claimant's attorney forwarded this letter, along with a cover letter, to the employer's attorney on October 4. To the cover letter, claimant's counsel penned the notation,

> "Based on this report you should reopen and pay TTD for full time less time worked and you should authorize surgery."

On October 21, 1977, claimant's hearing was convened. At this hearing the employer orally denied liability for the claimant's back condition, contending that it was not caused by the injury of January 10, 1975. The referee noted this denial in the record. The employer reasserted its acceptance of the claim with respect to claimant's ankle, but contended that the initial accident did not cause the back condition.

On November 30, 1977, while the hearing was in recess, claimant underwent surgery for removal of a herniated L4-L5 disc. The surgery relieved claimant's condition, and he has since returned to work.

A supplemental hearing was held on August 25, 1978. At this hearing, the employer reasserted its oral denial of liability for claimant's back condition. In his written Opinion and Order dated October 20, 1978, the referee recited in part as follows:

> "* * * Claimant filed a request for hearing on March 15, 1977. He stated three issues as follows:
>
> "1) Has claimant received all of the temporary total disability to which he is entitled?
>
> "2) Is claimant's condition stationary?
>
> "3) The amount of permanent disability to which claimant is entitled.
>
> "At the initial hearing claimant was allowed to amend his request for hearing to include determination of the validity of the *employer's oral denial on record of coverage for claimant's back condition.* The issues of penalties and attorney's fees for unreasonable resistance were also included." (Emphasis added.)

The referee found the evidence insufficient to persuade him "that claimant's back injury resulted from his industrial injury." The referee accordingly ordered

> "that defendant's partial denial with respect to claimant's back condition be and is hereby affirmed."

Claimant requested review by the Worker's Compensation Board, which found that claimant had established the causal link between the accident and his back condition, reversed the referee, ordered the employer to pay compensation, and assessed penalties and attorney fees. On reconsideration requested by the employer, the Board reversed its earlier decision and reinstated the Order and Opinion of the referee.

Claimant requested judicial review by the Court of Appeals. That court viewed the posture of the case as follows:

> "Claimant appeals from an order of the Workers' Compensation Board which upheld a denial of his claim for a herniated spinal disc.
>
> "There is no dispute that claimant suffered a damaged disc; the issue is whether the damage is traceable to a fall at work. The carrier accepted his claim filed for an ankle injury received in the fall, but contended at the hearing that there was no causal relationship between the compensable injury to his ankle and his back condition. * * *"

Ohlig v. Marine & Rail Equipment, 47 Or App 363, 365, 614 P2d 146 147 (1980). Reviewing de novo, the court held that claimant had shown by a preponderance of the evidence that his herniated disc was caused by his work accident and concluded its opinion as follows:

> "The Board's order on review upon reconsideration is reversed and claimant's claim is remanded to the employer and its carrier to be accepted and for payment of compensation, as provided by law, commencing on January 10, 1975 and until the claim is closed pursuant to the provisions of ORS 656.268."

47 Or App at 368, 614 P2d at 148. The court refused claimant's request for penalties and for attorney fees to be paid by the employer under ORS 656.386(1).

This court allowed claimant's petition for review on the question of the employer's responsibility to pay attorney fees. ORS 2.520; 290 Or 171 (1980).

The court below reasoned that the various medical reports and other writings which claimant sent to the employer after he requested review did not contitute a "separate" claim. From this the court apparently reasoned

that because the employer had accepted the claim originally, the matter under review remained an accepted claim and, accordingly, the claimant was not statutorily entitled to this line of reasoning, the Court of Appeals relied on three of its own cases, *Vandehey v. Pumilite Glass & Building Co.*, 35 Or App 187, 580 P2d 1068 (1978); *Smith v. Amalgamated Sugar Co.*, 25 Or App 243, 548 P2d 1329 (1976); and *Grudle v. S.A.I.F.*, 4 Or App 326, 479 P2d 250 (1971).

The court noted our decision in *Cavins v. SAIF*, 272 Or 162, 536 P2d 426 (1975), but, without discussion, apparently found it not in point.

The Court of Appeals cases are distinguishable from *Cavins* and from the instant case. In *Grudle, Smith,* and *Vandehey,* the question was the amount of compensation due for an injury which both parties agreed was compensable. In *Cavins* and in the present case, the employer disputes the worker's contention that his condition was caused by the accident.

In *Grudle v. S.A.I.F., supra,* plaintiff suffered the amputation of two fingers of his left hand. There was no question of causation, of the amputation, or of any other injury. The only question was the amount of compensation to which the worker was entitled for the injury. The court found this critical in denying attorney fees:

> "Claimant was not denied his claim for compensation. His case was not a rejected one. He appealed from the award made by the Workmen's Compensation Board, asserting that the amount of the award should have been greater in accordance with what he considered to be the applicable section of the statute. ORS 656.386(1) does not apply to these circumstances. * * * "

4 Or App at 333, 479 P2d at 253.

In *Smith v. Amalgamated Sugar Co., supra,* the parties agreed on the cause of the injury. They disputed the extent of disability and resulting amount of compensation due for that injury. Plaintiff injured his wrist. After the determination order was issued and he suffered recurring problems, he consulted a physician who ordered remedial surgery. The employer accepted the fact that the injury led to the surgery, but contested the amount of temporary total

disability due to the worker. The court found the amount of compensation was the controlling question, saying that the case was analogous to *Grudle* and quoting the text we have above quoted from *Grudle*. 25 Or App at 249.

Finally, in *Vandehey v. Pumilite Glass & Building Co., supra,* on which the court below and the dissent rely, the issue was again the amount due. Causation was conceded. The employer asserted that the worker's condition was not serious enough to warrant the treatment he sought. The Court of Appeals regarded the question as one of the amount due, as indicated at 35 Or App at 191-92, where the court quoted extensively from *Smith,* including the quote therein from *Grudle.*

The dissent contends that the instant case is on all fours with *Vandehey:*

> "There, while awaiting a hearing as to the extent of the claimant's disability (exactly the same situation as in the case at bar), the claimant's attorney sent a further medical report to the employer, requesting the reopening of the claim and payment of temporary total disability."

This overlooks the fundamental difference in the issues. The issue in *Vandehey* was the extent of disability and the amount of compensation due. In the instant case, the issue was whether the compensable accident *caused* the claimant's back condition.

In *Cavins v. SAIF, supra,* the issue was causation. The worker injured the lateral aspect of his ankle, and the employer accepted responsiblity for that injury. Later, he experienced pain in the area of an older injury to the medial aspect of the ankle. The claimant contended this was caused by the injury to the lateral aspect; the employer disputed that claim of causation. *Cavins* held that where the employer denies responsiblity for a condition or injury on the basis of causality, it forces the worker to appeal. If it is determined that the employer was wrong in this denial, that is, that the accident did cause the condition, the employer must pay attorney fees the claimant incurs in proving the causal link.

Contrary to the dissenting opinion, it is the factual issue of causality, not the procedural setting in which the

issue is raised, which was controlling in *Cavins* and which should be controlling in the case at bar.

Trying to distinguish *Cavins,* the dissent announces that it was "a claim for aggravation under ORS 656.273." That is questionable. ORS 656.273, the code section concerned with "aggravation" claims, is mentioned nowhere in the Court of Appeals' opinion, 20 Or App 361, 531 P2d 746 (1975), in our opinion, 272 Or 162, 536 P2d 426 (1975), or in any brief filed in that case.

The dissent also says that in *Cavins* SAIF denied the claim, though not formally. Actually, SAIF did exactly as the employer did in this case: SAIF refused to take a formal position, thus allowing it to contend that it had not denied the claim while it refused to pay compensation for medical treatment.

The dissent correctly states: "The only issue in *Cavins* was whether the worker's claim was compensable at all." In this case, that is also the issue. The employer insists that the back claim is not compensable because it was not caused by the industrial accident.

We have re-examined *Cavins* and find it controlling. SAIF accepted responsibility for the injury to the lateral aspect of the ankle, but refused to pay compensation for necessary surgery to the ankle and attendant compensation for temporary disability, insisting that *the compensable accident did not cause the condition* requiring the surgery. Plaintiff initiated review by a request for hearing, and established the compensability of his claim in the circuit court. That court, however, denied attorney fees. The Court of Appeals affirmed, and, on review, this court reversed the decision as to attorney fees. 272 Or at 163.

The issue in *Cavins* was causation; the insurer acknowledged that the worker had sustained a compensable injury and paid compensation as required for one condition, but denied responsibility *for a second condition* which the insurer contended was *not caused* by the accidental injury. The claimant's physician had prepared a report attributing the need for treatment of the medial aspect of the ankle to the injury to the lateral aspect, and this report was presented to the insurer. We noted the definition of a

claim and that there was no reason to hold that the report from the physician was not a request for compensation on the claimant's behalf. We rejected the argument that attorney fees could be awarded only if the employee filed and the employer rejected an "original claim." 272 Or at 164-165.

Here also, the notion that claimant did not initiate some original proceeding is unpersuasive. This claimant made a claim by his request for compensation for his back condition. Under ORS 656.005(7) claimant's attorney's letter of October 4, 1977, was a claim.[1] This letter had the notation, "Based on this report you should reopen and pay TTD for full time less time worked and you should authorize surgery." Attached was the doctor's report of September 26, 1977. This was a written request for compensation on behalf of the worker. The parties and the reviewing authorities have continually treated this as a claim. As in *Cavins,* the insurer here has paid compensation for one condition but has contended that the back condition was not caused by the fall and has denied the worker's claim for compensation for the back condition.

The employer's self-contradictory position would elevate form over substance and involve the worker's compensation system in semantic gymnastics.[2] The employer's

[1] ORS 656.005(7) reads as follows:

"(7) 'Claim' means a written request for compensation from a subject worker or someone on the worker's behalf, or any compensable injury of which a subject employer has notice or knowledge."

[2] The nature of the employer's position is amply illustrated by two quotes from the employer's explanation of its position to the referee at the supplemental hearing of August 25, 1978:

"* * * this is an accepted case. We accepted responsibility for the January 10, 1975 injury and all disability, medical care and treatment and time loss resulting therefrom. Once a hearing was requested on the second determination order, it was our position and we denied that any further time loss was warranted. We denied that any further scheduled permanent disability was warranted and we also denied there was any unscheduled disability in the area of the back. That denial and also three of those denials are merely asserting our position on the hearing that was coming up on the determination order. We have never denied a claim of any sort in this case.

"* * * * *

"* * * so I would ask you not to focus on the use of the word denial as trying to key into a denial of a claim which is a typical denial under the Act, but

characterizations do not change the fact that the employer denied responsibility for treatment of claimant's back condition.

Before the hearing of October 21, 1977, the employer refused to take a formal position and refused to authorize surgery for claimant's back condition. At the hearing of October 21, 1977, the referee found an oral denial, by which "the employer's representative has denied any coverage of the back related problem arising out of the injury of 1/10/75." Claimant was allowed to amend his request for hearing to challenge the validity of that denial.

Quite simply, what we have here is a "partial denial." We have not been referred to any statutory text concerning partial denials, but they are recognized and litigated in practice[3] and by administrative rule of the Workers' Compensation Board. OAR 436-83-125, effective September 1, 1975, provides:

> "Every notice of *partial denial* shall set forth with particularity the injury *or condition* for which responsibility is denied and the factual and legal reasons therefor. The notice shall be in the form provided for in [OAR 436-]83-120. Hearing and appeal rights and procedures shall be as provided for *claim denials* in ORS 656.262(6) and (7), 656.319 and these Rules." (Emphasis added.)

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instead denial as taking our position denying any further award from the determination order. That is the problem I think with the word denial.

"[Administrative Law Judge]: It is a fancy bit of footwork, I might say."

[3] As noted in the text, the practice is known to the Bar. In "Workers' Compensation (Oregon CLE 1980)," we find § 24.24:

> "A question arises under what might be called a 'partially rejected claim.' A simple demonstration follows: The worker sustains an injury to the lower back. He or she reports the injury and starts receiving compensation. After a period of time, the doctor commences treatment for a neck problem. The worker believes the neck problem is related to the back accident, but the carrier takes a different position. By administrative rule and custom, it is obligated to issue a denial of responsibility for the condition using the same form and giving the same notice of hearing rights as in a denial of claim in the first instance. OAR 436-83-125. Several of these cases have gone to the appellate courts on the merits. Dicta, at least, indicates approval. The supreme court's opinion in *Cavins v. SAIF*, 272 Or 162, 536 P2d 426 (1975) would seem to expand the meaning of 'claim' sufficiently to validate partial denials. It is assumed that attorney fees are payable in the partial denial situation just as they are in the first instance."

We do not decide in this case whether the "simple demonstration" which is given has [illegible] We only [illegible] forth [illegible] to show that the Workers' Compensation

The statutes to which reference is made in the rule concern the denial of claims and the procedure for a claimant to contest a denial. The reference to OAR 436-83-120 refers to the Board rule which fleshes out statutory duties of employers who would deny claims.

The employer here failed to follow the administrative rule despite the fact the worker's lawyer filed a claim for the back condition and the employer refused to accept responsibility for that condition. The claimant, the referee and the Board have treated this as litigation of a denied claim. The Court of Appeals, as must be obvious from the language we have quoted above from that court's opinion, did the same, except for that court's refusal to award an attorney fee to be paid by the employer. Certainly the employer should be in no better position for failure to give the written notice of denial required by the rule than would have been the case had there been compliance.[4]

At the supplemental hearing of August 25, 1978, the employer reaffirmed its "partial denial," again disclaiming all responsibility for claimant's back condition. The principal issue litigated in both the initial and the supplemental hearings was the employer's responsibility for compensation for the back condition. The Order and Opinion of the referee concluded: "IT IS NOW THEREFORE ORDERED that defendant's partial denial with respect to claimant's back condition be and is hereby affirmed."

In the face of this stream of denials at all levels, the employer asks this court to indulge the idea that because the employer accepted responsibility for claimant's original ankle injury, there has never been a denial upon which to predicate an award of attorney fees. The court refuses to accept this argument.

We hold here, as we did in *Cavins,* that ORS 656.386(1) requires that the petitioner's attorney fees be paid by the employer. Therefore, we reverse that portion of

[4] The dissent argues that this court has no authority to sanction the practice embraced in OAR 436-83-125. The employer has not attacked the validity of the rule; rather the employer simply ignores the existence of the rule. The dissent's attack on the validity of the rule is purely *sua sponte* and without the benefit of adversarial briefing.

the decision of the Court of Appeals denying attorney fees and remand the case for allowance of a reasonable fee to claimant's attorney.[5]

Reversed and remanded.

PETERSON, J., dissenting.

At the time of the claimant's injury, and during the hearings in this case, the procedure for obtaining compensation included the requirement that SAIF or the direct responsibility employer, within 60 days after having notice of a claim, give "written notice of acceptance or denial of the claim." ORS 656.262(5). If the claim were denied, the fund or direct responsibility employer was required to give "written notice of such denial, stating the reason for the denial, and informing the worker of hearing rights." ORS 656.262(6).

On October 4, 1977, the claimant's claim was pending and the parties were awaiting the referee's hearing scheduled for October 21, 1977. On October 4, 1977, his attorney sent a doctor's report to the employer along with this request:

> "Based on this report you should reopen and pay TTD for full time less time worked and you should authorize surgery."

This request was made prior to a hearing which the claimant had previously requested and which involved these issues:

1. Whether he had received all of the temporary total disability payments to which he was entitled;

2. Whether his condition was stationary;

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[5]We have treated the case before us as if there were a necessity that the employer has rejected a claim in order for there to be a statutory basis for the Court of Appeals to order the employer to pay an attorney fee to the claimant. The text of the statute can be read otherwise; indeed, when one's attention is upon the first sentence of ORS 656.386(1), the subsection relating to an allowance of attorney fees by the Court of Appeals, the right of a claimant to such an award is established by his prevailing in that court in an "appeal" from a Board order denying his claim. The sentence is silent as to any necessity for showing a rejection by the employer. The second sentence of ORS 656.386(1), which is concerned with the duty of the referee or the Board to award an attorney fee, makes reference to "such rejected cases" without a prior reference to "rejected cases." This language presents an ambiguity that we have not found necessary to resolve in this case.

3. The amount of permanent disability to which he was entitled.[1]

The claimant's request of October 4, 1977, did not create a "new claim." The request related to the issues then pending before the referee, and in addition raised the additional issue whether further medical treatment was required.

The majority opinion correctly points out that at the hearing on October 21, 1977, the employer's attorney "orally denied liability for the claimant's back condition." Although that statement by the employer's attorney put in issue the compensability of that portion of the claimant's claim relative to the back injury, it did not have the effect of creating a denied claim under ORS 656.262(5) or ORS 656.386(1). The posture of the case was this: The claimant's claim was then pending before the referee. The employer had denied a causal connection between the accident and the claim for compensation arising from the back problems. The claim was in exactly the same posture as if the back claim had been asserted originally and with the ankle claim.

This case involves a construction of the first sentence of ORS 656.386(1) which reads:

> "In all cases involving accidental injuries 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. * * *" (Emphasis added.)

Obviously, the key words in that sentence are the words "denying" and "claim." A failure to award all of the requested relief is not equivalent to "a board order denying his claim." Such a construction would compel the carrier to pay attorney fees in every appeal to the Court of Appeals in which the Court of Appeals increased an award of compensation. However desirable that may be, the statute does not require it.

ORS 656.005(7) defines a "claim" as "a written request for compensation." At one and the same time an injury can (and often does) give rise to compensation

[1] These issues were listed in the claimant's request for hearing. See majority opinion at 2.

"claims" for (1) medical expenses, (ORS 656.245), (2) temporary total disability (ORS 656.210), (3) permanent total disability (ORS 656.206), and (4) permanent partial disability (ORS 656.214), either scheduled (ORS 656.214(2)) or unscheduled (ORS 656.214(5)). "Claims" for permanent partial disability can involve scheduled claims for injury to more than one part of the anatomy. The word "claims," as used in the foregoing sentences, illustrates the fact that although but one claim is made in the sense that but one request for compensation is made under ORS chapter 656, the relief requested may involve claims of many different kinds.

The term "compensation" is defined in ORS 656.005(9) to include "all benefits, including medical services, provided for a compensable injury to a subject worker." In short, a compensable injury (which term is defined in ORS 656.005(8)(a)) gives rise to one claim—which in many cases is a multi-faceted claim—but which is nonetheless one claim. The majority opinion errs in treating the worker's claim as, in effect, two claims.

Nor does this case involve a "denied claim" under ORS 656.262(5) or (6) or ORS 656.386(1). The referee's order and the Board order did not deny compensation. The referee ordered an increase in compensation for 15 percent loss of the right foot. This order was affirmed by the Board.

Cavins v. State Accident Insurance Fund, 272 Or 162, 536 P2d 426 (1975), appears to be inconsistent with this analysis, but in fact, it is not. The briefs in *Cavins* reveal that the claimant's Workers' Compensation claim arising from the injury of March, 1970, was closed, apparently in 1971. The claimant sustained a second injury on September 21, 1972, and the Workers' Compensation claim made thereon was closed on November 24, 1972. *No appeal was taken from that closing order.* However, after symptoms continued in 1973, the claimant's treating physician wrote SAIF regarding the treatment that the claimant was then receiving. SAIF consistently refused to pay any compensation requested in various letters sent to it in 1973. However, SAIF did not issue a formal notice of denial of responsibility under ORS 656.262(5).

The letter of the treating physician in *Cavins,* requesting that SAIF reopen the claim for treatment, was in the nature of a claim for aggravation under ORS 656.273, which claim was consistently denied by SAIF from the very day that it was filed. The only issue in *Cavins* was whether the worker's claim was compensable at all. SAIF's position concerning ORS 654.386(1) was that since it had not denied the "original claim" arising from the 1972 injury, it should not be treated as having denied the aggravation claim under ORS 656.386(1). The court was correct in holding, in effect, that the consistent refusal of SAIF to pay all or any part of the claims asserted was a denial under ORS 656.386(1).

The facts of this case are more akin to *Vandehey v. Pumilite Glass & Building Co.,* 35 Or App 187, 580 P2d 1068 (1978). There, while awaiting a hearing as to the extent of the claimant's disability (exactly the same situation as in the case at bar), the claimant's attorney sent a further medical report to the employer, requesting the reopening of the claim and payment of temporary total disability. The referee reopened the claim and ordered payment of temporary total disability payments, but ordered the claimant to pay his attorney fees out of his compensation rather than ordering the employer to pay the fees. The Workers' Compensation Board affirmed, as did the Court of Appeals. This statement of Judge Gillette correctly analyzes the situation:

> "* * * Claimant's September 29, 1976, request for a hearing specifically placed in issue the need for further medical evaluation of claimant on a claim he had already made. Dr. Hickman's letter of January 4, 1977, supported that prior claim and was appropriate evidence to be received at the subsequent hearing. It was proffered evidence of a *pending* claim, not assertion of a *new* one. Any other rule would encourage similarly situated claimants to 'keep an anchor to windward' by labeling all new medical evidence as either a new claim or an aggravation claim, instead of concentrating on the hearing process they have alredy invoked. This approach would seriously undermine the hearing process. We decline to adopt it." (Emphasis theirs.) 35 Or App at 192-193.

Judge Gillette distinguished *Cavins, supra,* as follows:

"Claimant relies on *Cavins v. SAIF, supra.* In that case, however, the carrier had refused to pay for an ankle operation and consequent temporary disability on the theory that the surgery was not necessitated by a covered injury. In holding that claimant was entitled to attorney's fees, the Supreme Court said,

"'* * * the legislature clearly intended that a workman whose claim is erroneously rejected *and who is thereby forced to appeal* should not be forced to bear the additional expense of employing an attorney to represent him. (Footnote omitted.)'" (Emphasis theirs.) 35 Or App at 193.

The effect of the majority opinion is to make an employer who denies any part of a worker's compensation claim liable for attorney fees in the Court of Appeals if any increase is made. ORS 656.386(1) does not require or suggest such a result.

It is true that the quoted rule, OAR 436-83-125, provides for a "partial denial." However, a rule which provides for partial denials cannot enlarge the limited provision for attorney fees in a statute which is clear on its face. The majority concedes that there is no statutory authority for partial denials and counsel have pointed out none. Partial denials are apparently a device which has developed as a matter of convenient practice, but neither rule nor practice can substitute for an authorizing statute. The legislature has provided for acceptance or denial. If a contrary practice is to be adopted, it should be by the legislature. We have no authority to sanction the practice and certainly no authority to award attorney fees based upon it.

I would affirm. I believe that this is one of the "all other cases" referred to in ORS 686.386(2).[2]

Tanzer, J., joins in this dissent.

[2] ORS 656.386(2):

"In all other cases attorney fees shall continue to be paid from the claimant's award of compensation except as otherwise provided in ORS 656.382."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Lorraine Adamson, Claimant.

ADAMSON,
Petitioner,
v.
THE DALLES CHERRY GROWERS, INC.,
Respondent.

(WCB No. 80-1338, CA A20489)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 21, 1981.

Michael A. Greene, Portland, argued the cause and filed the brief for petitioner.

Roger Warren, Beaverton, argued the cause for respondent. On the brief was David Horne, Beaverton.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

GILLETTE, P. J.

Affirmed.

GILLETTE, P. J.

The issue in this worker's compensation case is compensability. Both the referee and the Workers' Compensation Board found claimant's injury—a fall on an icy street outside her place of employment—non-compensable. We affirm.

At the time of her injury, claimant had been employed as a general laborer by respondent for eight years. On the morning of January 15, 1980, she went to work as usual. There had been a severe snow storm in the area, and the streets were covered with snow and ice. Upon arriving at work she found the employe parking lot filled with snow and the place where she usually parked taken by another car,[1] so she parked on the street parallel to the curb.

Claimant got out of her car and walked toward respondent's plant office, which was on the same side of the street. Because the sidewalk was covered with snow, she had to walk in a traffic lane of the street. After walking approximately two car lengths, she slipped on the icy surface and fell. She got up, continued on her way to the office and told the personnel manager about the fall. Someone then went out to spread salt on the surface. Claimant then reported to work in a building across the street from the office. She worked only a short time before she was forced to go home because of discomfort.

Claimant's fall took place on a public street. Respondent's plant facilities and office are located on both sides of the street, but respondent has no responsibility for its maintainance. The fall occurred in the area generally used by employes going between buildings on opposite sides of the street.

Claimant testified that she normally arrived at work early and went to the lunch area in one of the buildings to have a cigarette and socialize. She arrived later than usual that morning because of the bad weather and therefore did not have time to go to the lunch room. She was in the main office talking with the personnel manager when the bell signalling the beginning of work rang.

[1] The area where claimant usually parked was an area off the street and beside one of employer's plant buildings.

Claimant contends that she was on her way to the main office, not to have a smoke as usual, but to find out where she was assigned to work that day. The referee and the Board found that she was on her way to the office building to socialize. Claimant testified that during the off-season general laborers such as she are assigned to different jobs located in different buildings and must check with the supervisor to obtain particular job assignments. She testified that, after talking with the personnel manager, she reported to her foreman and proceeded to the building across the street where she was assigned to work. It is not clear where she reported to her foreman to be assigned or if she already knew she was assigned to work across the street.

Respondent's personnel manager testified that employes do not need to go to the main office when they arrive at work. They can go directly to their assigned work place. However, she also indicated that in the off-season, when an employe finishes one job, she has to find her supervisor to find out what her next assignment is. The personnel manager did not know claimant's assignment for either the day before or the day of the accident.

The Board concluded that, because the accident took place on a public street over which the employer exercised no control and because the claimant was in pursuit of personal, rather than her employer's, interests, her injury was not compensable.

A compensable injury is defined by the Workers' Compensation Act as "an accidental injury * * * arising out of and in the course of employment * * *." ORS 656.005(8)(a). In *Rogers v. SAIF,* 289 Or 633, 616 P2d 485 (1980) the Supreme Court pointed out that historically the two elements "arising out of" and "in the course of" have been treated in Oregon cases as two distinct tests, both of which must be met for an injury to be compensable. Rejecting this "mechanistic two stage method of analysis," the court adopted a "unitary work-connection approach." 289 Or at 643. The court identified the pertinent inquiry to be whether the injury has a sufficient work relationship. 289 Or 643. If it does, it "arises out of and in the course of employment." The court made it clear in *Rogers* that it was

not substantially changing fundamental workers' compensation law, but simply adopting a new test or approach. Therefore, "existing law regarding proximity, causation, risk, economic benefit and all other concepts which are useful in determining work relationships remain applicable." 289 Or at 643. *See also, Halfman v. SAIF,* 49 Or 23, 26-27, 618 P2d 1294 (1980). As permitted by *Rogers,* we find it helpful to examine cases similar to the one before us.

As a general rule, injuries sustained by employes going to or coming from their regular place of work are not deemed to arise out of and in the course of their employment. *Nelson v. Douglas Fir Plywood Co.,* 260 Or 53, 57, 488 P2d 795 (1971); *White v. S.I.A.C.,* 236 Or 444, 447, 389 P2d 310 (1964); *Rohrs v. SAIF,* 27 Or App 505, 507, 556 P2d 714 (1976). There are, however, several exceptions to this general rule. *See,* generally, 1 Larson, Workmen's Compensation § 15.

In *Montgomery v. State Ind. Acc. Com.*, 224 Or 380, 356 P2d 524 (1960), the court held that an employe was entitled to compensation when he was struck by a car while crossing a public street on his way from work. The court found that the busy street, which was located in front of the plant, was the only approach to and from the plant, that it was a "special risk of the claimant's employment," and that the employer, who had a key to operate the traffic light in front of the plant, exercised some control over the traffic and pedestrians using or crossing the street. The employer in *Montgomery* provided parking lots for its employes, making it unnecessary to cross the busy street, but these were full on the day in question and the claimant there was forced to park on a public street.

In *Kowcun v. Bybee,* 182 Or 271, 186 P2d 790 (1947), the court found an employe's injury to be compensable when she was hit by a car as she walked through the company parking lot to reach her own car after work. The court stated:

> "We do not believe that the whistle which calls the men to work in the morning and later signals the end of the day's labors always determines whether or not an injury which befell a workman arose 'out of and in the course of his employment.' Likewise, we do not believe that the

> Workmen's Compensation Law selects the threshold of the factory as the dividing line which decides whether or not an injury happened 'out of and in the course of' an employment. In construing the phrase 'out of and in the course of his employment,' the courts consider the nature, conditions, obligations and incidents of the employment * * *. If they find a causal connection between the employment and the injury, the requirements of the phrase have been met. * * *" 182 Or at 279.

Noting that the injury occured on the employer's premises, that the employer contemplated the course of conduct pursued by the employe and that the employes who worked in the particular area the claimant worked in had to walk some distance in the parking lot, the court concluded that the claimant's injury was incidental and directly related to her employment.

Relying in part on the decisions in *Montgomery* and *Kowcun,* this court in *Willis v. State Acc. Ins. Fund,* 3 Or App 565, 475 P2d 986 (1970), held that a university professor was entitled to compensation when he slipped and fell on the pavement as he crossed a city-owned park area on his way to the office from his car, parked in a university lot. Some of the university buildings, including the one in which claimant worked, bordered on the park area, and the area was commonly used by students and staff to the point that it had become a "major adjunct" to the campus. 3 Or App at 567. As a result, the university had assumed substantial responsibility for the daily upkeep of the area. Given these factors and that the "claimant was traveling in a direct route from the university's parking lot to his place of work across a public area over which his employer exercised control and in an area which * * *" exposed him to greater risks than those faced by the general public, we concluded that the claimant was acting in the scope of his employment. 3 Or App at 572.

In *Jordan v. Western Electric,* 1 Or App 441, 463 P2d 598 (1970), we held that an employe who slipped on a curb and injured himself while out on a paid coffee break suffered a compensable injury. We noted that the claimant's activity when he was injured was for the employer's benefit as well as for his own, that it was contemplated

under the contract of employment, that there was an element of employer control exercised because the supervisor accompanied the employes and that the claimant was paid for the time involved. 1 Or App at 447.

Finally, in *Fenn v. Parker Construction Co.*, 6 Or App 412, 487 P2d 894 (1971), we held that where an employe was injured while traveling home from work and the employer paid for the employe's travel time to and from work, the injury occurred within the scope of the employe's employment. *See* also, *Livingston v. State Ind. Acc. Com.*, 200 Or 468, 266 P2d 684 (1954).

On the other hand, the "going and coming rule" has been applied to deny coverage in a number of cases. In *Kringen v. SAIF*, 28 Or App 19, 558 P2d 854 (1977), we held that an employe was not entitled to compensation when he was injured while crossing a busy street near his place of work. In that case the claimant was not being paid travel time, the accident did not occur on the employer's premises, and the employer exercised no control over that portion of the street where the claimant attempted to cross.

In *Rohrs v. SAIF, supra*, we denied compensation to an employe who slipped and fell in a parking garage while approaching her automobile after work. The parking garage was connected to the building which housed the employer's place of business by an underground tunnel. However, the garage was not owned by the employer, and the employer had no right, legal or customary, to use the facility any more than did any other member of the general public.

In *Barker v. Wagner Mining Equip.*, 6 Or App 275, 487 P2d 1162 (1971), we denied compensation where the employe was injured while crossing the railroad tracks on his way home from work during his lunch hour. In that case, the railroad crossing was some distance from the employer's premises, the employer exercised no control over the area, the claimant was not paid for his lunch hour, and he could go anywhere he pleased for lunch using any route he chose. *See also, White v. S.I.A.C., supra.*

In this case, the claimant was injured on a public street, not on the employer's premises. The street was

located between the employer's facilities and was frequently used by its employes. The claimant was forced to park on the street on the day of the injury because the other parking areas were full or inaccessible. The street was the only way she could get to her place of work. However, there is no evidence that the street had become a part of the employer's facilities or that the employer regularly exercised control over street traffic, use of the street or its maintenance. The spreading of salt after the fact does not indicate that the employer had assumed responsibility for the street's upkeep. Finally, we do not think that use of the street exposed the claimant to a greater risk of injury than any other member of the public. The factors of control over the off-premises site and special risk, which were present in *Montgomery v. State Ind. Acc. Comm., supra,* and *Willis v. State Acc. Ins. Fund, supra,* are not present.

We conclude that the injury was not related to claimant's employment and did not arise out of and in the course of her employment.[2]

Affirmed.

[2] Because we decide the case on this basis, it is not necessary to decide if the claimant was in pursuit of her own interests at the time of her fall.

PROPERTY OF
WORKMEN'S COMPENSATION BOARD
SALEM, OREGON

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