VAN NATTA'S WORKERS' COMPENSATION REPORTER

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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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Edited and published by:
Robert Coe and Merrily McCabe
1017 Parkway Drive NW
Salem, Oregon 97304
(503) 362-7336

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38 Van Natta ___ (1986)

MARCO AGUIAR, Claimant
Kenneth D. Peterson, Claimant's Attorney
Meyers & Terrall, Defense Attorneys

WCB 84-05596
April 2, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of those portions of Referee Fink's order which set aside its partial denial of proposed right foot surgery as not reasonable and necessary and ordered reopening of the claim when the surgery is performed. Claimant cross-requests review of those portions of the order which affirmed closure by the Determination Order dated May 15, 1984 and denied rating extent of scheduled disability because the claim was reopened for surgery. The issues on review are compensability of surgery, premature closure, and extent of scheduled permanent partial disability.

Claimant injured his right foot when an aluminum irrigation pipe fell on it on March 1, 1983. Claimant's treating doctor was Dr. Carpenter, who expected claimant to be able to return to regular work by the middle of May 1983. When claimant continued to report pain in the foot, claimant was examined by Drs. Rademacher and Gehling. They concluded there was no evidence of bone injury or disease. Claimant was then examined by Dr. Puziss who opined that there was the slightest suggestion of a ligamentous strain in claimant's foot possibly associated with the sinus tarsi fat pad. Dr. Puziss felt that claimant's foot was mildly impaired if no further treatment was attempted. Claimant was then examined by Dr. Smith, who concurred with Dr. Puziss's report. Dr. Carpenter also concurred with Dr. Puziss's report, especially that portion that recommended that surgery be considered only if both the treating doctor and the injured worker agreed on it.

Dr. Puziss then opined that claimant would probably be relieved of his pain if the proposed sinus tarsi fat pad excision were performed, and changed his rating of impairment to minimal. Dr. Kiest examined claimant and opined that bone scans revealed claimant's uninjured left foot to have exactly the same condition within the structure of the foot as the injured right foot and recommended against surgery unless the condition which produced pain could be objectively confirmed as pathological by electromyogram (EMG). Dr. Puziss and Dr. Carpenter agreed with Dr. Keist that no surgery should be performed unless the need were confirmed by EMG. Subsequent EMG performed by Dr. Eisler was within normal limits.

After the EMG results were known, Dr. Puziss became convinced that claimant would benefit from sinus tarsi fat pad removal. Dr. Weeks examined claimant, reviewed the file, and opined that it was extremely doubtful that claimant would benefit from the proposed surgery and that the literature on the procedure appeared biased. Dr. Carpenter concurred with Dr. Weeks.

At hearing, claimant testified that he wanted Dr. Puziss to perform the fat pad excision surgery as it had been described. He also testified that his foot hurt the same ever since the accident. Discrepancies in claimant's subsequent work activities and statements about his immigration status made the Referee feel that claimant was either untruthful or that he had a poor memory.

Taking the evidence as a whole, the Board is persuaded that the proposed surgery is neither reasonable nor necessary as a result of the industrial injury to claimant's right foot. The continuing opinion of the original treating doctor and the well-reasoned opinions of three examining doctors are more persuasive that the wavering opinion of Dr. Puziss on that issue. Therefore, the Board reverses that portion of the Referee's order which set aside the partial denial of proposed surgery.

On the issue of premature closure, the Board finds that the opinions that claimant would get better very slowly over a period of several months were expressions of hopefulness rather than medical probability. Maarefi v. SAIF, 69 Or App 527 (1984). Therefore, the Board affirms that portion of the order which approved closure by the Determination Order dated May 15, 1984.

On the issue of the extent of scheduled permanent partial disability of claimant's right foot, the Referee declined to rate the disability because he had ordered the claim to be reopened when the surgery was performed. The employer has requested that if the Board reverses on the issue of compensability of the surgery that the case be remanded to the Referee to rate in the first instance. The motion is denied because the rating of claimant's disability can be made on the record and the Board finds that the record has not been incompletely, improperly, or insufficiently developed or heard. ORS 656.295(3), (5).

The treating doctor repeatedly reported that claimant suffered no permanent impairment of his foot as a result of the industrial injury. Dr. Puziss opined the impairment was minimal. Dr. Kiest opined that claimant would have no impairment as he recovered from the injury. Claimant testified about continuting symptoms of pain, but the Referee found claimant was not credible. On the evidence as a whole, we find that claimant has not proven that he has permanent impairment or loss of function or use of his right foot and, therefore, there should be no award for permanent partial disability. That portion of the Determination Order dated May 15, 1984 which awarded 13.5 degrees for 10 percent loss of use or function of claimant's right foot is reversed.

ORDER

The Referee's order dated July 24, 1985 is affirmed in part and reversed in part. The Determination Order dated May 15, 1984 is affirmed in part and reversed in part. That portion of the Determination Order and the Referee's order that found claimant was medically stationary at the time of the publication of the Determination Order is affirmed. That portion of the Determination Order which awarded 13.5 degrees for 10 percent scheduled permanent partial disability for injury to claimant's right foot is reversed and claimant is awarded no compensation for permanent partial disability. That portion of the Referee's order which set aside the self-insured employer's partial denial of surgery as not reasonable and necessary is reversed and the partial denial dated September 10, 1984 is reinstated. That portion of the Referee's order which ordered reopening of the claim when proposed surgery was performed is reversed. The award of attorney fees for prevailing on a partial denial is reversed.

EUGENE F. CLARK, Claimant
Jim L. Scavera, Claimant's Attorney
Edward Olson, Defense Attorney
McNutt, et al., Defense Attorneys

WCB 84-06392
April 2, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Fireman's Fund Insurance Company (Fireman's Fund) requests review of that portion of Referee Mongrain's order that set aside its denial of the compensability of claimant's low back claim. The Referee affirmed the denials of the SAIF Corporation and North Pacific Insurance Company. The former denied the compensability of claimant's claim; the latter's denial was predicated on responsibility. Claimant cross-requests review of that portion of the Referee's order that denied claimant's request for penalties and attorney fees for Fireman's Fund's allegedly untimely denial of claimant's claim. The issues on review are penalties and attorney fees, whether claimant's claim is compensable and, if so, which insurer is responsible.

We affirm from the outset that portion of the Referee's order affirming North Pacific Insurance Company's denial. At no time did North Pacific insure either of claimant's employers during claimant's employment periods. We also affirm that portion of the order regarding penalties and attorney fees.

Claimant suffered a nondisabling compensable lumbar strain in January 1979 while employed by the Hatcher Construction Company (Hatcher). Hatcher was insured by SAIF. The injury resulted in sharp low back pain approximately twice per month during the next several years, although claimant never missed time from work due to the injury.

Claimant left Hatcher sometime in late 1981 and began work for the Erdman Meat Packing Company (Erdman) in January 1982. Claimant testified that he occasionally did heavy work while at Erdman, but that his intermittent low back pain neither increased nor became more frequent during the Erdman employment. Claimant worked for Erdman through May 1983, when he was laid off for reasons unrelated to his injury.

Before leaving Erdman claimant experienced a second acute symptomatic onset off the job. According to his testimony, claimant was driving to work on January 24, 1983 when he experienced a sudden onset of severe low back pain that radiated down his right leg. The leg symptom was new. Despite this second onset, claimant continued to work at Erdman without lost time through the date of his layoff. He ultimately visited a physician in May 1983 and reported "progressively radiating pain" in the low back and right leg.

Claimant's symptoms continued through the summer of 1983, and an August 31 myelogram revealed a large bulging defect at L4-5. Claimant's physician recommended surgery and claimant filed a claim for aggravation with SAIF. He did not file a claim with Erdman at that time. SAIF issued a compensability denial based on the reports of Drs. Brooks and Pasquesi. The physicians suggested that claimant's then-current condition was likely not the result of the original lumbar sprain. They further indicated that claimant's disk herniation most likely developed in 1983. Dr. Brooks added that it was possible that the herniation occurred

as a result of claimant's employment with Erdman, given the occasional heavy nature of that employment.

Claimant requested a hearing on SAIF's denial. Before the case went to hearing, however, he slipped and fell while hunting. The fall resulted in increased low back discomfort and constant radiating right leg pain. There is no medical report in the record addressing the effect of this slip and fall incident.

A February 1984 hearing was held before Referee Brown on SAIF's denial of compensability. Dr. Bert, who had treated claimant several times following the original lumbar strain, testified by way of deposition that claimant's employment at Erdman independently contributed to a worsening of the disk condition. Based on Dr. Bert's testimony and the remainder of the record, Referee Brown held that because the Erdman employment contributed to claimant's disability, SAIF (as insurer for Hatcher) was no longer responsible for claimant's back condition. The Referee, therefore, affirmed the denial. Because Erdman was not joined to the proceeding, responsibility was not assigned to Fireman's Fund, Erdman's insurer.

Two days after the Referee's order issued, claimant filed a claim against Erdman, alleging that the Erdman employment contributed to his low back condition. Erdman submitted the claim to Fireman's Fund, which issued a compensability denial approximately 90 days after Erdman received the claim. Claimant again requested a hearing, but only as against Fireman's Fund. North Pacific Insurance Company received a copy of the Notice of Hearing, however, and moved to join both SAIF and Fireman's Fund. No claim was filed against SAIF; that insurer appeared solely as a result of joinder.

After considering a record similar to the one considered by Referee Brown, Referee Mongrain found that the Erdman employment independently contributed to claimant's disability and that Fireman's Fund was the responsible insurer. Thus, the Referee implicitly found claimant's claim compensable as against at least one insurer, although he did not address the issue of compensability. After reviewing the record, we find that claimant has failed to establish a compensable claim against any insurer and we reverse the Referee's order as it relates to responsibility.

It is fundamental that claimant must have a compensable claim before responsibility between insurers is determined. The compensability of the claim can be established in one of two ways: (1) the insurers can concede compensability and request that a paying agent be designated pending resolution of the issue of responsibility, ORS 656.307; or (2) if compensability is not conceded, claimant may prove a compensable claim against one or both of the insurers joined. In the present case, compensability was contested by both SAIF and Fireman's Fund. It is incumbent on claimant, therefore, to prove the compensability of his low back condition against at least one insurer.

In order to prove a compensable aggravation against SAIF, claimant must establish that the 1979 lumbar strain remains a material contributing cause of his current condition. The medical evidence is contrary to that assertion, however, as is the remainder of the record. The evidence is that claimant's original injury was minor, without time lost from work, and that it

improved with conservative treatment. There is insufficient evidence that the original injury remains a material cause of claimant's current condition.

Claimant's remaining remedy, if any, is against Erdman's insurer, Fireman's Fund. In order to determine compensability as against Fireman's Fund, however, we must first determine whether the claim is one for accidental injury or occupational disease. If the claim is for accidental injury, claimant must prove that the Erdman employment materially contributed to his current condition. See Wilma H. Ruff, 34 Van Natta 1048 (1982). If it is for occupational disease, claimant must prove that the employment was the major contributing cause of his condition. Dethlefs v. Hyster Co., 295 Or 298 (1983).

Because the Referee did not address the compensability issue, he made no finding with regard to the posture of claimant's claim. After reviewing the evidence, however, we find that the claim against Erdman is properly characterized as one for occupational disease because of claimant's implicit assertion that his condition gradually worsened as a result of his year-long exposure to the conditions of the Erdman employment. See James v. SAIF, 290 Or 343 (1981). Claimant must, therefore, prove that the working conditions at Erdman were the major cause of his disk herniation. We find the evidence insufficient to satisfy claimant's burden of proof.

The medical evidence consists of the opinions of Drs. Bert, Brooks and Pasquesi. While the doctors suggest that the Erdman employment likely contributed to claimant's condition, they offer no opinion as to the degree of contribution. In fact, a reading of the opinions suggests that the employment was merely one of several causes as opposed to the major contributing factor. Dr. Brooks indicated that he was unsure what ultimately caused the disk herniation, but that it was possible that it occurred in 1983. Dr. Pasquesi stated that all of claimant's activities, both on and off the job and before and after the Erdman employment, were contributory. Dr. Bert indicated that both the Hatcher and Erdman employments contributed to claimant's condition, but he offered no opinion with regard to which of the two employments contributed more. No doctor offered an opinion regarding the effects of claimant's two off-the-job injuries.

Neither does claimant's testimony help to establish his occupational disease claim. He testified that he was experiencing twice per month symptoms at the time he began at Erdman, and that the Erdman employment neither made his symptoms worse nor more frequent. He lost no time from work and did not decide to undergo surgery until his off-the-job fall after leaving Erdman's employ. Considering these facts, it cannot be said that the period of employment at Erdman was the major cause of claimant's ultimate disk condition. Claimant's claim against Erdman is not compensable.

ORDER

The Referee's order dated August 1, 1985 is reversed in part and affirmed in part. That portion of the order that set aside Fireman's Fund's denial is reversed and the denial is reinstated. The remainder of the order is affirmed.

RUSSELL F. FOUTS, Claimant
W. Daniel Bates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-12376
April 2, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Michael Johnson's order that: (1) awarded claimant 128 degrees for 40 percent unscheduled permanent partial disability in lieu of a Determination Order award of 64 degrees for 20 percent unscheduled disability for the low back; and (2) allowed the SAIF Corporation to offset from claimant's award temporary total disability payments in an amount equal to the wages claimant allegedly received from his employer while claimant was receiving temporary total disability. The issues on review are extent of unscheduled disability and the offset.

On the extent issue we affirm the order of the Referee. On the offset issue we draw from the Referee's statement of facts and modify his allowance of the offset.

During the summer of 1984 claimant and his wife served as camp hosts in three Oregon state parks. Claimant was receiving temporary total disability payments simultaneously. Although neither claimant nor his wife received a salary for their services, they were permitted to reside free of charge in the campgrounds during the months of June, July and August in campsites normally renting for $4.00 per night. If they had not had a relationship with the State Park Service, claimant and his wife would have rented space for their recreational vehicle at a cost of $100.00 per month. Claimant viewed the rent benefit as a significant financial advantage.

As the Referee held, temporary total disability compensation is computed in part by subtracting from compensation any "wages" earned by the worker during the time in which claimant was entitled to temporary disability payments. OAR 436-60-020. "Wages" include the reasonable value of "rent, housing, lodging or similar advantage received from the employer. . . ." ORS 656.005(26). As did the Referee, we interpret the statutory definition to include the free rent advantage claimant and his wife received from the State Park Service in exchange for their services. Claimant was not entitled to receive full temporary total disability payments during the time he also received benefit from the State Park Service. An offset is appropriate.

Claimant argues on review that even if an offset is due, the offset should be limited to one-half the benefit he derived. We agree, noting that the value of the rent received by claimant was to also benefit his wife, and she was apparently expected to share claimant's camp host duties. Therefore, she "earned" one-half of the benefit received during the period at issue. The Referee's allowance of offset will be modified to account for the "wages" earned by claimant's wife during the summer of 1984.

ORDER

The Referee's order dated July 25, 1985 is affirmed in part and modified in part. That portion of the order that awarded claimant 128 degrees for 40 percent unscheduled permanent partial disability is affirmed. That portion of the order that allowed

the SAIF Corporation to offset the full amount of the value of the rent received by claimant and his wife during June, July and August of 1984 is modified to account for the one-half advantage earned by claimant's wife and, therefore, not subject to an offset. The SAIF Corporation shall calculate its offset consistent with this order.

DAVID L. McLAGAN, Claimant
Roberts, et al., Defense Attorneys

WCB 85-03989
April 2, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Mulder's order that granted the insurer's motion to dismiss the request for hearing on the ground that no evidence that could be presented would avoid operation of the Department's rule establishing the rate of temporary total disability compensation for a worker whose income included tips. The issue is rate of temporary total disability compensation.

The relevant facts are simple. Claimant worked as a bartender in a restaurant. He injured his knee on the job on December 28, 1984. His income from employment included tips, but he had been employed for such a short time by this employer that he had not established a verified tip income. The insurer, therefore, calculated temporary total disability using former OAR 436-54-212(3)(g), which provided:

> "Employed where tips and gratuities are an integral part of earnings: Use wages actually received, plus tips and gratuities, verfiable by employer's records, if available. If not available, use 2 percent of the Oregon average weekly wage at time of injury as defined in ORS 656.211 to determine daily tips and gratuities."

Claimant asserted at hearing that his temporary disability rate should have included tips and gratuities that his employer was required to report as income under the Internal Revenue Code, which, at the time of injury, the record establishes was eight percent of monthly gross sales.

We note that the rule for calculating tips and gratuities for purposes of temporary total disability, currently OAR 436-60-020(4)(g), was amended effective January 1, 1986 to provide for such a calculation. WCD Admin. Order 8-1985 (December 12, 1985). However, ORS 656.202(2) provides that, "Except as otherwise provided by law, payment of benefits for injuries or deaths under ORS 656.001 to 656.794 shall be continued as authorized, and in the amounts provided for, by the law in force at the time the injury giving rise to the right to compensation occurred." At the time of claimant's injury, the amount of temporary total disability benefits was calculated under former OAR 436-54-212(3)(g) for workers whose earnings included tips. The Referee's decision was correct.

ORDER

The Referee's order dated September 6, 1985 is affirmed.

CRAIG A. ERICKSON, Claimant
Shepherd, et al., Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 85-03520
April 3, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of Referee Podnar's order that: (1) set aside its denial of claimant's right knee aggravation claim; and (2) assessed a 15 percent penalty and an associated attorney fee against the employer for an alleged unreasonable denial of the aggravation claim. The issues on review are compensability and penalties and attorney fees.

On the issue of compensability we affirm the Referee's order. We disagree with the Referee, however, that the employer's denial was unreasonable. We, therefore, reverse that portion of the order that assessed a penalty and attorney fee against the employer.

If an employer has a reasonable doubt as to the compensability of a claim, it may issue a denial without incurring a penalty. Devereaux v. North Pacific Ins. Co., 74 Or App 388 (1985); Nelson v. SAIF, 49 Or App 111 (1980). The present denial was predicated on the opinion of Dr. Schuler, who examined claimant both before and after his alleged aggravation. Dr. Schuler concluded that subsequent to the last arrangement of compensation, claimant had suffered a new, unrelated injury to his right knee. Although this opinion conflicted with that of another doctor, we find that it raised a reasonable doubt upon which the employer could rely in issuing its denial. The denial was not unreasonable and a penalty was inappropriate.

ORDER

The Referee's denial is affirmed in part and reversed in part. That portion of the order that set aside the self-insured employer's denial of claimant's aggravation claim is affirmed. That portion of the order that assessed a 15 percent penalty and an attorney fee against the employer for an alleged unreasonable denial is reversed.

ROBERT CASPERSON, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Gleaves, et al., Defense Attorneys

WCB 85-04781 & 85-04782
April 7, 1986
Order Dismissing Cross-Request for Review

Claimant has filed a cross-request for Board review of Referee Holtan's order dated January 29, 1986. Claimant's cross-request was mailed March 18, 1986. ORS 656.289(3) provides that after a party has requested Board review of a Referee's order, any other party may also request review. Subsequent requests for review (commonly called "cross-requests") are effective if mailed more than 30 days after the Referee's order was issued only if mailed within 10 days of the first request. Thus, under the most extreme of circumstances, a cross-request may be effective if mailed within 40 days of the Referee's order. Claimant's request in this case was mailed more than 40 days from the mailing date of the Referee's order and is, therefore, untimely.

Claimant argues that the time should be extended because a copy of the Referee's order was not mailed to his attorneys. The Referee's order recites that a copy of the order was mailed to claimant, but does not indicate mailing to claimant's attorneys. We agree that the failure to mail a copy of the order to claimant's attorneys was apparently an administrative oversight; however, it cannot serve as the basis to expand our jurisdiction. While failure to mail a copy of an order to a statutory "party" may render an order ineffective, claimant's attorneys are not "parties." ORS 656.005(19). In any event, failure to perfect a cross-request does not prevent a party from raising issues before the Board. Miller v. SAIF, 78 Or App 158, 161 (1986).

Claimant's cross-request for Board review dated March 18, 1986 is dismissed as untimely.

IT IS SO ORDERED.

ISABEL APARICIO, Claimant
MacAfee & Friedman, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-05851
April 9, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of Referee Baker's order that awarded claimant 112.5 degrees for 75 percent scheduled permanent partial disability for loss of use of the left hand in lieu of a Determination Order award of 60 degrees for 40 percent scheduled disability. SAIF asserts that the Referee's award was excessive.

Claimant suffered a compensable injury to the left hand in October 1983 when it became entangled in farm machinery. The accident traumatically amputated the left middle finger at the PIP joint, and later necessitated the amputation of the left ring finger at the base of the proximal phalanx. In addition, claimant suffered a comminuted fracture of the left little finger, resulting in flexion contractures and tenodesis of the flexor mechanism. The index finger and thumb were not injured. As a result of his injuries, claimant's left hand is essentially a "pincher;" he uses his index finger and thumb to grasp objects. Claimant has some sensory loss, some loss of thumb opposition, and decreased grip strength in the left hand.

The Referee concluded that the injury to claimant's hand is severe and that, as a practical matter, he has lost most of the use of the injured member. The Referee, therefore, increased claimant's award from the 40 percent awarded by the Determination Order to 75 percent scheduled disability.

On review, SAIF argues that a 75 percent award is excessive. We agree. The criteria for rating the extent of scheduled permanent disability is the loss of use or function of the injured member. ORS 656.214(2). While loss of use does not necessarily correlate with the extent of a claimant's mechanical impairment, objective impairment is a relevant consideration. Boyce v. Sambo's Restaurant, 44 Or App 305 (1980). We utilize the Workers' Compensation Department's administrative rules governing extent of disability as guidelines, rather than as hard and fast

rules. Fraijo v Fred N. Bay News Co., 59 Or App 260 (1982). In cases involving scheduled disability, however, the Department's guidelines are highly persuasive because of their promulgation directly from ORS 656.214(2)-(4) and their basis in accepted medical principle. Steven D. Silva, 37 Van Natta 1621, 1623 (1985).

We note that under the guidelines promulgated by the Department, claimant would not be entitled to an award exceeding that awarded by the Determination Order even if his award assumed a complete loss of the middle, ring and little fingers of the left hand. See OAR 436-30-180(3), (4), and (5). The Referee clearly considered not only the factors set forth in the pertinent rules, but other factors as well, including claimant's lack of grip strength. Subsequent to the Referee's order, we held that no additional allowance for loss of grip strength is to be included in determining the extent of a scheduled loss when decreased grip strength results from amputation rather than from a neurological deficit. Charles R. Jackson, 37 Van Natta 1609 (1985); Royce J. Burian, 37 Van Natta 1602 (1985). Additional impairment is not considered where the evidence is that claimant has no greater loss of grip strength than that which would be a natural consequence of the injury to the fingers. In the present case, claimant's loss of grip strength has resulted from amputation and there is no evidence that the loss is greater than that reasonably expected from his injury. Therefore, no additional scheduled award for the loss of grip strength should have been made.

After our review of the record we are persuaded that claimant was adequately compensated by the Determination Order's 40 percent scheduled permanent disability. That Order shall be reinstated.

ORDER

The Referee's order dated April 30, 1985 is reversed and the Determination Order dated April 30, 1984 is reinstated.

MARVIN L. BROWN, Claimant
Hayner, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-09489, 82-09728 & 83-04952
April 9, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Brown v. Weyerhaeuser Co., 77 Or App 182 (1985). The court affirmed our order in part and reversed that portion of the order that held that claimant had not proved the nonpayment of a period of temporary disability compensation ordered by a Determination Order. The court has remanded the case for our determination of a penalty and attorney fee for failure to pay the temporary disability compensation. The court found as fact that temporary partial disability compensation was due and not paid for the period September 22 through October 1, 1980. We are bound by this finding.

Now, therefore, the self-insured employer shall pay claimant temporary partial disability compensation pursuant to ORS 656.212 for the period September 22, 1980 through October 1, 1980 and shall pay to claimant in addition thereto a sum equal to 25 percent of the compensation due and not paid. The self-insured employer shall also pay to claimant's attorney $450 as a

reasonable attorney fee, in addition to all other sums ordered paid by this order.

IT IS SO ORDERED.

NANCY E. CUDABACK, Claimant
Steven C. Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Noreen K. Saltveit, Defense Attorney
Moscato & Byerly, Defense Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-08031, 83-03359, 84-05661, 84-12695 & 85-01701
April 9, 1986
Order on Reconsideration

We issued our Order on Review on November 4, 1985. Thereafter, on our own motion, we issued an Amended Order on Review dated November 25, 1985, in which we corrected errors in the calculation of awards of disability for which the various insurers were responsible. On November 26, 1985 we withdrew all orders to allow comment by the parties as to the corrections.

The time having passed for receipt of additional comments, we have reconsidered this matter and we now adhere to and republish our Amended Order on Review, effective this date.

IT IS SO ORDERED.

VERNON R. JENSEN, Claimant
Lawrence Wobbrock, Claimant's Attorney
Peter O. Hansen, Attorney
Roberts, et al., Attorneys

WCB TP-85010
April 9, 1986
Third Party Order

Claimant has petitioned the Board to resolve a dispute regarding the just and proper distribution of the proceeds of the settlement of a third-party action brought by claimant against the parties actually responsible for claimant's industrial injury. The issue is the amount of the lien of CNA Insurance Companies, the paying agent for claimant's workers' compensation benefits. ORS 656.580(2); 656.593(1). Claimant and CNA agree that CNA's claim costs to date total $11,693.03. Claimant urges that a just and proper distribution of the settlement requires that CNA's lien be enforced in the amount of one-half the acknowledged claim costs to date. CNA insists that it is entitled to the full amount of its claim costs. The amount of the settlement is $35,000.

The formula for the distribution of proceeds of actions brought against third parties allegedly responsible for injury to covered workers is set forth in ORS 656.593(1). The statute provides that distribution of the gross settlement proceeds shall be first to pay costs and attorney fees (limited by regulation to not more than 33 1/3% of the gross recovery, OAR 438-47-095), next to pay not less than 33 1/3% of the balance to the claimant, then to pay the remainder to the paying agency to the extent of its lien for claim costs, with the balance, if any remains, to be paid to the claimant. ORS 656.593(3) provides:

> "A claimant may settle any third party case with the approval of the paying agency, in which event the paying agency is authorized to accept such a share of the proceeds as may be just and proper and the worker or the beneficiaries of the worker shall receive the

amount to which the worker would be entitled for a recovery under subsections (1) and (2) of this section. Any conflict as to what may be a just and proper distribution shall be resolved by the board."

We have previously held that the distribution of proceeds of a settlement will be effected in the same manner as the distribution of proceeds of a judgment, Peter R. Warner, 37 Van Natta 419, 420 (1985); Marvin Thornton, 34 Van Natta 998, 1001-02 (1982), unless there is a clear agreement between the parties otherwise, Robert T. Gerlach, 36 Van Natta 293, 295-96 (1984). In Gerlach, the claimant entered into a settlement in substantial reliance upon the industrial insurer's agreement that it would accept a lesser share of the proceeds than its statutory entitlement, and we upheld the agreement. See also Robert B. Williams, 38 Van Natta 119 (1986). However, in this case there is no evidence that CNA ever agreed or represented that it would accept less than that provided for by ORS 656.593(1)(c). We note also that CNA made a contribution toward the costs of claimant's action, which it does not seek to recover.

The distribution of the proceeds of claimant's third-party settlement shall be as provided by ORS 656.593(1), with payment as follows:

To Claimant's attorney:	$11,540.03
To CNA Insurance Companies:	$11,693.03
To Claimant:	$11,766.94
TOTAL:	$35,000.00.

IT IS SO ORDERED.

HARVEY V. ROSSI, Claimant
Welch, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-04697
April 9, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Fink's order that affirmed the Determination Order award of 16 degrees (5 percent) unscheduled permanent partial disability for injury to the low back. The issue is extent of disability.

The Board affirms the order of the Referee with the following observations. Based upon demeanor at hearing alone, the Referee found no reason to question claimant's credibility; however, the Referee did question claimant's credibility based upon inconsistencies between claimant's testimony and the documentary evidence. After de novo review of the entire record, we agree with the Referee's conclusions regarding the inconsistency between claimant's testimony and the medical histories and findings.

The Referee also stated in his order that he inadvertently personally observed claimant in the hallway after the hearing in a posture that was inconsistent with the testimony regarding claimant's disability. Although the better practice may have been to reconvene the hearing and disclose his observation to

the parties, we conclude that the error, if any, was harmless. See James M. Woodward, 37 Van Natta 1662 (1985). We have not considered the Referee's observation. We conclude that the record as a whole establishes that claimant has been adequately compensated by the 16 degrees (5 percent) unscheduled permanent partial disability awarded by the Determination Order.

ORDER

The Referee's order dated February 5, 1985 is affirmed.

DANA R. SMITH, Claimant
Pozzi, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 84-09178
April 9, 1986
Order on Reconsideration

The employer requested reconsideration of that portion of our November 15, 1985 Order on Review that denied a requested offset against future permanent disability compensation for temporary total disability compensation paid pursuant to the Referee's order. We reversed that portion of the Referee's order that awarded temporary total disability compensation. We withdrew our order to allow sufficient time for response from claimant. On reconsideration, we adhere to our previous order, with the following comment.

ORS 656.313 provides in relevant part:

> "(1) Filing by an employer or insurer of a request for review or court appeal shall not stay payment of compensation to a claimant.
>
> "(2) If the board or court subsequently orders that compensation to the claimant should not have been allowed or should have been awarded in a lesser amount than awarded, the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal."

The employer argues in essence that the requested offset is not "repayment." The employer's argument is contrary to well-established case law. SAIF v. Casteel, 74 Or App 566, 569 (1985); Hutchinson v. Louisiana-Pacific, 67 Or App 577, 581 (1984).

The request for reconsideration is allowed. On reconsideration, we adhere to and republish our prior order, effective this date.

IT IS SO ORDERED.

WILLIAM E. HARTZOG, Claimant
Goldberg & Mechanic, Claimant's Attorneys
Kay E. Kinsley, Defense Attorney

Own Motion 85-0533M
April 11, 1986
Own Motion Determination

The insurer voluntarily reopened claimant's claim for a worsened condition related to his industrial injury of November 22, 1976.

The claim has now been submitted for closure. Claimant and the employer stipulated to a reopening to commence on the date of claimant's hospitalization for surgery. Pursuant to that stipulation, claimant is hereby granted temporary total disability from March 26, 1985 through February 3, 1986, less any time worked. Deduction of overpaid temporary disability, if any, from unpaid temporary and permanent disability is approved.

The Board has received an additional request from claimant that it reconsider its February 24, 1986 Own Motion Order and allow claimant compensation for temporary total disability from May 15, 1984, the date claimant was seen by Dr. Keizer, through March 25, 1985. Compensation from March 26, 1985 to the date of closure was stipulated to by the parties and approved by the Board on January 6, 1986. Claimant has been out of the labor market for at least five years. Pursuant to Cutright v. Weyerhaeuser Company, 299 Or 290 (1985), workers who have removed themselves voluntarily from the general labor market are not entitled to time loss benefits. Medical support for claimant's alleged inability to work since 1981 might have persuaded the Board to allow the additional compensation he sought. However, we are not persuaded Dr. Keizer could speak knowledgeably on claimant's alleged inability to work prior to 1984 and, therefore, can only conclude that claimant voluntarily removed himself from the labor market several years prior to his "aggravation". Again, we decline to allow the additional compensation claimant requests.

IT IS SO ORDERED.

MILFORD W. HUFFMAN, Claimant
Kenneth D. Peterson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-04110
April 14, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Leahy's order which: (1) directed it to pay temporary total disability pursuant to a prior Board Own Motion Order; and (2) assessed penalties and accompanying attorney fees. On review SAIF contends that the Referee lacked jurisdiction to consider the matter. We agree and reverse.

On January 5, 1985 we issued an Own Motion Order reopening claimant's 1973 injury claim. The order directed that time loss compensation should begin May 1, 1984. By letter dated January 16, 1985, SAIF requested reconsideration, enclosing an additional medical report which indicated that claimant's time loss should begin at a later date. SAIF paid temporary total disability as authorized by the additional medical report, but did not fully comply with the Board's Own Motion Order. On March 12, 1985 we issued an Own Motion Order on Reconsideration which reaffirmed our prior order. The following day SAIF complied with the order.

Claimant requested a hearing, contending that SAIF had unreasonably failed to timely pay temporary disability pursuant to a Board order. The Referee agreed with claimant's argument. Thus, SAIF was directed to pay the temporary disability benefits it had initially withheld, a 25 penalty and an accompanying attorney's fee.

Subsequent to the Referee's order, we issued our order in David L. Waasdorp, 38 Van Natta 81 (January 28, 1986). In Waasdorp, we found that the Hearings Division lacked jurisdiction to consider a penalty issue stemming from the alleged noncompliance with an Own Motion Order. We reasoned that the Board, pursuant to ORS 656.278, was the appropriate forum for issues emanating from an Own Motion Order. In this regard, we further concluded that the claimant's hearing request did not present "a question concerning a claim," as that phrase is used in ORS 656.283(1).

Here, as in Waasdorp, claimant is attempting to enforce an Own Motion Order through the Hearings Division. As we held in Waasdorp, the Hearings Division is without jurisdiction to consider the matter. Accordingly, claimant's hearing request is dismissed.

ORDER

The Referee's order dated August 29, 1985 is reversed. Claimant's request for hearing is dismissed.

ALFONSO ROGERS, SR., Claimant
Peter O. Hansen, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-06571
April 14, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

The self-insured employer requests review of those portions of Referee Mulder's order that awarded claimant temporary total disability compensation and associated penalties and attorney fees for periods during which claimant was paid vacation, holiday and severance pay, awarded claimant $913.80 and associated penalties and attorney fees for an unauthorized overpayment offset and awarded penalties and attorney fees for late payment of temporary total disability awarded by the Determination Order dated February 9, 1983. The issues are temporary total disability, res judicata, offset, late payment, penalties and attorney fees.

We affirm the Referee on the issues of temporary total disability and associated penalties and attorney fees for the periods during which claimant was paid vacation, holiday and severance pay.

On the issues of penalties and attorney fees for late payment of temporary disability compensation and the unauthorized offset and associated penalties and attorney fees, we reverse. These issues were ripe for adjudication at the time of a prior hearing which was held on May 17, 1984 but were not raised at that time. Claimant, therefore, was precluded from raising them in the present proceeding. Million v. SAIF, 45 Or App 1097, 1102-03, rev den 289 Or 337 (1980); Delfina Lopez, 37 Van Natta 164, 168-71 (1985); see John Losinger, 36 Van Natta 239, 241-42 (1984); Elfreda Puckett, 8 Van Natta 158 (1972).

ORDER

The Referee's order dated August 27, 1985 is reversed in part. Those portions of the order that awarded claimant penalties

compensation ordered by the Determination Order of February 9, 1983 and that awarded claimant $913.80 and associated penalties and attorney fees for an unauthorized offset are reversed. The remainder of the Referee's order is affirmed.

ZENO T. IDZERDA, Claimant
Royce, et al., Claimant's Attorneys
Stoel, et al., Defense Attorneys
Richard A. Braman, Attorney

WCB 85-15055
April 15, 1986
Order on Dismissal

The self-insured employer has requested review of Referee T. Lavere Johnson's order dated March 10, 1986, adhered to on reconsideration April 3, 1986, that allowed the motions of the City of Portland and Arthur N. Wiens, Ph.D., to quash subpoenas duces tecum served on the city and Dr. Wiens. We have reviewed the request for review on our own motion to determine whether Referee Johnson's orders are reviewable. We conclude that they are not. See Lindamood v. SAIF, 78 Or App 15, 18 (February 26, 1986) and cases cited therein. The Request for Review is, therefore, dismissed and this case is remanded to the Hearings Division for further proceedings.

IT IS SO ORDERED.

CRAIG A. ERICKSON, Claimant
Shepherd, et al., Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 85-03520
April 16, 1986
Order on Reconsideration

Claimant requests that the Board reconsider those portions of its Order on Review dated April 3, 1986 that: (1) reversed the Referee's assessment of a penalty and associated attorney fee for the self-insured employer's alleged unreasonable denial; and (2) failed to award an employer-paid attorney fee for the claimant's prevailing on an employer-initiated request for Board review on the issue of compensability. Claimant's request for reconsideration is granted.

From the outset, we agree with claimant that he is entitled to an attorney fee for services before the Board. See ORS 656.382(2). The omission of the fee was inadvertent and shall be corrected herein.

With regard to the issue of penalties and attorney fees, we remain convinced that at the time of the employer's denial there was sufficient evidence in the record to give the employer reasonable doubt as to its continuing responsibility for claimant's right knee condition. The denial was based in part on the employer's belief that claimant's condition in 1985 was due to a noncompensable congenital condition of the femoral head. Reports authored by Dr. Schuler prior to the denial supported that conclusion. The denial was not unreasonable.

Now, therefore, having granted claimant's request for reconsideration, we hereby modify our April 3, 1986 Order on Review to award claimant's attorney a fee of $600 for prevailing before the Board on an employer-initiated request for review on the issue of compensability. We adhere to and republish the remainder of our order.

IT IS SO ORDERED.

RENE L. PENCE, Claimant
Michael B. Dye, Claimant's Attorney
Marshall B. Cheney, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-10329 & 84-13434
April 16, 1986
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated March 18, 1986 on four separate grounds. Claimant prevailed on review on the grounds related to the factual findings made by the Board. Therefore, we deny the request to reconsider the factual findings. The claim for penalties and attorney fees based on alleged unreasonableness in delay of compensation to be paid under Oregon law as opposed to payment under Idaho law was briefed solely as a portion of a sentence and was based on an inference that might be drawn from a portion of the evidence. We deny the request to reconsider the issue of penalties and attorney fees related to delayed payment of compensation under Oregon law because claimant failed to show that the conduct was unreasonable when the insurer was paying compensation under Idaho law in reliance on a decision of the Oregon Court of Appeals.

The request to reconsider attorney fees awarded to be paid out of claimant's award of additional temporary total disability compensation is granted. OAR 438-47-040 allows a maximum fee of up to $3,000 for prevailing on Board review on an issue of temporary total disability compensation. The rule states that "an additional attorney fee of 25 percent of the amount of any increase awarded by the Board shall be approved." (Emphasis supplied.) The rule allows no discretion in the setting of an attorney fee in this circumstance. Consequently the Board's limitation of the additional attorney fee to be paid by claimant out of temporary total disability compensation awarded on review was incorrect and the order should be modified to follow the rule. Claimant's attorney is allowed 25 percent of the amount of the increased temporary disability compensation awarded by this order up to a maximum of $3,000 including fees paid pursuant to the Referee's award of additional temporary disability compensation.

As modified by this order, the Order on Review dated March 18, 1986 is reconsidered and republished.

IT IS SO ORDERED.

EUGENE R. ASHFORD, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-08083
April 17, 1986
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of that portion of Referee Mulder's order that set aside its denial of claimant's diabetic condition. The issue is whether claimant's industrial injury was a material contributing factor in the development of his diabetic condition.

Claimant injured his head on September 23, 1968 in the course of his employment as a truck driver when a metal bar attached to a winch struck him in the face. As a result of the accident claimant sustained partial loss of vision in his right eye and partial paralysis of the left side of his body. In addition, since the accident claimant has suffered from headaches

and a seizure disorder. Claimant was awarded permanent total disability in 1970.

Late in 1983 claimant was diagnosed as suffering from diabetes mellitus. A number of physicians subsequently offered opinions on the question of whether claimant's diabetic condition was causally related to his 1968 head injury. In November 1983, Dr. Brown, a consulting neurologist, stated that "there is no foundation in the relationship between the diabetes and the injury." In January 1984, a multidisciplinary panel of the Northwest Pain Center commented, "It is very difficult for us to see how [claimant's] diabetic condition . . . is in any way related to his head injury." Dr. Seres, a neurologist and one of the members of the Northwest Pain Center multidisciplinary panel, stated in a separate report, "Certainly his diabetes . . . [is] not related to his head injury in any reasonably [sic] way." Later in January 1984, Dr. Bell, claimant's treating neurologist since 1968, reviewed the Northwest Pain Center report and agreed that claimant's diabetes was not related to his 1968 industrial injury.

The only opinion tending to support the compensability of claimant's diabetic condition was that offered by Dr. Pfaff, claimant's treating internist since 1980. In a letter to claimant's attorney in February 1985, Dr. Pfaff stated without further explanation, "I do believe that the diabetes is indirectly secondary to the head injury, as a consequence of weight gain."

On Board review SAIF challenges Dr. Pfaff's opinion as conclusory and contrary to the weight of the evidence. SAIF also points out that the record contains no evidence that claimant has gained weight since the 1968 injury and argues, therefore, that Dr. Pfaff's conclusion is unsupported by the record. In light of the conclusory nature of Dr. Pfaff's opinion and the numerous contrary opinions, especially that of Dr. Bell, claimant's long-time treating neurologist, we agree with SAIF and reverse that portion of the Referee's order that set aside its denial of claimant's diabetic condition. See Moe v. Ceiling Systems, Inc., 44 Or App 429, 433 (1980); Hammons v. Perini Corp., 43 Or App 299, 302 (1979).

ORDER

The Referee's order dated April 8, 1985 and reissued by order dated April 30, 1985 is affirmed in part and reversed in part. That portion of the Referee's order that set aside the SAIF Corporation's denial of June 27, 1984 relating to claimant's diabetic condition is reversed. The SAIF Corporation's denial of claimant's diabetic condition is reinstated and affirmed. The remainder of the Referee's order is affirmed.

BOARD MEMBER LEWIS DISSENTING

I respectfully dissent from the majority's conclusion that claimant has failed to establish that his 1968 industrial injury was a material contributing factor in the development of his diabetic condition. The majority discounts Dr. Pfaff's opinion as conclusory and contrary to the weight of the medical evidence. I disagree with the majority's analysis.

Dr. Pfaff's February 1985 opinion contains a short review of claimant's injury and the resulting seizure disorder and left hemiparesis. It goes on to recount the diagnosis of diabetes mellitus in late 1983 and emphasizes weight loss as the primary mode of treatment. Dr. Pfaff then states his opinion: "In summary, I do believe that the diabetes is indirectly secondary to the head injury, as a consequence of weight gain." Although brief, I would find this opinion sufficient to carry claimant's burden of proof for the following reasons.

First, before his industrial injury, claimant was healthy and active. The injury partially paralyzed the left side of his body resulting in loss of coordination and balance. He had to use a cane to walk. Claimant abandoned recreational activities and began to lead a very sedentary life. Claimant is five feet eleven inches tall. Two years after the accident, in early 1970, a consulting neurologist characterized claimant as "slightly obese." By the early 1980's, claimant weighed nearly 200 pounds and in a report dated April 29, 1982 was characterized by Dr. Pfaff as "quite obese." In light of the activity limitations imposed by the injury and the subsequent weight gain, the record supports the conclusion that claimant gained weight as an indirect consequence of his industrial injury.

Second, at the time he rendered his opinion, Dr. Pfaff had been treating claimant for more than four years. Dr. Pfaff began following claimant's condition in September 1980 and ultimately diagnosed diabetes milletus in late 1983. Dr. Pfaff has treated claimant for that condition ever since. Dr. Pfaff specializes in internal medicine, a branch of medicine which deals with metabolic disorders such as diabetes. Given his specialty and his status as claimant's treating physician, Dr. Pfaff is the best qualified of all of the doctors to render an opinion on the causal connection between claimant's weight gain and his diabetic condition. See Harris v. Farmers' Co-op Creamery, 53 Or App 618, 625 n.4, rev den 291 Or 893 (1981); Abbott v. SAIF, 45 Or App 657, 661 (1980). Dr. Bell, claimant's long-time treating neurologist, acknowledged as much when he was first asked by SAIF in October 1983 to give his opinion on the question of whether claimant's diabetes was related to the industrial injury. His reply was that Dr. Pfaff was treating claimant for that condition and that SAIF should seek an opinion from him. Dr. Pfaff's opinion should be given great weight.

Third, the opinion of Dr. Pfaff and those of the other treating and consulting physicians are not necessarily conflicting. Dr. Pfaff was the last to render an opinion on the causation question. He drew a causal connection between the industrial injury, weight gain and diabetes. None of the previous reports relied upon by the majority expressly rejects weight gain as a cause in fact of claimant's diabetic condition. The most reasonable way of reading these reports is not to say that they deny a causal connection between weight gain and the development of diabetes, but to say that they deny a direct causal connection between a blow to the head and the development of diabetes.

Support for this reading of these reports is found in the report of Dr. Seres, one of the members of the Northwest Pain Center's multidisciplinary panel. In one paragraph of his report he states: "Certainly [claimant's] diabetes . . . [is] not related to his head injury in any reasonably [sic] way." A couple

of paragraphs later, Dr. Seres states: "Certainly his diabetes can be well controlled with diet and some weight reduction." It appears from these statements that Dr. Seres recognized a causal connection between claimant's industrial injury, his excessive weight and his diabetes from a medical perspective, but did not think that this connection was "reasonable" from a legal perspective. Such legal judgments, of course, are ours to make. On the medical causation question, however, Dr. Seres does not contradict Dr. Pfaff.

This totally alters the balance of the medical record. Dr. Seres not only wrote his own report but also appears to have been the author of the multidisciplinary report. Dr. Bell's ultimate opinion relied heavily upon the multidisciplinary report. At least three of the four opinions relied upon by the majority, therefore, either implicitly support claimant's position or are of questionable validity.

In light of the above discussion, I would find claimant's diabetic condition causally related to his industrial injury and would affirm the order of the Referee.

LEE A. AUSTIN, Claimant
Robert E. Nelson, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 82-03002
April 17, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Austin v. Consolidated Freightways, 74 Or App 680, rev den, 300 Or 332 (1985). The court reversed our Order on Review and remanded the case for a determination of penalties and attorney fees.

Claimant requested a hearing after employer stopped paying temporary total disability benefits. While the matter was pending before the Hearings Division, a Determination Order fixed the period of claimant's temporary disability as December 16, 1981 through June 28, 1982. Employer paid no temporary total disability after March 19, 1982. The court found, in relevent part:

> "Employer . . . described the letter of March 19, 1982 as a 'suspension of benefits' and, before it was sent, it had not sought any information from claimant regarding his income; instead, it suspended benefits as a means of obtaining that information.
>
> ". . . The Workers' Compensation laws provide every employer with the right to request a hearing at any time, ORS 656.283(1); that is the employer's resource for obtaining information if the claimant refuses to provide it. Suspension of time loss benefits was not proper and was unreasonable in the absence of a determination order or evidence that claimant had returned to work for at least the same hours and wages."

74 Or App at 684. These findings and conclusions are binding upon us.

The employer argues that claimant's failure to cooperate with its attempt to determine the appropriate benefits for temporary partial disability by disclosing his income from self employment ought to mitigate any penalty and attorney fees assessed for unilateral suspension of benefits. The court, by remanding the penalty determination, has left the amount of the penalty to our discretion. Guided by the court's opinion, we conclude that more than a nominal penalty is required, but that the maximum penalty is not appropriate under the facts of this case. We find that a penalty of ten percent of the temporary total disability compensation due and unpaid from March 19, 1982 through June 28, 1982 is warranted.

Claimant's attorney is entitled to a reasonable attorney fee under the provisions of ORS 656.262(10) and 656.382(1). We recently held that the relative unreasonableness of an insurer's or employer's conduct is not a factor in awarding a reasonable attorney fee under ORS 656.382(1). Charlene K. Brotherton, 38 Van Natta 256 (March 27, 1986). The factors that are considered are: (1) time devoted to the case; (2) complexity of the issues involved; (3) value of the interest involved; (4) skill and standing of counsel; (5) the nature of the proceedings; and, (6) the result obtained for the injured worker. Muncy v. SAIF, 19 Or App 783, 787-88 (1974); OAR 438-47-010(2); Barbara A. Wheeler, 37 Van Natta 122, 123 (1985). Taking all of these factors into consideration, we conclude that a reasonable attorney fee for claimant's attorney in this case is $1,800.

ORDER

The employer shall pay to claimant a sum equal to 10 percent of the temporary total disability compensation due from March 19, 1982 through June 28, 1982 as a penalty. Claimant's attorney is awarded a reasonable attorney fee of $1,800, to be paid by the employer in addition to compensation and penalties.

ROBERT E. CUSHMAN, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Beers, Zimmerman & Rice, Defense Attorneys

WCB 84-07367 & 83-08455
April 17, 1986
Order on Reconsideration

EBI Companies (EBI) has requested reconsideration of our Order on Review dated March 25, 1986. In that order we affirmed the order of the Referee setting aside EBI's denial of claimant's aggravation claim and upholding the SAIF Corporation's denial of claimant's new injury claim. EBI has also submitted a "Supplement to Appellant's Brief," which it submits in lieu of a Reply to SAIF's Respondent's brief. EBI alleges that it did not receive a copy of SAIF's brief. We treat EBI's "supplement" as a list of points and authorities in support of its request for reconsideration. EBI's request for reconsideration is granted.

The apparent basis for the Referee's conclusion regarding responsibility was claimant's involvement in a "wage-subsidy" program at the time of his second work incident at SAIF's insured's. The Referee analogized claimant's wage-subsidy situation to that in which a claimant is injured on one job, enters vocational rehabilitation as a result of that injury, and is then injured a second time during the rehabilitation period. Under the rule of Wood v. SAIF, 30 Or App 1103 (1977), the second injury remains the responsibility of the first employer regardless

of the contribution of the second employment to claimant's disability. EBI asserts that the present case differs from the vocational rehabilitation fact pattern presented in Wood v. SAIF, supra.

We affirmed the Referee's order, but did not find it necessary to reach the wage-subsidy issue. Our review of the record persuaded us that claimant's second injury did not contribute to his disability. We therefore agreed that EBI, as the insurer on the risk at the time of claimant's original injury, should remain the responsible insurer. Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984). We remain of that opinion.

Now, therefore, having granted EBI's request for reconsideration, we adhere to and republish our Order on Review dated March 26, 1986.

IT IS SO ORDERED.

HOWARD E. HUGHES, Claimant
Olson Law Firm, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 84-12107
April 17, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of Referee Seifert's order that awarded penalties and attorney fees in connection with the employer's refusal to pay "interim compensation" awarded by Referee Podnar in an earlier order. The issues are penalties and attorney fees.

Claimant filed a stress-related occupational disease claim on April 16, 1982. Claimant was off work from that point until he became self-employed on November 29, 1982. The self-insured employer denied the claim on July 8, 1983, more than a year after it had been filed. The employer did not pay claimant compensation for any portion of the period from April 16, 1982 through July 8, 1983.

Claimant requested a hearing on the denial of his claim and a hearing was held before Referee Podnar. The issues addressed at the hearing included the compensability of claimant's claim and claimant's entitlement to interim compensation for the fifteen-month period between the filing of the claim and its denial. One of the employer's contentions at the hearing was that the Workers' Compensation Board was without jurisdiction to hear the case because claimant's claim had not been timely filed.

Following the hearing, Referee Podnar issued an Opinion and Order on October 23, 1984 finding the claim not compensable. He also found, however, that the claim was not barred as untimely and ordered the employer to pay interim compensation for the period from April 16, 1982 through July 8, 1983. Although claimant was working for more than seven months of this period, the award was proper under the law in effect at that time. See Bono v. SAIF, 66 Or App 138, 143 (1983). The employer requested Board review of Referee Podnar's decision on the timeliness issue and the award of interim compensation. Claimant cross-requested review on the compensability issue. Shortly thereafter, the Supreme Court reversed the Court of Appeals' Bono decision and

ruled that interim compensation is not payable during any period in which a claimant is working. 298 Or 405, 410 (1984).

Pending the outcome of Board review, the employer refused to pay the interim compensation ordered by Referee Podnar. Claimant requested a hearing in connection with this refusal and a hearing was held before Referee Seifert. In an Opinion and Order dated July 18, 1985 Referee Seifert concluded that the interim compensation awarded by Referee Podnar's order was "compensation" within the meaning of ORS 656.313(4) and that pursuant to ORS 656.313(1) the payment of such compensation could not be stayed pending the employer's appeal. Referee Seifert awarded claimant penalties based upon the interim compensation awarded by Referee Podnar for the entire period from April 16, 1982 through July 8, 1983 and an attorney fee of $800.

On July 30, 1985 the Board issued its Order on Review of Referee Podnar's Opinion and Order. Howard E. Hughes, 37 Van Natta 998 (1985). The Board affirmed on the timeliness and compensability issues, but modified the award of interim compensation in light of the Supreme Court's Bono decision to reflect the fact that claimant had returned to work on November 29, 1982. Claimant was awarded interim compensation for the period from April 16, 1982 through November 28, 1982. The remainder of the interim compensation ordered by Referee Podnar from November 29, 1982 through the date of the employer's denial on July 8, 1983 was disallowed. The Board's order presently is on appeal to the Court of Appeals.

In Terry L. Hunter, 38 Van Natta 134 (1986), the Board held that interim compensation awarded under the Court of Appeals' Bono decision for a period during which the claimant was employed full time at his regular salary was not "compensation" within the meaning of ORS 656.313(4) and that payment of such compensation could be stayed pending an appeal by the insurer. In light of Hunter, we conclude in the present case that the Referee erred in awarding penalties based upon the entire period between April 16, 1982 (the date claimant filed his claim) and July 8, 1983 (the date of the employer's denial). The interim compensation awarded for the period after claimant returned to work on November 29, 1982 was not "compensation" within the meaning of ORS 656.313(4) and payment of that portion of the award could properly be withheld by the employer pending its appeal. Having reaffirmed Hunter on that question, we are left with a question not decided in Hunter. That question is whether the employer properly withheld payment of the interim compensation awarded for the period during which claimant was not working. To answer this question, we must reexamine the definition of "compensation" in ORS 656.313(4).

ORS 656.313(4) defines "compensation" for purposes of that section as "benefits payable pursuant to the provisions of ORS 656.204 to 656.208, 656.210 and 656.214 and does not include medical benefits." The employer, relying on selected statements from the Supreme Court's decisions in Bono and Jones v. Emanuel Hospital, 280 Or 147 (1977), argues that interim compensation is payable "pursuant to" the provisions of ORS 656.262. Because ORS 656.262 is not enumerated in ORS 656.313(4), the employer concludes that interim compensation is not "compensation" within the meaning of ORS 656.313 and thus that payment of interim

compensation may be stayed pending an appeal by the employer. Claimant, also relying on Bono and Jones, contends that ORS 656.262 concerns only the procedure for obtaining compensation and that the interim compensation in the present case was payable as temporary total disability "pursuant to" the provisions of ORS 656.210. ORS 656.210 is one of the sections enumerated in ORS 656.313(4) and thus, according to claimant, the interim compensation ordered by Referee Podnar should have been paid pending the employer's appeal.

After reviewing the language of ORS 656.210 and 656.262 in light of Bono and Jones, we conclude that the interim compensation awarded by Referee Podnar for the period during which claimant was off work was payable "pursuant to" ORS 656.210. It is clear from Bono that when a claimant is temporarily totally disabled as a result of a claimed injury or occupational disease, ORS 656.210 substantively defines the claimant's right to receive what the court for convenience has called interim compensation. Unless the "leaves work" requirement and all of the other requirements of ORS 656.210 are satisfied, a claimant is not entitled to such compensation. ORS 656.262 and Jones, by contrast, define the time periods during which such compensation is due. We conclude that the interim compensation awarded by Referee Podnar for the period from April 16 through November 28, 1982 was payable "pursuant to" the provisions of ORS 656.210 and thus is "compensation" within the meaning of ORS 656.313(4). Payment of such compensation may not be stayed pending an appeal by an employer. ORS 656.313(1).

The employer raises one further argument based upon the rule of Bell v. Hartman, 289 Or 447 (1980). We do not find it necessary to discuss this argument in detail because Bell is clearly distinguishable from the present case. In Bell the Referee, the Board, the Court of Appeals and the Supreme Court all ruled that the claimant's claim was void from the outset because he was not a "worker" within the meaning of ORS chapter 656. See 289 Or at 449, 453. In the present case, the Referee found that claimant's claim, although noncompensable, was not barred as untimely and thus was not void. The Referee ordered the payment of interim compensation based upon this finding. The Referee's finding in the present case gave rise to an obligation which never existed in Bell. That case, therefore, does not aid the employer.

ORDER

The Referee's order dated July 18, 1985 is reversed in part. That portion of the order that awarded penalties based upon the period from November 29, 1983 through July 8, 1983 is reversed. That portion of the order that awarded penalties based upon the period from April 16 through November 28, 1982 is affirmed. The Referee's award of attorney fees is affirmed.

PHILIP J. BARRETT, Claimant
Haugh & Foote, Claimant's Attorneys
Marshall C. Cheney, Defense Attorney

WCB 85-00027
April 18, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Peterson's order that set aside its denial of aggravation of claimant's low back injury. The issue on review is aggravation.

Claimant injured his back on March 9, 1979. Except for a few days later that year claimant has not worked since. No surgery has been performed on claimant related to his industrial injury. The claim was first closed by Determination Order on February 17, 1981 with an award of 32 degrees for 10 percent unscheduled permanent partial disability. A hearing was held on September 22, 1981 on claimant's request for an increased award for unscheduled permanent partial disability. The procedural progress of the litigation and a summary of the prior evidence was published in the Board's order on remand from the Supreme Court at 35 Van Natta 789 (1983). The Board awarded 224 degrees for 70 percent unscheduled permanent partial disability based on the evidence as it had been developed at the hearing in September 1981. The Board's order was affirmed without opinion by the Court of Appeals and the Supreme Court denied review. 297 Or 458 (1984).

The last arrangement of compensation by operation of law was the date of the last hearing at which new evidence was received on the issue of the extent of claimant's unscheduled permanent partial disability: September 22, 1981. Suzanne E. Williams, 36 Van Natta 1310 (1984); Joseph R. Klinsky, 35 Van Natta 332, aff'd mem., 66 Or App 193 (1983). Therefore, to determine if claimant's work-related condition has worsened so that his claim might be reopened we compare his condition before the 1981 hearing with his condition since then.

In the nine months before the 1981 hearing claimant was examined by his treating doctor, Dr. Winkler, who is a family practioner, and by Dr. Berkeley. Dr. Berkeley has been a consulting neurosurgeon on claimant's condition for Dr. Winkler since November 1979. Dr. Raaf examined claimant twice in December 1980. In March 1981 Dr. Winkler opined that claimant was permanently and totally disabled as a result of the industrial injury. At Dr. Berkeley's last examination before the hearing in July 1981 the doctor reported that claimant's condition was unchanged from the April 1981 examination and Dr. Raaf's examinations in December 1980. The report is strikingly similar to the report of Dr. Berkeley's first examination of November 2, 1979. Dr. Berkeley and Dr. Raaf found no evidence of neurological impairment and extremely good musculature development. Computerized tomography and myelography revealed no defect in claimant's back. In June 1980 Dr. Winkler had reported straight leg raising tests positive bilaterally at 50 degrees.

In December 1979 a panel at Orthopaedic Consultants had examined claimant and reported that he had minimal impairment of his back but moderate interference by claimant with the examination made it difficult to ascertain the extent of impairment. The panel recommended a psychiatric evaluation.

Claimant continued to seek medical attention for his condition. In 1982 Dr. Winkler reported symptomatic worsening but Dr. Berkeley reported claimant was unchanged. Another CT scan proved negative for signs of disease.

On August 9, 1984 Dr. Buza examined claimant and reported that the examination was about the same as the earlier reports from Drs. Raaf and Berkeley and recommended an electromyogram (EMG) and bone scan. He noted claimant had good strength in his arms. The bone scan and EMG showed no evidence of disease and Dr. Buza's final report concluded that there was no change in claimant's condition when it was compared with the reported findings of Drs. Raaf and Berkeley.

In December 1984 Dr. Winkler reported that claimant was having trouble with impotence and bladder control, and that his back and leg complaints concerned the same symptoms but now the complaints were more intense, more severe, and more often. The doctor concluded that claimant was more disabled than he was a year prior. Dr. Winkler also reported that claimant continued to be well developed, well nourished, and well muscled with no evidence of atrophy. In February 1985 Dr. Winkler opined that claimant's treatment was palliative only and that claimant was as muscular in 1985 as he had been at the time of the first examination in 1979.

At his deposition Dr. Winkler testified that claimant's condition worsened after the examination by Dr. Buza and that claimant's testicular problem and related genitourinary problems began in November 1984. He had no explanation why claimant remains unusually muscular. He did not explain why or how claimant's genitourinary problems might be related to the industrial injury.

At his deposition Dr. Berkeley testified that claimant's examination in August 1982 and April 1981 were the same as the initial examination in 1979 but that an examination just before the deposition had revealed a positive straight leg raising test at 40 to 45 degrees. Dr. Berkeley said that he did not test claimant to the level where claimant was in pain but allowed him to stop the straight leg raising test when he said it would cause pain if it went any further. At the most recent examination claimant complained of genitourinary problems but the neurological examination continued to be otherwise normal and claimant's body continued to be strong. Dr. Berkeley had ordered more tests but expected to find no evidence of disease. After the deposition a myelogram and CT scan proved negative for evidence of disease. By report letter Dr. Berkeley felt claimant's condition had slightly worsened in relation to 1982 based on a decreased lumbar range of motion. Dr. Berkeley did not explain why or how claimant's genitourinary problems might be related to the industrial injury.

Claimant testified that his bladder problems had started in 1983 and that he had had testicular pain which interfered with normal functions ever since the accident at least. He said he has constant pain in his low back and sometimes it feels like there are hot rods going up inside his back. His weight has remained approximately the same since before the accident. The Referee found there was no reason to doubt claimant's testimony based on his demeanor at the hearing.

Claimant has not been examined by a mental health professional notwithstanding the recommendation by the Orthopaedic Consultants in 1979. There has never been objective evidence of any pathology involving claimant's low back. Between the time of the injury and the first hearing on the extent of claimant's permanent disability positive straight leg raising tests had been reported to vary between 50 degrees and 90 degrees. Current tests reveal very nearly the same range of variability. Deep tendon reflexes remain within normal limits. Claimant was awarded compensation for 70 percent unscheduled permanent partial disability and continues to be severely disabled but there is no evidence that persuades the Board that claimant is either more severely disabled than he was at the time of the last arrangement

of compensation or that his compensable condition has worsened since the last arrangement of compensation. McElmurray v. Roseburg School District, 77 Or App 673 (1986).

Dr. Berkeley's conclusion is not supported by the results of the tests reported by himself and by other examiners. Dr. Winkler has consistently reported since 1981 that claimant is totally unable to perform any activities of any kind due to pain but has no explanation why claimant remains muscular and well developed.

Claimant's credible testimony is relatively unchanged since the September 1981 hearing regarding the symptoms and limitations he suffers and it conflicts with the testimony of Dr. Winkler on some of the supporting facts for the doctor's opinion of worsening. There is the additional fact that Dr. Winkler was suspended from the practice of medicine for a period in 1979 due to a finding that he had falsified medical records which causes us to place less confidence in Dr. Winkler's reports and testimony.

No doctor relates claimant's genitourinary complaints to claimant's low back injury or the original accident in any way. The record only reflects claimant's statements that the genitourinary problems began and that claimant relates the symptoms to the back injury. No cause for the genitourinary complaints was identified in the record.

Considering the record as a whole and comparing claimant's condition before and after the last arrangement of compensation we find that claimant has not carried his burden of proof that his work-related low back and functional overlay condition worsened since the last arrangement of compensation. Therefore, the Referee's order is reversed and the insurer's denial is reinstated.

ORDER

The Referee's order dated July 31, 1985 is reversed. The insurer's denial dated December 20, 1984 is reinstated.

PATRICIA A. MARTIN, Claimant
Steenson, et al., Claimant's Attorneys
Liberty Northwest, Defense Attorney

WCB 84-12094
May 6, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Galton's order that set aside the denial of claimant's claim for left neck myofascial trigger point. The issue is compensability. The insurer also contends that the Referee erred in several respects in his evidentiary findings and rulings.

Claimant was age 25 at the time the hearing began, and had lived in Oregon for about three years. Prior to moving to Oregon, claimant had been the victim of a kidnapping and attempted sexual assault in California. The record does not establish precisely when this incident occurred and there is no documentary evidence concerning any medical treatment or counseling claimant may have had in California, but all inferences available are that the incident had a profound emotional and psychological effect.

In February 1983 claimant was arrested for shoplifting at a grocery store in Portland, Oregon. In the course of her detention, she alleges she was subject to a "pat down" search by a male security officer. On April 8, 1983 claimant began treating with Dr. Landsdowne, a psychologist. Dr. Landsdowne's clinical diagnosis was "[p]ost-traumatic stress disorder, chronic, secondary to assaults." The doctor reported that claimant's physical complaints included "neckaches, headaches, stomach problems, dysequilibrium and numerous other physical complaints." She estimated that claimant would need "years of therapy [in] order to regain any kind of lively and vital existence." In June 1984 claimant filed a civil action against the grocery store chain and its employes, seeking damages for "indignity, humiliation, disgrace, injury to her reputation, extreme depression, paranoia, distrust of others, interrupted sleep, inability to leave her house unless she was in the company of her husband, anxiety, tension, and other symptoms such as neckaches, headaches, stomach problems, and dysequilibrium . . . ."

On July 19, 1984 claimant began working for the employer in this case, a cannery. Prior to beginning work, claimant was subjected to a physical assessment performed by an occupational health nurse. The physical assessment, which consisted of range of motion testing, was normal. On August 15, 1984 claimant began working packaging two-pound packages of beans. The evidence most favorable to claimant is that she worked approximately four hours standing under a conveyor belt that dripped a constant stream of cold water onto her left side. The insurer has admitted that claimant worked with water dripping on her, however, the insurer's evidence is that the exposure was for one and one-half hours, rather than four.

Claimant testified that the next day she had symptoms of a "cold," but did not seek any medical attention. About two weeks later, claimant began experiencing sharp pains and soreness in her neck and shoulders. However, she did not seek medical attention until September 19, 1984. Claimant was seen by Dr. Lord, who diagnosed "trapezius strain," prescribed anti-inflamatory medication and released claimant for regular work. Claimant completed form 801 on September 19, 1984. On October 5, 1984 claimant saw Dr. Sanford, who diagnosed "[c]ervical myofascial trigger point," which he injected with xylocaine. Dr. Sanford authorized time loss through October 9, 1984. Claimant returned to work October 10, 1984. She saw Dr. Sanford again on October 11, 1984. He directed that claimant not use her left arm for ten days. Claimant continued to work until October 18, 1984, when she was terminated in a seasonal layoff.

On October 23, 1984 claimant was examined by Dr. Lawson, an orthopedic surgeon, on referal from Dr. Sanford. Dr. Lawson concluded that claimant's neurological examination was normal and diagnosed "an acute cervical/dorsal muscle strain/spasm." His prognosis was for rapid resolution with physical therapy.

On October 26, 1984 the insurer issued a formal denial. The insurer did not know of claimant's past psychological difficulties when it issued the denial. Up until the time of the first hearing session on February 20, 1985, the insurer treated this case as one involving purely the credibility of the claimant relative to the type and length of exposure to dripping water.

After disclosure of claimant's previous psychological condition with reported symptoms similar to those claimed as a result of claimant's alleged industrial injury, the insurer urged that the case was one involving a complex medical question of causation.

We first address the issues raised by the insurer relating to the Referee's findings and rulings regarding the evidence. There were three separate hearing sessions in this case. Prior to the first session on February 20, 1985 the insurer was unaware that claimant had received extensive treatment from Dr. Landsdowne between approximately April to July of 1983, although evidence of the treatment was in claimant's attorney's possession. The matter arose through questioning regarding the civil action. Full disclosure of evidence at that point became an issue. See OAR 438-07-015. The hearing was continued.

At the second hearing session on May 30, 1985 counsel advocated their respective positions on discovery. The Referee ruled generally against the insurer. By the time of the motion hearing the insurer had obtained a copy of a January 11, 1984 narrative report authored by Dr. Landsdowne and had issued a subpoena duces tecum for her entire file. The Referee quashed that portion of the subpoena allowing delivery to the process server of a certified copy of Dr. Landsdowne's complete file, but let stand that portion that compelled production of the file at the hearing. The hearing was set for June 4, 1985.

The insurer then had Dr. Turco, a psychiatrist also board certified in neurology, review the available medical record, which included Dr. Landsdowne's narrative report. Dr. Turco authored an opinion letter dated June 2, 1985. Claimant's counsel conceded on the record that Dr. Turco's report was received by the insurer less than ten days before the hearing and that it was promptly furnished to claimant. Dr. Turco was not available to be cross-examined at the hearing; however, the insurer demonstrated that substantial effort had been made to secure the presence of Dr. Turco, to no avail. The insurer offered to make Dr. Turco available for deposition at the earliest possible time at its expense. There is no evidence that claimant requested Dr. Turco's deposition.

In Merle Barry, 37 Van Natta 1492 (1985), we held that when a proferred piece of documentary evidence satisfies the technical requirements for submission of supplemental exhibits set forth in the last paragraph of OAR 438-07-005(3)(b), the Referee does not have discretion to exclude the exhibit and no showing of good cause for delay is required. In this case, Dr. Turco's report satisified the technical requirements of the rule and should have been admitted. We also hold, however, that even if Dr. Turco's report had not satisfied the technical requirements of the rule, exclusion of the report under the facts of this case would have been a denial of substantial justice. See ORS 656.283(7); OAR 438-07-005(4). The report is included in the record compiled by the Referee and we have considered it. See Robert A. Leppla, 37 Van Natta 1698 (1985).

The Referee made detailed findings of his assessment of the credibility of the witnesses. When a Referee's credibility findings are based upon his or her observation of a witness's demeanor at hearing, we will ordinarily defer to them. See Humphrey v. SAIF, 58 Or App 360 (1982). However, when credibility and, more importantly, reliability of a witness is based upon the

substance of the witness' testimony, a reviewing body is just as capable of evaluating the witness as is the Referee. See Davies v. Hanel Lbr. Co., 67 Or App 35, 38 (1984); Andrew Simer, 37 Van Natta 118 (1985).

The Referee made the following findings:

> "Based upon my extremely close and careful observations of the attitude, appearance and demeanor of the witnesses at the hearings and during their testimony on February 20 and June 4, 1985, I find that claimant was an entirely credible, reliable, candid, direct and non-exaggerating witness. So, too, was her husband . . . . On the other hand, however, [claimant's supervisor] was only a basically credible and essentially reliable witness. [Claimant's coworker] was unreliable in material part. Finally, [employer's occupational health nurse] was neither credible nor reliable in significant part."

These findings are of almost no assistance to us, for three reasons. First, they are largely irrelevant. In this industrial injury case, claimant has the burden of proving that her exposure to dripping water contributed in a material way to her inability to work and/or need for medical services. See von Kohlbeck v. SAIF, 68 Or App 272 (1984). Based upon the entire record, we find that resolution of this question is a complex matter involving medical causation requiring expert medical evidence for resolution. See Uris v. Compensation Department, 247 Or 420 (1967); Liz A. Destael, 37 Van Natta 506 (1985). Whether or not the Referee believes the lay witnesses is not in any material way dispositive. Second, on the substance of the lay testimony we find the Referee's findings inconsistent. We do not know what the Referee meant when he opined that claimant's supervisor was "only basically credible and essentially reliable . . ." (emphasis added); however, we find no appreciable difference between the substance of the supervisor's testimony and that of the coworker, whom the Referee found "unreliable in material part." Considering the testimony, either both were reliable or neither were reliable. We find that the testimony of both witnesses was consistent. However, whether the testimony was "reliable" is of little or no import. Finally, claimant was impeached at least once. Claimant testified directly that she had never been employed outside of Oregon. Claimant later admitted to having worked as a "car jockey" for a California automobile dealer. The record also indicates that claimant complained to Dr. Landsdowne of being lonely in Oregon without her family. Yet, the record establishes that claimant's brother was with her when she was arrested for shoplifting and her disabled mother accompanied her to at least one medical appointment. The reliability of the substance of claimant's testimony, we conclude, bears scrutiny.

The Referee concluded that portions of Dr. Landsdowne's file that were not offered into evidence would have been adverse to the insurer's case. Based upon the entire record, we find the Referee's conclusion erroneous. It is clear to us from numerous statements made by claimant's counsel that claimant undertook heroic efforts to suppress Dr. Landsdowne's records, with much

success. The file was finally produced at the last hearing session, when Dr. Rosenbaum was permitted to examine it while he was on the witness stand. The record establishes that the insurer's counsel agreed that he would offer into evidence only those items deemed relevant by Dr. Rosenbaum. The only items in the record from Dr. Landsdowne's file are a January 11, 1984 narrative report and a censored computer analysis of a Minnesota Multiphasic Personality Inventory (MMPI), both of which, even in "sanitized" form, establish by a clear preponderance of the evidence that claimant suffered, prior to her employment with this employer, from a profound, chronic psychological disturbance.

The MMPI report was withheld by the Referee at the request of claimant's attorney. There are powerful inferences throughout the record of the last two hearing sessions that claimant's concern in suppressing Dr. Landsdowne's file was that it was thought to be detrimental to claimant's position as a plaintiff in the civil action against the grocery chain. Such a concern has no place in this forum where the result is exclusion or suppression of highly relevant evidence. Contrary to the Referee, we conclude that the unadmitted portions of Dr. Landsdowne's files would have been adverse to claimant.

On the merits of the case, the preponderance of the medical evidence establishes that claimant suffers from cervical myofascial trigger point. Drs. Sanford and Lawson, claimant's treating physicians, both have opined that claimant's myofascial trigger point was caused by a combination of her exposure to water on August 15, 1984 and her upper extremity reaching activities while working on the bean line. Both physicians based their initial opinions on an incomplete medical history. On October 31, 1984 Dr. Sanford wrote, "I have no reason to believe that there was any pre-existing underlying causes for [claimant's] neck problems and headaches." On February 11, 1985 Dr. Lawson wrote, "There was no history of other additional injury or condition of which I was aware." On May 17, 1985 Dr. Sanford was furnished a copy of Dr. Landsdowne's report and checked the "yes" response to the following question phrased by claimant's attorney:

> "Given the patient history that you have available, including Dr. Landsdowne's report, and assuming that [claimant] testified her stress-related physical symptoms improved or resolved within a few months of her treatment with Dr. Landsdowne, is it your opinion that the work-related injury, rather than the previous stress-related neck pain, is the major factor contributing to the condition for which you treated [claimant]?"

Claimant did testify that her physical symptoms subsided after several sessions with Dr. Landsdowne. Dr. Landsdowne wrote just prior to the last hearing session that claimant did not report physical symptoms after the initial visit. She, therefore, assumed that once treatment began physical symptoms were not a relevant problem.

Dr. Edward Rosenbaum, rheumatologist, authored an opinion and testified for the insurer. He wrote:

"It is my understanding from reviewing the file, this patient complains of neck pain. Her primary treating physician, Dr. Clinton C. Sanford, has made a diagnosis of neck pain, specifically myofascial trigger point. He attributes this to the patient's being exposed to cold dripping water and her arm motion while exposed to the cold dripping water.

"Myofascial trigger point is a diagnosis that means the patient's muscles or underlying connective tissue, called fascia, are tender to palpation. It is a diagnosis based entirely on what the patient states. It is not a diagnosis substantiated by objective evidence. That is, in these cases, all laboratory tests are normal, all x-rays are normal and if a biopsy was performed on the tender trigger point the pathologist after careful examination under the microscope would report this as a normal tissue examination.

"Therefore, if we do indeed accept such a diagnosis, it is certainly a disease of unknown cause. If we cannot demonstrate the pathology, it becomes useless to speculate on the etiology.

"As for the theory exposure to dripping cold water can cause these symptoms, my only comment is: if this is true, then myofascial trigger points should be the most common disease in Western Oregon and Western Washington."

Dr. Rosenbaum went on to note that both Drs. Sanford's and Lawson's histories omitted reference to claimant's previously documented, stress-related neck pain, which, Dr. Rosenbaum pointed out, Dr. Landsdowne had opined would be significant for many years in the future. Finally, Dr. Rosenbaum noted that Dr. Sanford had been treating claimant with Doxepin. He stated, "Doxepin is a psychotheraputic drug which is used to treat anxiety and sleep disturbances. Sleep disturbances are a common cause of muscoloskelatal pain." Dr. Rosenbaum concluded that, in his opinion, claimant did not have a work-related illness. Dr. Rosenbaum's testimony was consistent with his written opinion. He added that, in his opinion, claimant's reported two week interval between the industrial exposure and the onset of symptoms was not consistent with myofascial trigger point caused by the reported exposure to dripping water, regardless whether the exposure was for four hours or one and one-half hours.

Dr. Turco's opinion, rendered after a review of the record, including Dr. Landsdowne's narrative report, concludes:

"The probability of this claimant's headaches and neckaches being related to her incident at [employer] is minimal in comparison with the two prior incidents

> regarding which we have substantial information. Both the physical and psychological effects of such prior assaults are substantial, in and of themselves, to produce the effect that the patient is currently complaining of."

As noted above, the Referee refused to consider Dr. Turco's opinion, on timeliness grounds. He also rejected Dr. Rosenbaum's opinion and testimony, as follows:

> "In this case, I find [Dr. Rosenbaum's] quite dogmatically-stated 'eleventh-hour' opinions unpersuasive for a multitude of reasons I need not exhaustively delineate. Suffice it to say that I find the other physicians' reports not to have been based on any or a materially inaccurate history. I further find that Dr. Rosenbaum's very last minute records' review without having examined or treated claimant (how better to make an objective, truly independent evaluation of claimant's attitude, emotions and reactions to life stresses?) insufficient to overcome the credible and reliable testimony of claimant and [her husband] coupled with the medical opinions of claimant's treating physicians."

Referees' credibility findings are important to this Board and to the courts, which review important cases on the basis of a cold record. In this case, the Referee gave the greater weight to claimant's and her husband's largely irrelevant testimony solely on the basis of his credibility findings. We do not doubt that the Referee believed claimant's and her husband's testimony. To have said so would have been not only sufficient, but more helpful.

Coupled with the claimant's and her husband's testimony, the Referee found that the opinions of her treating physicians outweighed Dr. Rosenbaum's expert opinion. We disagree with the Referee's finding that Drs. Sanford's and Lawson's opinions were not based upon incomplete histories. They were. Dr. Sanford is a family practice physician. Dr. Lawson is an orthopedic surgeon. Claimant furnished the general practitioner with a copy of Dr. Landsdowne's expert opinion on the psychological aspect of claimant's condition along with a "check-the-box" response. Dr. Sanford checked the right box (from claimant's point of view) but supported his opinion with no reasoning. Dr. Lawson, the orthopedic expert who also treated claimant, was never asked for an opinion based upon a correct history.

Drs. Turco and, to a greater extent, Rosenbaum, gave detailed reasons for their conclusions. That the conclusions were "eleventh-hour" is a fact that resulted directly from claimant's almost totally successful suppression of probative, relevant evidence. We note that Dr. Sanford's "opinion" based on a correct history was equally "eleventh hour." The timing of the reports from Drs. Turco and Rosenbaum does not, under the facts of this case, impeach their reasoning or persuasiveness. More

significantly, Dr. Landsdowne's well-reasoned narrative report, which the Referee scarcely mentions in connection with the issue of causation, supports the opinions of Drs. Turco and Rosenbaum. Based upon our de novo review of the relevant evidence, we hold that claimant failed to establish by a preponderance of the evidence that her on-the-job incident on August 15, 1984 contributed in a material way to her cervical myofascial trigger point. The denial will be reinstated.

The Referee also awarded temporary total disability compensation as "interim" compensation for the periods October 5 through 9 and 18 through 26, 1984. The record does establish that claimant was not working during those periods, more likely than not due to her neck condition. Since those periods of "time loss" are more than 14 days after claimant made her claim, "interim" compensation was appropriate. ORS 656.262(4); Bono v. SAIF, 298 Or 405 (1984). The Referee also assessed a penalty and attorney fee for unexplained failure to pay the "interim" compensation. ORS 656.262(10); 656.382(1). The insurer has attacked neither finding on Board review. That portion of the Referee's order shall be affirmed. Because the issues of "interim" compensation, penalty and attorney fees were not argued by the insurer on Board review, claimant's attorney is entitled to no attorney fee at this level.

ORDER

Those portions of the Referee's orders dated June 7, 1985 as amended June 21, 1985 that set aside the insurer's denial of claimant's neck claim, ordered payment of temporary total disability from October 26, 1984 through January 10, 1985 and awarded claimant's attorneys an insurer-paid attorney fee of $2,750 are reversed. The insurer's formal denial of October 26, 1984 is reinstated and approved. Those portions of the Referee's order that awarded "interim" compensation from October 5 through 9 and 18 through 26, 1984, together with a 25 percent penalty and $300 attorney fee are affirmed.

SERJIA MENCHACA, Claimant
Bottini, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-13038
April 18, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of that portion of Referee Seifert's order that disallowed an award by Determination Order of 64 degrees for 20 percent unscheduled permanent partial disability for injury to claimant's back and pelvis. The issues are whether claimant, as an undocumented alien, is eligible to receive an award of unscheduled permanent partial disability and, if so, the extent of claimant's disability.

Claimant, an undocumented alien, seriously injured his right knee and sustained fractures of the right foot, pelvis and the transverse processes of L3 and L4 in a work-related traffic accident on July 7, 1981. Claimant's claim was closed by Determination Order dated December 4, 1984. The order included an

award for unscheduled permanent partial disability of 20 percent (64 degrees). Claimant requested a hearing on this Determination Order and a hearing was held on May 29, 1985.

The Referee's Opinion and Order eliminated claimant's award of unscheduled permanent partial disability on the ground that claimant, as an undocumented alien, had no earning capacity within the meaning of ORS 656.214(5). That subsection defines earning capacity as "the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience." The Referee concluded that claimant had no lawful ability to obtain and hold gainful employment in the broad field of general occupations and thus concluded that he had no earning capacity upon which an unscheduled award could be based.

We reverse this portion of the Referee's order. A "worker" within the meaning of ORS chapter 656 is defined by ORS 656.005(27) as "any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for remuneration, subject to the direction and control of an employer." No other section of ORS chapter 656 excludes undocumented aliens from the scope of this definition. The term "worker" is used to identify those entitled to compensation for unscheduled permanent partial disability under ORS 656.214(5). Despite his status as an undocumented alien, therefore, claimant presumptively is entitled to an unscheduled award.

As for claimant's "ability to obtain and hold gainful employment in the broad field of general occupations," we conclude that this phrase has reference to claimant's physical abilities and social and vocational factors other than his status as an undocumented alien. Claimant's unscheduled award, therefore, must be assessed under the assumption that claimant is lawfully employable. See 1A A. Larson, The Law of Workmen's Compensation, §35.20 at 6-124 (1985).

On our de novo review of the record, considering claimant's impairment together with the pertinent social and vocational factors, see ORS 656.214 (5); OAR 436-30-380 et seq., we find that claimant was adequately compensated for his permanent loss of earning capacity due to the compensable injury by the Determination Order award of 64 degrees for 20 percent unscheduled permanent partial disability. We, therefore, reinstate and affirm that award.

ORDER

The Referee's order dated June 20, 1985 is reversed in part and that portion of the Determination Order dated December 4, 1984 that awarded claimant 20 percent (64 degrees) unscheduled permanent partial disability is reinstated and affirmed. For services on Board review, claimant's attorney is awarded 25 percent of the increased compensation awarded by this order, not to exceed $500.

RODNEY R. ROUSE, Claimant
Francesconi & Cash, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-05667
April 18, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Pferdner's order that upheld the SAIF Corporation's denial of claimant's low back injury. Claimant also requests review of the Referee's rulings at hearing that: (1) allowed testimony of claimant's unemployment compensation misreprentation, and (2) denied admission of a prior inconsistent statement by the employer in a letter to the employer's insurer's attorney in preparation for litigation. The issues on review are admissibility of evidence and compensability.

Referees have great discretion to allow and deny admission of evidence at hearing. ORS 656.283(7). If an exhibit or testimony has some probative value, the Referee may admit it. See Lucke v. Compensation Dept., 254 Or 439 (1969). The testimony regarding the unemployment matter was relevant to the issue whether claimant was a reliable witness. The evidence submitted under an offer of proof did not establish that the requested letter was something other than a privileged communication between an insured and his legal representative in preparation for litigation. The Board finds that the Referee did not abuse his discretion by allowing the testimony regarding claimant's misrepresentation of employment in an unemployment compensation matter and denial of admission of a letter written by an insured to his insurer's attorney as preparation for litigation. Therefore, the Referee's rulings will stand.

The Board affirms the order of the Referee.

ORDER

The Referee's order dated June 19, 1985 is affirmed.

CHARLES F. WORKMAN, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 86-0046M
April 18, 1986
Own Motion Determination

The insurer voluntarily reopened claimant's claim for a worsened condition related to his industrial injury of August 2, 1974.

The claim has now been submitted for closure. Liberty Northwest has requested that the Board order SAIF Corporation to reimburse it for all claim costs paid by Liberty prior to its denial. The Board does not have jurisdiction to order such a reimbursement. See Reynolds-Croft v. Bill Morrison Co., 55 Or App 487, 491 (1982).

SAIF has asked the Board to consider any possible entitlement to further permanent partial disability compensation. We hereby award claimant compensation equal to 16 degrees for 5 percent unscheduled disability for injury to his low back. This award is in addition to any prior awards claimant has received for the 1974 injury.

IT IS SO ORDERED.

WALTER J. REZNICSEK, Claimant
Flaxel, Todd & Nylander, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 84-13107
April 21, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of those portions of Referee Baker's order which upheld the self-insured employer's denial of aggravation of claimant's neck injury and which denied claimant's request for interim compensation benefits from March 26, 1984 through May 14, 1984. Claimant also requests penalties and attorney fees for unreasonable denial and unreasonable delay of payment of claimed interim compensation. The issues on review are aggravation, interim compensation, and penalties and attorney fees.

The Board affirms the Referee's order with the following comment. The last arrangement or award of compensation was the date of the hearing which led to the last award of compensation: July 10, 1980. The subsequent Determination Order and hearing awarded no additional compensation, therefore, none of them was the last arrangement or award of compensation. Noble A. Price, 36 Van Natta 1105 (1984); Joseph R. Klinsky, 35 Van Natta 332, aff'd mem., 66 Or App 193 (1983). The Referee's order resulting from the July 1980 hearing is in the record and provides the basis for comparison of claimant's condition at the present.

ORDER

The Referee's order dated August 12, 1985 is affirmed.

ROSE D. TUTTLE, Claimant
Roll, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-09216
April 21, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee St. Martin's order that set aside its denial of claimant's occupational disease claim for mental stress and awarded a 5 percent penalty on unpaid "interim" compensation. The issues are compensability and penalties.

The Board affirms the order of the Referee with the following comment. The record establishes that claimant did not work at least part of the time between the date the claim was made, July 24, 1984, and the date SAIF issued its denial, October 5, 1984. Even if the claim was ultimately noncompensable, claimant would be entitled to "interim" compensation during the time she was not working. ORS 656.262(4); Bono v. SAIF, 298 Or 405 (1984). Because the claim is compensable, claimant is entitled to temporary disability compensation for all lost time due to the compensable condition. In addition, the claim was denied more than 60 days after it was made. See ORS 656.262(6). We agree with the Referee that SAIF's claim processing in this case warrants the 5 percent penalty and $150 attorney fee assessed by the Referee.

ORDER

The Referee's order dated June 10, 1985 as modified and republished July 10, 1985 is affirmed. Claimant's attorney is awarded $700 for services on Board review, to be paid by the SAIF Corporation in addition to compensation.

RICHARD O. BIRKMAIER, Claimant
Vick & Associates, Claimant's Attorneys
Spears, et al., Defense Attorneys

WCB 84-12011
April 22, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Michael Johnson's order which: (1) awarded 32 degrees for 10 percent unscheduled permanent partial disability for injury to claimant's right shoulder in addition to the Determination Order dated October 9, 1984 which awarded only temporary disability compensation; (2) ordered the self-insured employer to pay for three chiropractic adjustments per month from July 13, 1984 through September 13, 1984; and (3) ordered the employer to pay for two chiropractic adjustments per month after September 19, 1984. The self-insured employer cross-requests review of the award for unscheduled permanent partial disability, the order to pay for any chiropractic adjustments after July 13, 1984, and cites as error the consideration of a report from the treating chiropractor dated the day before the hearing. The issues on review are reasonableness and necessity of chiropractic care, extent of unscheduled permanent partial disability, and admission of documents.

On the issue of the admission of the treating chiropractor's report, claimant submitted it within seven days of receipt and satisfied the technical requirement of the hearings rules. The Referee offered the employer the opportunity to cross-examine the doctor by holding the hearing open or by deposition but the employer declined. We find that the Referee's ruling was correct. OAR 438-07-005(3)(b); Susan F. Vernon, 37 Van Natta 1562 (1985); Merle Barry, 37 Van Natta 1492 (1985).

Claimant was working as a truck driver taking piggyback trailers off rail cars when he injured his right shoulder in an accidental fall on November 21, 1983. He sought medical treatment from Dr. Duris, but felt he was not improving after approximately three months of care. He continued to work full-time at the same job. Dr. Duris suggested that physical therapy might help claimant who then sought the chiropractic treatment of Dr. Deshaw on February 13, 1984 and began an extensive course of therapy. Modalities of therapy billed at medical services rates included swimming pool therapy, hydrotherapy, and weight lifting therapy at the Northwood Health Club in addition to chiropractic adjustment. In 1984 claimant obtained therapy services on fourteen days in February, ten days in March, eight days in April, ten days in May, eight days in June, eleven days in July, seven days in August, and six days in September which were billed to the employer. After the denial, claimant continued to receive treatment eight times in October, ten times in November, five times in December of 1984; and four times in January, and at least one time in February of 1985.

In July 1984 the employer requested justification for chiropractic treatment from Dr. Deshaw but the chiropractor did

not respond. In September claimant was examined by Dr. Howell, osteopath, who opined that claimant had no physical impairment and that there was no justification for any medical or chiropractic treatment. In October 1984 the employer denied payment of all but one chiropractic bill per month and claimant returned to work for the employer as a truck driver. A Determination Order was published on October 9, 1984 which awarded temporary disability compensation from November 24, 1983 through September 19, 1984. In November Dr. Deshaw responded to a request from Dr. Russell, the medical director of the Workers' Compensation Department, to submit his records to peer review on the necessity and extent of chiropractic treatment by sending a copy of his chartnotes. The chartnotes were also submitted to the Referee.

Claimant was found to be a credible witness by the Referee. Claimant testified that the therapy helped him feel better and that he felt that the therapy helped him return to work full-time as a truck driver. He also felt that the continued therapy helped him remain on the job. He testified that there was no pain in his shoulder after April 1984. Claimant also testified that he was able to chop wood with a six pound ax but felt he could not unlock piggyback trailers with a six pound hammer. Claimant has not returned to the job of unloading piggyback trailers because he does not have enough seniority to return to that work, but he has returned to work as a full-time long haul truck driver.

The Chiropractic Peer Review Committee found Dr. Deshaw's chartnotes notes were illegible and, therefore, did not substantiate the necessity nor extent of treatment. Their conclusion was not based on the substance of the notes. We attempted to read the treating chiropractor's chartnotes and we agree with the committee's assessment. Claimant's testimony was inconclusive regarding the benefit received by therapy. Dr. Howell's well-reasoned report is persuasive that there was no justification for therapy when compared with claimant's testimony and Dr. Deshaw's ultimate conclusory opinion letter. We find that claimant failed to carry his burden of proof that chiropractic adjustment and other modalities of therapy carried out at the direction of Dr. Deshaw after September 19, 1984 were reasonable and necessary and, therefore, we reverse that portion of the Referee's order which ordered the employer to pay for two chiropractic adjustments per month after that date.

Before the date of Dr. Howell's examination, the only evidence of the reasonableness and necessity of claimant's treatment was Dr. Deshaw's letter of May 2, 1984 and the opinion of Dr. Duris on May 25, 1984 that claimant was not sufficiently recovered to be able to return to the work he had been doing at the time of injury. Dr. Duris never expressed an opinion on the reasonableness or necessity of the chiropractor's course of treatment.

Until Dr. Howell's examination the evidence weighed in favor of compensability of the chiropractic services and there was no denial of compensability of services before September 1984. The October 26, 1984 letter denied compensation for chiropractic services beyond one per month as violative of the administrative rule guideline and not justified as reasonable and necessary. Although there may be doubt about the necessity of the

chiropractor's services before Dr. Howell examined claimant, there is no evidence from which the Board can state that no treatment was reasonable and necessary after a certain date except the date of Dr. Howell's examination. Therefore, we find that claimant's chiropractic treatment until September 19, 1984 was reasonable and necessary and modify that portion of the Referee's order which ordered the employer to pay for only three chiropractic visits per month from July 13 through September 13, 1984. The employer shall pay for all chiropractic visits from July 13 through September 19, 1984 in addition to the chiropractic services already paid for before July 13.

The remaining issue is the extent of claimant's unscheduled permanent partial disability due to the injury to claimant's right shoulder. Dr. Howell reported that claimant had no loss of range of motion. Claimant testified that he felt that he had a loss of range of motion and demonstrated what he felt was a limitation to the Referee. The transcript contains a description of the maneuver claimant attempted. Dr. Deshaw's final report letter does not persuade the Board that claimant has suffered any permanent impairment of his shoulder. Dr. Deshaw's opinion of claimant's limitations was not related to the industrial injury and it was mixed in with comments about the necessity for treatment, the nature of the therapy, and his opinion of the emotional benefits of full-time employment. Claimant testified that he was able to chop wood with a six pound ax but due to his shoulder injury felt he could not use a six pound hammer on the job. Claimant returned to full-time work as a truck driver with the employer at the date of injury.

To prevail on the issue of entitlement to an award for unscheduled permanent partial disability, a worker must demonstrate by a preponderance of the evidence that as a result of the industrial injury there has been a permanent loss of earning capacity. The extent of disability is measured by the loss of earning capacity caused by the industrial accident and "taking into consideration the worker's loss of earning capacity, if any, resulting from symptoms caused by the injury." Barrett v. D & H Drywall, 300 Or 325 (1985), aff'd on reconsideration, 300 Or 553 (1986). "Earning capacity" is defined as a worker's "ability to obtain and hold gainful employment in the broad field of general occupations" and considers the medical assessment of impairment as well as social and vocational factors. Surratt v. Gunderson Bros., 259 Or 65 (1971).

We rely on medical assessment and claimant's credible testimony to establish the degree of impairment. See Garbutt v. SAIF, 297 Or 148 (1984). Social and vocational factors are considered in the totality of claimant's circumstances. OAR 436-30-380 et seq.; Howerton v. SAIF, 70 Or App 99 (1984); Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982).

Based on our de novo review of the entire record, we are not persuaded that claimant suffered permanent impairment or loss of earning capacity as a result of his industrial injury. Without a loss of earning capacity, claimant is not entitled to an award of compensation for permanent partial disability. Consequently we reverse the Referee's award of compensation for permanent partial disability and reinstate the Determination Order which authorized no award for permanent disability.

Claimant has ultimately prevailed on only one portion of one of his claims for compensation: that the employer should pay for all chiropractic treatment between July 13, 1984 and September 19, 1984. The only increase that claimant has achieved in his compensation was payment of some medical services billings. Claimant's attorney will be allowed a fee to be paid by claimant out of the amount claimant is relieved of paying for chiropractic services by operation of this order. OAR 438-47-010(4).

ORDER

The Referee's order dated June 7, 1985 as corrected June 21, 1985 is reversed in part and modified in part. That portion of the order which ordered the self-insured employer to pay for chiropractic services at the rate of two times per month after September 19, 1984 is reversed and the employer shall pay for no chiropractic services provided to claimant after September 19, 1984. That portion of the order which awarded 32 degrees for 10 percent unscheduled permanent partial disability is reversed and the Determination Order dated October 9, 1984 which authorized no award for unscheduled permanent partial disability is reinstated. That portion of the order which ordered the employer to pay for three chiropractic visits per month from July 13, 1984 through September 13, 1984 is modified to order the employer to pay for all chiropractic services through September 19, 1984. Claimant's attorney is allowed 25 percent of the amount the claimant is relieved of paying as a result of this order to be paid by claimant out of the award of payment for medical services and not to be paid by the employer in addition to the chiropractor's billings. The remainder of the attorney fees awarded by the Referee are reversed.

ROBERT S. FOSTER, Claimant
Quintin B. Estell, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 84-10997
April 22, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of Referee Foster's order that: (1) awarded claimant 32 degrees for 10 percent unscheduled permanent partial disability for the low back, whereas a Determination Order awarded no permanent disability; and (2) set aside the employer's denial for claimant's ongoing chiropractic treatment. The issues on review are extent of unscheduled disability and the compensability of continuing chiropractic treatment. We reverse.

Claimant compensably injured his low back in July 1983 while shoveling beets at a cannery. His initial examining physician, Dr. Berman, diagnosed a probable thoracolumbar strain and released claimant to return to work without restrictions. Claimant immediately changed physicians and began treating with Dr. Nickila, a chiropractor. Dr. Nickila took claimant off the job and estimated that two months of chiropractic treatment would be required. Within two weeks, however, Dr. Nickila also released claimant to return to work without restrictions. Claimant did return, but resigned after a few weeks for reasons unrelated to his industrial injury.

Claimant remained off work for a year, a fact unknown to Dr. Nickila, who continued treating claimant with the same

frequency as when claimant was on the job. In September 1984 claimant was examined by a panel of Independnent Chiropractic Consultants, one of whom was Dr. Berman. The panel diagnosed a thoracic spine strain by history and found no evidence of physical impairment. The panel further suggested that any treatment claimant was receiving was unrelated to his industrial injury.

Dr. Nickila then sent claimant to Dr. Holzapel, a chiropractor, who diagnosed an injury-related weakening and instability of the thoracic spine supporting tissues. Upon the employer's issuance of a Notice of Closure, claimant retained counsel and requested a Determination Order. The resulting September 1984 Order awarded temporary total disability but no permanent disability compensation. Claimant appealed.

At the hearing claimant indicated that following some thoracic spine discomfort that resolved soon after the original injury, all problems had involved the low back. He also described several periods of employment following the injury, including security guard work requiring occasional ten-hour shifts, and his current work as an aide to mentally retarded patients. This work requires the lifting and carrying of patients and the restraint of those who are disruptive.

The Referee found claimant to be suffering from "mid and low back problems." He also found that although the problems "may be functional" and exaggerated, claimant had suffered a 10 percent loss of earning capacity as a result of his injury. Finally, the Referee found that Dr. Nickila's twice-per-week chiropractic treatments were necessitated by the effects of the compensable injury. We disagree with the Referee's findings. With regard to the issue of extent, our conclusion is based on a record nearly devoid of evidence of permanent impairment. We note that claimant's initial physician released him to return to work on the day he was examined, and although claimant immediately changed doctors, he was given a second unrestricted release within two weeks. We also note the findings of the Independent Chiropractic Consultants that claimant exhibited no objective impairment whatsoever.

Claimant must necessarily rely on the statements of Drs. Nickila and Holzapel, for they offer the only support for an award of disability. We find neither doctors' opinion persuasive, however. Dr. Nickila testified at the hearing that although he had treated claimant for an extended period, he kept no chartnotes and authored no narrative description of claimant's condition at any time. Therefore, his opinion was based solely on memory alone, without the benefit of empirical findings. When compared to the extensive report of the Independent Chiropractic Consultants, outlining in detail their thorough physical examination of the claimant, Dr. Nickila's opinion is of little persuasive value.

Although Dr. Holzapel suggested that claimant had suffered a significant injury to the thoracic spine, claimant testified that shortly after his accident, his only problems were in the low back. Because Dr. Holzapel has apparently misidentified the area of claimant's injury, his opinion carries little weight.

We find, based on the medical record and claimant's employment history subsequent to the industrial injury, that claimant has not suffered a compensable loss of earning capacity. The Referee's award of permanent disability shall be reversed.

The remaining issue is whether claimant is entitled to further chiropractic treatment. He again relies on the opinion of his treating chiropractor, Dr. Nickila, who states that palliative chiropractic care is necessary in order to maintain claimant at his current level of functioning.

It is claimant's burden to prove the reasonableness and necessity of chiropractic treatment. SAIF v. Belcher, 71 Or App 502 (1984); Teresa L. Bogle, 37 Van Natta 615 (1985). We normally defer to the treating physician's opinion in that regard, unless there are persuasive reasons not to do so. Weiland v. SAIF, 64 Or App 810 (1983). In the present case we are less persuaded by the opinion of claimant's treating doctor than we are by the remaining evidence. We note that Dr. Nickila specifically testified that the need for chiropractic treatment is dependent in part on claimant's level of activity. He further indicated, however, that he was unaware that claimant was off work for a year during a time that he was being regularly treated. Dr. Nickila's incomplete knowledge, coupled with his apparent failure to keep records, leaves us unpersuaded by his opinion that claimant requires chiropractic treatment. This is particularly true in light of the Independent Chiropractic Consultants' opinion that any treatment claimant might be receiving is unrelated to his industrial injury.

ORDER

The Referee's order dated June 25, 1985 is reversed. The Determination Order dated September 24, 1984, which awarded temporary total disability only, is reinstated. The self-insured employer's denial of claimant's continuing chiropractic treatment is reinstated.

WADE HAMPTON, JR., Claimant
Pozzi, et al., Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 84-11482
April 22, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of Referee Galton's order that awarded claimant permanent total disability in lieu of a Determination Order award of 128 degrees for 40 percent unscheduled disability for the low back. The insurer also asks that we remand this case to the Referee for the taking of additional evidence.

We agree with the Referee that claimant is permanently and totally disabled. We, therefore, affirm the Referee's order on the merits. With regard to the insurer's request for remand, we recognize that the insurer was placed in an awkward position by the Referee's unfortunate handling of the matters before him. We find, however, that the evidence now sought to be produced by the insurer could have been produced with due diligence prior to the hearing. Remand, therefore, is not appropriate. See Richard G. Kennedy, 37 Van Natta 1468 (1985).

ORDER

The Referee's order dated July 8, 1985 is affirmed. The insurer's request for remand is denied. Claimant's attorney is awarded a fee of $650 for services before the Board, to be paid by the insurer.

RON C. KENDALL, Claimant
Robert J. Thorbeck, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 83-08287
April 22, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Wilson's order which declined to assess the insurer a penalty and accompanying attorney fees for an allegedly unreasonable delay in paying compensation. On review, claimant contends that the insurer unreasonably failed to: (1) accept or deny his aggravation claim within 60 days; and (2) pay interim compensation within 14 days of receipt of the claim. We agree and reverse.

Claimant had sustained a compensable right knee injury in December 1979. Since his injury he has undergone several surgical procedures. As of October 25, 1982, the last arrangement of compensation, claimant had received a scheduled right leg (knee) permanent disability award totalling 40 percent. Sometime thereafter claimant secured employment as an offbearer on a green chain.

By letter dated July 26, 1983 Dr. Thompson, claimant's treating orthopedist, reported on claimant's July 20, 1983 examination. Claimant was complaining of increasing pain, slipping, and catching in the right knee. Repeat x-rays indicated "some very early hypertrophic changes," but otherwise the knee was essentially unchanged from prior films. Dr. Thompson opined as follows:

> "...[Claimant] may very well have sustained a tear of the remaining medial meniscus of the right knee as a result of the continued instability of the knee. He was sent for an arthrogram to see if this will help delineate the problem.
>
> "...I think [claimant] may well require an arthroscopy to completely evaluate the knee."

An arthrogram revealed considerable anterior cruciate looseness, some mild hypertrophic changes, mild patellar cartilage thinning, and some medial compartment cartilage thinning. Thereafter, Dr. Thompson opined that, effective July 28, 1983, claimant should refrain from working. Dr. Thompson based his decision on claimant's knee problems and the possibility of surgery.

On August 9, 1983 claimant's attorney requested claim reopening. The request was based on Dr. Thompson's July 26, 1983 report, a copy of which was enclosed with the attorney's letter. On August 30, 1983 claimant requested a hearing, raising the issue of unreasonable refusal, resistance, or delay in paying compensation.

On September 20, 1983 Dr. Thompson released claimant to work, with instructions to avoid sideward stress on his right leg. Dr. Thompson stated that claimant's lost time from work was primarily due to the insurer's "delaying actions."

By letter dated October 12, 1983 claimant's employer reported that claimant had missed approximately seven weeks of work since July 25, 1983. On October 24, 1983 Dr. Thompson advised the insurer that claimant was authorized to be off work from July 20, 1983 until September 20, 1983. Had it not been for the insurer's delayed response, Dr. Thompson stated that claimant's time loss would have been significantly reduced. On October 27, 1983 Dr. Thompson performed an arthroscopy, resecting the medial suprapatellar plica and a cartilage flap of the medial femoral condyle.

On November 8, 1983 the insurer reopened the claim. Temporary total disability compensation was retroactively paid to July 25, 1983. In accepting the claim, the insurer noted that it had received verification of time loss authorization on October 27, 1983 (Dr. Thompson's October 24, 1983 report) and verification of time lost from work on October 21, 1983 (the employer's October 12, 1983 report).

Claimant testified that he made approximately 14 phone calls to the insurer between July 22, 1983 and September 19, 1983. His attempts to have his claim reopened were unsuccessful, primarily because he was told that his claim file had been misplaced.

The Referee found Dr. Thompson's July 26, 1983 report insufficient to constitute an aggravation claim. Reasoning that the report was couched in terms of possibility, the Referee concluded that the insurer was under no legal duty to accept or deny, nor to begin paying interim compensation. Furthermore, since claimant's attorney's request for reopening merely relied on Dr. Thompson's report, the Referee found that this request was also not a valid aggravation claim. Inasmuch as the insurer had promptly reopened the claim once it had received the employer's and Dr. Thompson's October 1983 reports, the Referee held that penalties and accompanying attorney fees were not warranted.

A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation. ORS 656.273(3). The physician's report need not adduce facts sufficient to show an aggravation, but it need only show the need for further treatment of the injury. Smith v. SAIF, 78 Or App 443 (April 9, 1986); Haret v. SAIF, 72 Or App 668, 672 (1985); Clark v. SAIF, 50 Or App 139, 143 (1981).

The first installment of interim compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of medically verified inability to work resulting from the worsened condition. ORS 656.273(6). If the worker has "left work" as that phrase is used in ORS 656.210(3), the employer or insurer is required to pay interim compensation if the claim is not accepted or denied within 14 days. Bono v. SAIF, 298 Or 405 (1984); Jones v. Emanuel Hospital, 280 Or 147 (1977).

We find that Dr. Thompson's July 26, 1983 report constituted a valid aggravation claim. The report advises the insurer that claimant is experiencing increasing right knee pain and that an arthrogram has been scheduled. Dr. Thompson's "feeling" that claimant "may well have" sustained additional damage to the knee, does not detract from the fact that further medical services were needed. A report such as this, where the need for further medical services is clearly outlined, is all that

ORS 656.273(3) requires. See Smith v. SAIF, supra; Douglas Dooley, 35 Van Natta 125 (1983). Moreover, Dr. Thompson's July 28, 1983 time loss authorization for claimant's knee problems and possible surgery, provided further notification to the insurer that claimant required additional medical treatment and compensation stemming from his compensable injury. Therefore, if the insurer had any doubts whether Dr. Thompson's initial report constituted a valid aggravation claim, these doubts were put to rest upon receipt of the time loss authorization.

The insurer did not accept the claim and begin paying temporary total disability compensation until November 8, 1983, more than three months after Dr. Thompson's July 1983 report and time loss authorization. Thus, the insurer did not timely accept or deny the claim within 60 days as required by ORS 656.262(6) nor did it timely pay interim compensation within 14 days as required by ORS 656.273(6). Since claimant requested a hearing regarding the insurer's "de facto" denial less than 60 days after what we consider to be the date of his aggravation claim, a penalty for failing to timely accept or deny the claim would be inappropriate. Lee E. Short, 37 Van Natta 137, 140 (1985); Joyce A. Morgan, 36 Van 114, 118 (1984), aff'd. mem., 70 Or App 616 (1984). However, we find the delay in paying interim compensation unreasonable. Accordingly, the insurer is assessed a 25 percent penalty based on the temporary total disability which should have been paid in a timely fashion for the period from July 28, 1983, the date Dr. Thompson cited in his initial time loss authorization, through November 8, 1983. The insurer shall also be assessed an accompanying attorney's fee. ORS 656.262(10).

ORDER

The Referee's order dated August 1, 1985 is reversed in part and affirmed in part. The insurer shall pay a sum equal to 25 percent of the temporary total disability due from July 28, 1983 through November 8, 1983 as a penalty for failing to pay interim compensation in a timely manner. For services at the hearing level and on Board review, claimant's attorney is awarded $500. The remainder of the Referee's order is affirmed.

ELIZABETH McFARLAND, Claimant
Roberts, et al., Defense Attorneys

WCB 83-06434
April 22, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Knapp's order, adhered to after reconsideration, that dismissed claimant's request for hearing. The issue is whether claimant made a showing of good cause for failure to appear at a rescheduled hearing.

A hearing convened on May 9, 1985 at Hood River, Oregon. After a lengthy discussion, the Referee entered an order postponing the hearing in order to allow claimant sufficient time to obtain another attorney and to marshal additional evidence. The rescheduled hearing was set for 2 p.m. on August 6, 1985 at Hood River. Claimant did not appear at the rescheduled hearing and the Referee dismissed the request for hearing on motion of the insurer.

Claimant later explained that she had lost the notice of hearing and could not remember the time of the hearing. Because

the May hearing had been set for 9:30 a.m., she went to the hearing room at 9:30 a.m. on August 6, 1985. When no one else arrived, she left at 10:45 a.m. She did not return in the afternoon or make any other effort to contact the Hearings Division, the Referee, the insurer or its counsel. We agree with the Referee that this explanation does not constitute good cause for failure to appear at the hearing or otherwise notify the Hearings Division if she was unable to appear. The Referee's order is affirmed.

ORDER

The Referee's order of dismissal dated August 9, 1985 and republished August 15, 1985 is affirmed.

JACK E. RAMSEY, Claimant
Dwyer, Simpson & Wold, Claimant's Attorneys
Breathouwer & Gilman, Defense Attorneys

WCB 85-00769
April 22, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Seymour's order that affirmed the Determination Order dated November 28, 1984 that awarded 18 degrees for 100 percent loss of the great toe, 3.6 degrees for 90 percent loss of the second toe, and 3.2 degrees for 80 percent loss of the third toe, all of the right foot, due to traumatic amputation. Claimant requests an award for unscheduled permanent partial disability and and increased award for scheduled permanent partial disability. The issues on review are extent of unscheduled permanent partial disability and scheduled permanent partial disability.

The Board affirms the Referee's order with the following comment. Compensation is awarded for disability which results from the industrial injury and is not necessarily confined to the schedule award for the part which suffered directly. Woodman v. Georgia-Pacific Corp., 289 Or 551 (1980).

ORDER

The Referee's order dated September 25, 1985 is affirmed.

ELVA JUNE TERRY, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-11869
April 22, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of those portions of Referee Galton's order that set aside its partial denial of claimant's claim for medical services. The issues are whether the claim is barred by res judicata and whether the medical services are causally related to her compensable psychological condition.

Claimant filed a stress claim in March 1981 claiming that her employment as a social worker with the Children's Services Division had caused various conditions including emotional problems, headaches, stomach aches, chest pains and hypertension. Claimant's claim was found compensable by Referee Gemmell in an Opinion and Order dated May 25, 1983. The claim was closed by Determination Order in January 1984 with an award of 15

percent unscheduled permanent partial disability. This award was increased to 40 percent in September 1984 by stipulation. The stipulation recited that it was "in full settlement of all issues presently raised or raisable herein, preserving to claimant her aggravation rights."

In November 1984 claimant was referred to the Institute for Health Maintenance by her treating internist, Dr. Brodhacker, for participation in the "Risk Factor Obesity Control Program." Between November 1984 and February 1985 claimant incurred expenses totalling $1,431 in connection with this program. She submitted documentation of these expenses to SAIF in March 1985 and requested payment. SAIF denied her claim for these expenses on April 4, 1985.

SAIF argues initially that claimant's claim for medical services is barred by res judicata by virtue of the September 1984 stipulation which purported to dispose of all issues raisable at that time. We reject this argument. Claimant was referred to the weight control program and incurred all of the expenses connected with this program after the date of the stipulation. Under these circumstances, the issue of the payment of claimant's weight control expenses was not raisable at the time of the stipulation. The stipulation, therefore, does not bar claimant's present claim for these expenses. See Harold J. Simonis, 37 Van Natta 1649 (1985).

On the merits, there is no opinion by any medical professional indicating a causal connection between claimant's compensable psychological condition and her weight control expenses. The only evidence suggesting such a connection is claimant's own testimony. She stated that the anxiety and depression associated with her compensable psychological condition brought her to the point where she "just didn't care" and caused her to eat excessively and put on weight.

Claimant's testimony is not supported by the rest of the record. She has had problems with obesity for more than 20 years. Her weight was excessive well before the occurrence of any of the events which gave rise to her psychological problems and remained at about the same level through the time that she began participating in the weight control program in late 1984.

We have stated repeatedly that expenses for weight control are not the responsibility of the employer or its insurer under ORS 656.245 absent a showing that the weight problem was caused or materially worsened by the industrial injury. Helen L. Dodge, 36 Van Natta 1283 (1984); Neil D. Maloney, 36 Van Natta 1071 (1984); Mark G. Blanchard, 34 Van Natta 1660 (1982); Clarice G. Dorn, 34 Van Natta 506, 507 (1982); Joda M. Ruhl, 34 Van Natta 2, aff'd mem., 58 Or App 389 (1982); Shirley Severe, 27 Van Natta 710, 714 (1979); Daniel Tanory, 19 Van Natta 209, 210 (1976); Doris J. Lanham, 2 Van Natta 15 (1968). Claimant has made no such showing in this case. We conclude, therefore, that the insurer's denial of the expenses connected with claimant's weight control program was proper.

ORDER

The Referee's order dated August 9, 1985 is reversed in part. Those portions of the order that set aside the SAIF

Corporation's partial denial of April 4, 1985 and awarded an associated attorney fee are reversed. The remainder of the order is affirmed.

DONALD L. WALDRON, Claimant
Roll, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-13467
April 22, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Lipton's order which found that he was not entitled to additional permanent total disability benefits for his minor children born more than one year after the date of his original injury, but prior to the date of his award of permanent total disability. On review, claimant contends that he is entitled to these benefits. SAIF also objects to that portion of the Referee's order which found that children conceived on or before the date of injury would be entitled to benefits.

The Board affirms the order of the Referee with the following comments.

Claimant sustained a compensable injury in December 1976. At the time of the injury, he was single and childless. Claimant married in January 1977. He subseqently became a father in January 1978 and March 1979. Claimant was eventually awarded permanent total disability by virtue of a Referee's order in September 1984. Thereafter, he requested a hearing, contending that he was entitled to permanent total disability benefits for each of his minor children.

The Referee concluded that consistent with the entire statutory scheme of ORS Chapter 656, claimant's beneficiaries would include his children born or conceived on or before the date of his injury. However, since none of claimant's children came within this requirement, the Referee declined to grant claimant's request for benefits.

We agree that claimant is not entitled to additional permanent total disability benefits for his two minor children. This case is analogous to the facts present in SAIF v. Brannon, 62 Or App 768 (1983). In Brannon, a deceased worker's widow cross-appealed from a Board's order which had declined to award the worker's minor child permanent total disability benefits. The child was born approximately five years after the worker's compensable injury, but before the worker's award of permanent total disability. The court affirmed the Board's order. Citing ORS 656.202(2), the court concluded that the date of injury is the date on which a worker's status conclusively determines his rate of compensation. Brannon, supra., at 771.

Here, as in Brannon, the minor children had not been born at the time of the compensable injury. Consequently, they are not entitled to benefits when that compensable injury subsequently results in an award of permanent total disability.

Claimant's minor children were clearly not conceived at the time of his compensable injury. Therefore, the Referee's finding that children who were conceived, but not born, at the time of the compensable injury would be entitled to permanent

total disability benefits was dicta. However, had we been faced with this issue, we would disagree with the Referee's decision. We consider the Referee's finding contrary to ORS 656.206(2)(b)(A). This statute provides that a worker entitled to permanent total disability benefits shall receive additional benefits for each child under the age of 18 years at the time of the compensable injury. (emphasis added). Furthermore, since ORS 656.005(3) and (6) speak in terms of "child" and "posthumous child," it follows that where an injured worker does not die as a result of the accidental injury, but is subsequently determined to be permanently and totally disabled, the worker's "beneficiaries" should not include the minor children who had not been born at the time of the injury.

ORDER

The Referee's order dated August 30, 1985 is affirmed.

LINDA E. WOOD (BARON), Claimant
Victor Calzaretta, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-00794
April 22, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Fink's order which: (1) found that her claim had not been prematurely closed; and (2) awarded 15 percent (48 degrees) unscheduled permanent disability for a polycystic ovarian syndrome condition, whereas a January 25, 1985 Determination Order had awarded no permanent disability. On review, claimant contends that she is entitled to additional temporary and permanent disability.

In its respondent's brief, the SAIF Corporation contends that claimant is not entitled to a permanent disability award. We have authority to consider SAIF's contention notwithstanding its failure to cross-request review. Jimmie Parkerson, 35 Van Natta 1247, 1249-50 (1983). Moreover, SAIF's contention does not raise a new issue. Gleason W. Rippey, 36 Van Natta 778 (1984).

Following our de novo review of the medical and lay evidence, we are persuaded that based on the medical information available at the time of the Determination Order, claimant's condition was medically stationary as defined in ORS 656.005(17). See Sullivan v. Argonaut Ins. Co., 73 Or App 694 (1985); Alvarez v. GAB Business Services, Inc., 72 Or App 524 (1985). Furthermore, we find that claimant has sustained a permanent loss of earning capacity as a result of her compensable condition and that a 15 percent unscheduled permanent disability award is adequate compensation for her condition. ORS 656.214(5). Accordingly, we affirm the Referee's order.

ORDER

The Referee's order dated August 20, 1985 is affirmed.

NORMAN E. WRIGHT, Claimant
Velure & Bruce, Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

WCB 84-08871
April 22, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee McCullough's order which increased claimant's unscheduled permanent disability award for a back injury from 15 percent (48 degrees), as awarded by an August 1, 1984 Determination Order, to 60 percent (192 degrees). On review, the insurer contends that the award should be reduced. We agree and modify the Referee's order.

Claimant was 45 years of age at the time of hearing. In January 1982, while working as a truck driver, he slipped on some ice, landing on his head and back. His condition was diagnosed as "thoracic vertebra number 9 compression fracture, cervical sprain, traumitic labyrinthitis, Grade I acromioclavicular separation." Treatment has been conservative, consisting of medication and physical therapy.

In April 1982 Dr. Rosenbaum, neurosurgeon, performed an independent medical examination. Claimant's chief complaint was midscapular pain. Diagnosing midthoracic compression fracture and chronic thoracic strain, Dr. Rosenbaum opined that claimant's condition was essentially stationary. In the latter part of 1982, claimant made two abortive attempts to return to truck driving. However, his back complaints soon forced him to discontinue his efforts.

In February 1983 claimant was examined by Dr. Armbrust, neurosurgeon. Claimant's complaints included intermittent right leg numbness and periodic left leg discomfort. Thoracic CT scans demonstrated calcification in the T8-9 level. Diagnosing atypical left thoracic radiculopathy, Dr. Armbrust recommended further conservative treatment.

In December 1983 Dr. Martens, orthopedist, performed an independent medical examination. Claimant's primary complaint was a sensation "like somebody poking his finger into the base of [his] left shoulder blade." The pain increased whenever claimant was physically active or failed to frequently change his body position. Dr. Martens diagnosed "musculoskeletal thoracic back pain without evidence of nerve root compression, obesity, tension headaches, [and] compression fracture, T9, healed." Concluding that claimant had suffered 10 percent permanent impairment, Dr. Martens recommended that he engage in light work, avoiding twisting of the upper back or repetitive arm motions. Dr. Martens acknowledged that these restrictions would preclude claimant's return to his past activities as a mill worker and truck driver.

In December 1983 vocational assistance efforts were initiated. Claimant had left school in the eleventh grade, but had obtained his GED. Aptitude test results indicated that claimant's skills were average or above average in every category, except hand-eye coordination, finger dexterity, and manual dexterity. Claimant's spelling and arithmetic skills were at the 6.9 grade level, while his reading skill was at the 9.6 level.

In January 1984 claimant and his wife began a vocational retraining program in motel management. In February 1984 they

secured employment with a California motel. However, claimant left this position in July 1984, when he found some of his duties were beyond his physical capabilities. Although he has subsequently applied for work with larger motel chains and as a temporary bus driver, claimant has been unable to procure further employment.

In October 1984 Dr. Hartmann, claimant's treating physician, agreed that the physical demands of claimant's California employment had exceeded his limitations. Specifically, claimant had been required to climb too many stairs, carry heavy supplies, and perform physical maintenance work. Dr. Hartmann concluded that claimant could continue to work in motel management, if the position involved more sedentary activities.

According to a "Physical Capacities Analysis," apparently completed by Dr. Hartmann, claimant was subject to the following restrictions: (1) sit, stand and walk for 1 to 3 hours; (2) occasionally lift 10 to 20 pounds; (3) no fine manipulation nor pushing and pulling activities; (4) an opportunity to frequently change position; (5) occasional bending, climbing, and crawling; (6) no reaching above shoulder level; and (7) no prolonged driving.

In December 1984 Dr. Hartmann reported that claimant's physical limitations were essentially unchanged. There were no plans for continued medical treatment nor physical therapy. However, Dr. Hartmann stated that claimant had been instructed to seek treatment as needed for his chronic low back pain syndrome.

Claimant and his wife credibly described his past work experiences, disabling pain, and permanent physical limitations. In addition to his duties as a truck driver, he has worked as a manual laborer in a glass plant and in a papermill. Claimant now lacks the physical capacity to perform these duties. He continues to experience back symptoms, particularly after engaging in physical activities. Following these activities claimant feels a "burning sensation" at the base of his shoulder blades, swelling in his back, and partial numbness "from [his] hips down." Riding in a car for more than 25 miles also produces numbness in his legs. Claimant is currently not receiving medical treatment, but he does take "strong aspirin" if his symptoms become "real bad." Since his injury he has curtailed, if not eliminated, most of his household chores and recreational activities. For example, he no longer splits the family's firewood nor does he hunt or fish.

The Referee found that claimant had sustained substantial physical limitations as a result of his compensable back injury. After considering these limitations and the relevant social/vocational factors contained in OAR 436-30-380 et. seq., the Referee increased claimant's unscheduled permanent disability award from the Determination Order's award of 15 percent to 60 percent.

We agree that claimant's compensable injury and subsequent physical limitations have caused a permanent loss of earning capacity in excess of the Determination Order's award. However, we consider the Referee's award to be excessive.

In rating the extent of claimant's permanent disability, we consider his physical impairment attributable to the compensable back injury, which includes his and his wife's

credible testimony concerning his disabling pain and physical limitations, and all of the relevant social and vocational factors set forth in OAR 436-30-380 et. seq. We do not apply these rules as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982).

Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that a 35 percent unscheduled permanent disability award adequately compensates claimant for his compensable back injury. In reaching this determination, we note that although claimant did not specifically injure his low back, he has experienced radiating symptoms in the area since the injury. Thus, these complaints have been considered in evaluating the extent of claimant's permanent disability.

ORDER

The Referee's order dated May 22, 1985 is modified. In lieu of the Referee's award, and in addition to the Determination Order's award of 15 percent (48 degrees) unscheduled permanent disability, claimant is awarded 20 percent (64 degrees), which gives him a total award to date of 35 percent (112 degrees) unscheduled permanent disability for his compensable back injury. Claimant's attorney's fees shall be adjusted accordingly.

STEPHEN R. MARTIN, Claimant
David Force, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-05921
April 23, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Martin v. SAIF, 77 Or App 395 (1986). Claimant requested judicial review of our order on review that affirmed the Referee's order that held the claim was not prematurely closed in June 1983. Although SAIF ultimately reopened claimant's claim in February 1984 for surgery, claimant maintained that he was entitled to temporary disability compensation from June 1983 through claim reopening. After de novo review, the court held: (1) claimant's claim was properly closed on June 12, 1983; (2) claimant's chiropractor's letter of October 5, 1983 was an aggravation claim which included a statement of medically verified inability to work; and (3) the October 19, 1983 denial of the aggravation claim was improper. These findings and conclusions are binding upon us.

Consistent with the court's mandate, the SAIF Corporation shall pay to claimant benefits for temporary total disability commencing October 5, 1983 through February 6, 1984, less time worked, if any.

IT IS SO ORDERED.

ROBERT C. MILLER, Claimant
Hayner, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 82-07083
April 23, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Miller v. Weyerhaeuser Co. 77 Or App 402 (1986). Claimant requested judicial review of our memorandum order that affirmed the Referee's order upholding the employer's denial of claimant's claim for aggravation of his 1977 low back injury or,

in the alternative, a new claim for occupational disease. After its de novo review, the Court of Appeals concluded that claimant's claim could not be an aggravation claim because claimant's aggravation rights had expired, ORS 656.273(4)(a), and that no new occupational disease claim was presented because claimant did not claim that he was more disabled. 77 Or App at 404-05. The court concluded that claimant's claim was nothing more than a claim for medical services under the provisions of ORS 656.245(1), which it held was compensable as related to the 1977 industrial injury. These findings and conclusions are binding upon us.

Treating the employer's July 26, 1982 formal denial as a denial of a medical services claim, and consistent with the mandate of the court, the denial is set aside and claimant's medical service claims for treatment of his low back shall be accepted and paid. This order shall not be construed as foreclosing relitigation by either party of medical service claims, if any, made after the date of the hearing, December 13, 1983.

IT IS SO ORDERED.

CHARLIE W. OWEN (Deceased), Claimant
Pozzi, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 82-11633
April 23, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Owen v. SAIF, 77 Or App 368 (1986). Claimant's beneficiaries requested judicial review of our Order on Review that affirmed the Referee's order that held the beneficiaries could not maintain a claim for death benefits under ORS 656.208. After de novo review, the court concluded that because claimant's claim had never been closed after a Referee set aside a Determination Order in 1974, all previous orders in this proceeding were moot because the proceedings were premature. 77 Or App at 372-73. The court then remanded the case to us for further proceedings consistent with its opinion.

Consistent with the court's mandate, this matter is remanded to the SAIF Corporation, which shall forthwith submit the claim to the Evaluation Division for consideration under the provisions of ORS 656.268(3).

IT IS SO ORDERED.

BRADLEY J. REYNOLDS, Claimant
Bottini & Bottini, Claimant's Attorneys
James R. Greenfield, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-09614
April 23, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The non-complying employer requests review of Referee Knapp's order that set aside the denial of coverage of claimant's head injury based on claimant's alleged status as an independent contractor. The employer also requests remand to obtain the testimony of a witness who was sought but not located before the hearing. The issues on review are coverage and remand.

On the issue of remand, the employer submitted his affidavit in which he stated what his receptionist would testify

to regarding an independent contractor declaration allegedly signed by claimant. At the hearing the employer testified that the receptionist had been sought before the hearing but was unavailable for service of a subpoena by the processing agent. The affidavit sets out what the employer represents to be the substance of the proffered testimony: that claimant signed and filed an independent contractor declaration.

If claimant signed such a declaration, by statute the declaration "creates a rebuttable presumption that the person is an independent contractor." ORS 656.029(3). In this case, the Referee found in the alternative that claimant had rebutted the presumption and that claimant was a subject worker. We find that the case has not been "improperly, incompletely or otherwise insufficiently developed or heard by the referee," therefore, we deny the request to remand the case.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated June 24, 1985 is affirmed. Claimant's attorney is awarded $750 for services on Board review to be paid by the non-complying employer in addition to compensation awarded.

LARRY L. SCHUTTE, Claimant
Pozzi, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 85-10316
April 23, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee T. Lavere Johnson's order that required it to pay claimant an award of unscheduled permanent partial disability pursuant to an earlier Referee's order during a period in which claimant was receiving temporary total disability benefits in connection with a claim for aggravation. The issue is simultaneous payment of permanent partial and temporary total disability compensation.

The Board affirms the order of the Referee with the following comment. The employer argued at the hearing that its action in refusing to pay permanent partial disability compensation was justified under the administrative rule in effect at the time of its refusal, OAR 436-54-232 (amended effective January 1, 1986 and renumbered OAR 436-60-040). The employer's action ostensibly was permissible under this rule. The Referee rejected the employer's argument on the ground that, in light of Allen v. Fireman's Fund Insurance Co., 71 Or App 40 (1984), the rule was contrary to Oregon law and invalid.

We conclude that OAR 436-54-232 was inapplicable in this case by virtue of ORS 656.202(2). That subsection provides:

> "(2) Except as otherwise provided by law, payment of benefits for injuries or deaths under ORS 656.001 to 656.794 shall be continued as authorized, and in the amounts provided for, by the law in force at the time of the injury giving rise to the right to compensation occurred."

The Court of Appeals has found ORS 656.202(2) applicable to prevent retroactive application of statutory amendments affecting the timing of payment of benefits. Madden v. SAIF, 64 Or App 820, 824 & n.4 (1983); SAIF v. Mathews, 55 Or App 608, 611-12, rev den 292 Or 825 (1982). We conclude that it is applicable in like manner to the law controlling simultaneous payment of permanent partial and temporary total disability compensation.

OAR 436-54-232 did not become effective until well after the date of claimant's injury. In light of ORS 656.202(2) and the above discussion, it was not applicable to compensation awarded as a result of that injury. The law in effect on the date of claimant's injury required simultaneous payment of permanent partial and temporary total disability compensation. Allen v. Fireman's Fund Insurance Co., supra, 71 Or App at 47-48. Under that law, the employer was not justified in refusing payment of the award of permanent partial disability pending closure of claimant's aggravation claim.

Because we decide this case under ORS 656.202(2), we conclude that it was unnecessary for the Referee to rule on the validity of former OAR 436-54-232. We thus render that issue moot.

ORDER

The Referee's order dated October 10, 1985 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the self-insured employer.

BETTY A. SMITH, Claimant
Kirkpatrick & Zeitz, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-03544
April 23, 1986
Order on Review (Remanding)

Reviewed by Board Members Lewis and McMurdo.

Claimant has requested review of that portion of Referee Tuhy's order that denied claimant's request for temporary total disability compensation as of October 4, 1984. Claimant has submitted no brief on review, but has moved the Board to remand this case to the Referee for the taking of evidence generated after the hearing. Claimant asserts that this evidence, which consists of post-hearing arthroscopic and surgical reports, directly bears on the issue of claimant's entitlement to temporary total disability compensation. We agree and remand.

Claimant's compensable injury involves her right shoulder. Her claim was closed by way of an August 24, 1983 Determination Order, which claimant appealed. The Determination Order was affirmed by an Opinion and Order dated December 12, 1983, and later by a Board order dated July 25, 1984. Subsequently, claimant continued chiropractic treatment and complained of a worsening of her shoulder condition. She was eventually seen by Dr. Berselli, an orthopedist, in September 1984. Dr. Berselli suspected a possible right shoulder impingement syndrome, for which he requested authority to perform a diagnostic arthroscopy. He also requested that the SAIF Corporation commence payment of temporary total disability as of October 4, 1984.

After receiving Dr. Berselli's requests, SAIF sent

claimant for an independent medical examination by a panel of Orthopaedic Consultants. The panel reported that claimant was medically stationary and in need of no further medical or diagnostic treatment. Based on this report, SAIF issued a denial of claimant's claims for aggravation and diagnostic medical treatment. Claimant requested a hearing.

In his Opinion and Order, Referee Tuhy affirmed the denial of claimant's aggravation claim, finding that claimant had failed to prove a worsening since the last arrangement of compensation. He set aside the denial of the diagnostic procedure, however, holding that the procedure was reasonably necessary to determine whether claimant's shoulder condition remained causally related to her original injury. The Referee ordered SAIF to commence temporary total disability compensation as of the date the diagnostic procedure was performed.

Claimant's arthroscopy was, in fact, performed by Dr. Berselli after the hearing. According to his report dated October 14, 1985, the arthroscopy revealed adhesions in the subdeltoid area of claimant's right shoulder. Subsequent to the arthroscopy, claimant underwent a Neer acromioplasty in which a portion of the right shoulder acromion was removed. Dr. Berselli opined that claimant's shoulder condition was the result of her compensable injury, and that claimant was not stationary on October 4, 1984, when claimant first visited Dr. Berselli complaining of increased right shoulder pain.

Claimant seeks to have Dr. Berselli's October 14, 1985 report and the operative report considered by the Referee on remand. Claimant asserts that these reports are probative regarding her entitlement to compensation as of October 1984, and that the reports could not have been produced with due diligence before or at the time of the hearing.

We agree with claimant's assertion. Clearly, the arthroscopy report now offered by claimant was not available at the time of the hearing, for claimant's entitlement to the arthroscopy was one of the issues before the Referee. It was only after the Referee approved the performance of the diagnostic procedure that claimant proceeded with it. The results of that procedure directly bear on whether claimant was stationary as of the time she visited Dr. Berselli in October 1984. Under these circumstances, we find that the record before the Referee was incompletely developed at the time of the hearing. ORS 656.295(5); Bailey v. SAIF, 296 Or 41 (1983); Muffet v. SAIF, 58 Or App 684 (1982). Remand is, therefore, appropriate.

ORDER

The Referee's order dated May 24, 1985 is vacated. This case is remanded to the Referee for the limited purpose of taking additional evidence concerning claimant's post-hearing medical treatment and its relationship to claimant's alleged entitlement to temporary disability compensation. After consideration of this additional evidence, the Referee shall issue an Opinion and Order on Remand consistent with this order.

JERRY W. WINE, Claimant
L. Thomas Clark, Claimant's Attorney
Garrett, et al., Defense Attorneys
Marcus Ward, Defense Attorney

WCB 82-10473, 84-04838 & 85-03699
April 23, 1986
Order on Reconsideration

Northwest Farm Bureau (Northwest) requests reconsideration of that portion of the Board's Order on Review dated March 28, 1986 which awarded claimant's attorney a fee of $750 for services on review to be paid by Northwest.

When claimant made his claim of aggravation of his low back injury to Northwest, it responded with a denial that claimant's condition had worsened and with a request to dismiss because the claim was not timely filed. It also denied responsibility because of a prior injury covered by SAIF. SAIF denied that claimant's low back condition had worsened. No order pursuant to ORS 656.307 was sought or obtained even though claimant wanted an order issued. At hearing Northwest agreed that claimant had a low back condition which it had accepted, but repeated that there was no worsening of claimant's condition. The Referee found that claimant's condition had worsened and that Northwest was the responsible party. On review Northwest renewed its argument that the aggravation claim was untimely and that the claim against it should be dismissed. Claimant responded with a brief on the issue of timeliness of the claim.

The Board found that the claim was timely filed, that claimant's low back condition had worsened, that Northwest was responsible for compensation and affirmed the relevant portions of the Referee's order. The Board awarded attorney fees to claimant's attorney for defending claimant's compensation from reduction.

Northwest argues in its request for reconsideration that "this is a 'pure .307' case and compensability has never been an issue." This argument is wide of the mark. No application for a .307 order was ever submitted nor agreed to by Northwest. Claimant's compensation has been at risk throughout the proceedings. Northwest is responsible for payment of a reasonable attorney fee to claimant's attorney for services on review.

The request for reconsideration is granted. The Board adheres to and republishes its Order on Review dated March 28, 1986.

IT IS SO ORDERED.

JACK D. RICHARDSON, Claimant
Emmons, et al., Claimant's Attorneys
Acker, et al., Defense Attorneys
Roberts, et al., Defense Attorneys

WCB 84-13066 & 85-00971
April 24, 1986
Order on Reconsideration

The self-insured employer has requested reconsideration of the Board's Order on Review dated March 28, 1986, which found it responsible for claimant's left carpal tunnel syndrome. The employer contends that Liberty Northwest Insurance Corporation is the responsible party because the "date of disability" actually occurred in 1980, while Liberty was on the risk. Furthermore, the employer argues that claimant's subsequent employment exposure, while it was on the risk, did not aggravate, exacerbate, or accelerate his left underlying carpal tunnel syndrome condition.

Assuming for the sake of argument that the "date of disability" occurred in 1980 while Liberty was on the risk, the employer would remain responsible for claimant's left carpal tunnel syndrome condition. The preponderance of the medical and lay evidence establishes that claimant's subsequent employment while the employer was on the risk, either contributed to the cause of, aggravated, or exacerbated claimant's underlying disease. Bracke v. Baza'r, 293 Or 239, 250 (1982); Fred Meyer v. Benjamin Franklin Savings & Loan, 73 Or App 795, 799 (1985).

Claimant testified that his post-1981 employment activities, while the employer was on the risk, were more strenuous, resulting in a gradual worsening of his left wrist pain. Moreover, when claimant eventually sought medical treatment in 1984, again while the employer was on the risk, his complaints concerned bilateral difficulties. Prior to this time claimant's complaints had not pertained to left wrist problems. Finally, electrical studies administered in 1984 indicated that claimant's 1980 "moderate early left-sided carpal tunnel compression" had evolved into a carpal tunnel syndrome condition.

Accordingly, the employer's request for reconsideration is granted. On reconsideration, the Board adheres to and republishes its former order, effective this date.

IT IS SO ORDERED.

WANDA M. WOOD, Claimant
Olson Law Firm, Claimant's Attorney
Horne, et al., Defense Attorneys

WCB 84-10885
April 24, 1986
Order on Review (Remanding)

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of that portion of Referee Leahy's order which awarded claimant 25 percent (80 degrees) unscheduled permanent disability for chronic depression. On review, the insurer contends that: (1) claimant's underlying mental condition has not worsened; (2) the alleged worsening was not caused by her compensable injury nor its sequela; and (3) any emotional disability claimant sustained was not permanent.

Following our de novo review of the record, we note that reference is made to a June 1983 deposition involving Dr. Roberts. Apparently, the parties considered this deposition to be part of the record as Exhibit 46. The record on review does contain an Exhibit 46. However, the document is neither a deposition nor does it pertain to Dr. Roberts. Moreover, a deposition regarding Dr. Roberts does not appear anywhere in the record.

Pursuant to ORS 656.295(5) we may remand to the Referee for further evidence taking, correction or other necessary action, when we determine that a case has been improperly, incompletely, or otherwise insufficiently developed. We conclude that the omission of Dr. Roberts' deposition, referred to in the record as Exhibit 46, constitutes an improper, incomplete, or otherwise insufficient development of this case.

Accordingly, we remand to the Referee to reconsider this matter in light of our discovery. Should the Referee conclude that a hearing is necessary to identify the aforementioned exhibit

and include it in the record, he is directed to initiate the appropriate proceedings. The Referee is further directed to issue an order on reconsideration indicating the effect, if any, the inclusion of Dr. Roberts' deposition into the record has upon his original order.

ORDER

This case is remanded to the Referee for further action consistent with this order.

JERRY E. KASSAHN, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 82-11458
April 25, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Kassahn v. Publishers Paper Co., 76 Or App 105 (1985), rev den 300 Or 546 (1986). The court has ordered that claimant's aggravation claim be accepted. Therefore, consistent with the mandate, the insurer's formal denial dated December 2, 1982 is set aside and this claim is remanded to the insurer for acceptance, processing and the payment of compensation according to law.

IT IS SO ORDERED.

JAVIER O. LOPEZ, Claimant
Quintin B. Estell, Claimant's Attorney
Michael G. Bostwick, Defense Attorney

WCB 85-02209
April 25, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of that portion of Referee Daron's order that awarded claimant 96 degrees for 30 percent unscheduled permanent partial disability compensation for injury to the back in addition to the 32 degrees for 10 percent awarded by the Determination Order. Claimant cross-requests review of that portion of the Referee's order that denied his request for payment of temporary disability compensation at a rate higher than paid by the insurer. The issues are extent of disability and rate of temporary disability compensation.

The Board affirms and adopts that portion of the Referee's order that approved the insurer's calculation of the temporary disability compensation rate. On the issue of extent of unscheduled permanent disability we reverse.

Claimant is a 40 year old, fluently bilingual college graduate and citizen of the United States. He has taught school in Mexico and worked as a paralegal assistant and translator in the United States. Although the record is not specific as to the date, claimant left a teaching position in Mexico sometime between 1981 and early 1983 and returned to this country. He came to Oregon to seek work, but was unable to obtain a job commensurate with his level of education and past employment experience. Prior to his injury, he worked in Oregon in general farm labor and for a short time as a cook. Claimant was working as a tree planter when he was injured.

The preponderance of the medical and lay evidence is that claimant sustained soft tissue injuries to his back and right shoulder when he fell down a hillside. He continues to experience limitation of back range of motion due to pain. His physical

impairment is in the range of minimal. Although the medical opinions are far from unanimous on the point, we conclude that claimant is effectively precluded from performing the job he had when he was injured and similar heavy work. As stated, claimant was awarded 10 percent unscheduled permanent disability by the Determination Order. The Referee quadrupled the award after concluding that claimant's education, prior work experience and transferable skills should be disregarded in rating his extent of disability. The Referee based this decision on evidence that, prior to his injury, claimant had been unable to find suitable work. We are unable to accept this reasoning.

Unscheduled permanent disability is based upon 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 such factors as age, education, training, skills and work experience." ORS 656.214(5). As applied to this claimant, all of the factors enumerated in the statute are either neutral (age) or negative (all of the other factors). To disregard these negative factors in this case is unreasonable and unrealistic. See Igene G. Shaw, 37 Van Natta 239, 240 (1985). Taking into account all the relevant physical, social and vocational factors, we conclude that claimant was correctly compensated by the Determination Order award.

ORDER

The Referee's order dated June 14, 1985 is reversed in part and affirmed in part. That portion of the order that awarded an additional 96 degrees for 30 percent unscheduled permanent partial disability and allowed an attorney fee payable out of compensation is reversed. The Determination Order dated February 13, 1985 is reinstated and affirmed. The remainder of the Referee's order is affirmed.

MARIE E. RIDDELL, Claimant
MacMurray & Emerson, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-04372
April 25, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Thye's order that upheld the insurer's denial of claimant's right wrist carpal tunnel syndrome as a sequela of an industrial injury. Claimant also requests remand to consider the treating doctor's letter opinion which was generated in response to the Referee's order. The insurer in its brief cross-requests review of the Referee's finding that he had jurisdiction to decide whether claimant was entitled to medical services after the aggravation rights period passed. The issues on review are jurisdiction, remand, and compensability.

The question of the Referee's jurisdiction to decide whether claimant's request for medical services is related to her industrial injury was correctly decided by the Referee. ORS 656.245; Bowser v. Evans Products Co., 270 Or 841 (1974); Melvin L. Martin, 37 Van Natta 1119, 1120 (1985).

We may remand to the Referee if we find that the record has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5); Bailey v. SAIF, 296 Or 41 (1983). To merit remand it must be shown that material evidence was not

obtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985). The letter generated after the publication of the Referee's order purports to fill the gap in evidence presented at hearing that claimant's wrist sprain injury in 1977 materially contributed to the need for carpal tunnel surgery in 1984. Claimant had obtained prior conclusory opinions from the treating doctor that the industrial injury was a possible contributing cause and that he felt the industrial insurer was responsible to pay for everything that happened to claimant's wrist after the date of injury. However, the treating doctor never reported knowledge or consideration of intervening pain producing events which were treated by other doctors or claimant's knitting and crocheting activities. Even the proffered letter does not add anything except a conclusory opinion of causation in the absence of consideration of the subsequent unrelated injuries to the wrist. There was no showing why, if the letter could be read as supportive of claimant's position, the clarifying opinion of the treating doctor could not have been obtained before the hearing. No new physical evidence of a causal connection between the 1977 sprain injury and the 1984 request for carpal tunnel surgery was developed. Cf. Parmer v. Plaid Pantry #54, 76 Or App 405 (1985) (remand allowed when subsequent surgery provides evidence of causal connection which was only theoretical before surgery). Therefore, the Board finds that the record was not improperly, incompletely or otherwise insufficiently developed and denies the request to remand the case to the Referee.

The Board affirms and adopts the well reasoned order of the Referee.

ORDER

The Referee's order dated June 28, 1985 is affirmed.

YOLANDA T. SANTIAGO, Claimant
Joel Lieberman, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 85-01361
April 25, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Leahy's order that upheld the self-insured employer's denial of claimant's occupational disease claim for the left wrist. The issue is compensability.

Claimant is a licensed pharmacist who alleges that years of filling prescriptions resulted in a compensable left wrist occupational disease. Specifically, claimant asserts that she developed chronic tendinitis as a result of pulling down and tearing off tape from a tape dispenser up to 70 times per day for several years. The tape was used to affix prescription labels to pill bottles. The dispenser was situated on claimant's left at the worksite so that her left hand was routinely used to remove tape.

Claimant testified that she first noticed symptoms in April 1983. She visited Dr. Talley, her long-time family physician, complaining of pain and swelling in the left wrist. Dr. Talley made the tendinitis diagnosis. Claimant testified that she was initially unaware that the condition might be

work-related. She, therefore, did not discuss the possibility of a work connection with Dr. Talley until long after the initial visit. Claimant filed a claim with the employer's group health carrier and received benefits until October 1984, when she was terminated from her job for reasons unrelated to her alleged disease. Claimant's medical benefits terminated along with her employment.

The termination resulted in claimant's application for unemployment benefits. When those benefits were apparently denied, claimant sought the assistance of counsel. She testified that her attorney mentioned in passing the possibility of a connection between her employment and her wrist condition. Upon reflection, claimant remembered noticing left wrist pain each time she tore tape from its dispenser. She ultimately filed a workers' compensation claim in November 1984, more than 20 months after she first noticed symptoms. The claim was denied on the ground that claimant's condition did not arise out of her employment.

After filing her claim, claimant returned to Dr. Talley, again complaining of left wrist pain and swelling. On December 15, 1984 Dr. Tally issued a Form 827, indicating that claimant's condition was related to her work activity. Dr. Talley later issued a narrative report in which he confirmed his opinion that the condition was work-related. He was particularly convinced by the fact that after claimant left her job, her left wrist soon improved. The employer then sent claimant to Dr. Button for an independent medical examination. After the examination and a review of claimant's employment history, Dr. Button agreed with Dr. Talley that there was a "reasonable relationship" between claimant's work and her left wrist problems.

Five months later, however, Dr. Button retracted his opinion, stating that the possibility of a work-connection was "tenuous." The reason for Dr. Button's change of opinion is uncertain. There is no indication that he reexamined the claimant or received additional medical information that might alter his opinion. Because Dr. Button was not deposed and did not testify at the hearing, his change of opinion remains unexplained.

The Referee found the medical evidence to be in equipoise, although he recognized that the employer had offered no alternative explanation for the development of claimant's condition. Having found the evidence to be equally divided, the Referee affirmed the denial.

Our review of the record persuades us that claimant's claim is compensable. While it may be difficult to understand how claimant could work for the employer for several years without developing symptoms and then suddenly develop them approximately a year and a half before being terminated, there is no alternative explanation for the development of claimant's condition. Her off-the-job activities consist of the most sedentary of activities. Claimant's long-time treating doctor has unequivocally stated that the condition is work-related, and the only conflicting medical opinion is unpersuasive due to its unexplained inconsistency. On the balance of this record, we find that claimant has proved her claim.

ORDER

The Referee's order dated October 1, 1985 is reversed. Claimant's claim is remanded to the self-insured employer for

processing and payment according to law. Claimant's attorney is awarded $1,300 for services at hearing and $600 for services on Board review, both fees to be paid by the self-insured employer.

BARBARA S. WILLIAMS, Claimant
Doblie & Associates, Claimant's Attorneys
Meyers & Terrall, Defense Attorneys

WCB 84-01082
April 25, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of those portions of Referee Baker's order which: (1) set aside its denial of claimant's request for reimbursement of her travel expenses; and (2) assessed penalties and accompanying attorney fees for an unreasonable denial of the aforementioned request. On review, the insurer contends that claimant's travel expenses are not compensable. We agree and reverse.

Claimant was 22 years of age at the time of hearing. In August 1983, while working as a custodian, she suffered a compensable injury when her eyes were exposed to a cleaning chemical. She continued to work and, initially, did not seek medical treatment.

On September 14, 1983 claimant was examined by Dr. Meagher, her treating optometrist since 1975. Dr. Meagher noted that claimant's eyes were bothering her. No reference was made to an injury at work. The only apparent finding was a slight dry eye syndrome and "lid conjunctivia." Dr. Meagher prescribed corrective lenses. Claimant testified that she had scheduled her appointment to have the watering in her eyes checked, not to receive a new prescription for eyeglasses. On September 25, 1983 claimant returned to Dr. Meagher to have her new eyeglasses fitted.

On October 23, 1983 claimant returned to Dr. Meagher, complaining of a film that she had to pull off of her eye. Dr. Meagher quoted claimant as stating that "[her] company was worried." Suspecting the presence of an allergy, Dr. Meagher prescribed a mild decongestant and eyedrops.

Claimant returned to Dr. Meagher on three separate occasions in November 1983. Each time she complained of a burning sensation in her eyes. After each examination, Dr. Meagher changed claimant's eyedrop prescription. Dr. Meagher conceded that the burning in claimant's eyes could have been brought on by the eyedrops he had prescribed.

On November 20, 1983 claimant filed her claim, alleging that she had suffered chemical burns to both of her eyes. On December 9, 1983 the insurer accepted the claim as a nondisabling injury.

On December 15, 1983 Dr. Meagher recommended that claimant refrain from working for one week. At the end of that period, Dr. Meagher proposed that claimant be evaluated for an environmental allergy. The insurer apparently paid temporary total disability for this period. On December 23, 1983, noting that claimant's symptoms had dissipated, Dr. Meagher recommended that she be examined by a specialist.

In January 1984 claimant was examined by Dr. Kent, otolaryngologist, and Dr. Wilson, allergist. Although claimant's history was compatible with a possible allergic reaction, no

allergy was diagnosed. Dr. Wilson diagnosed an irritative effect from claimant's cleaning materials, but encouraged her to return to work as long as she avoided heavy exposure to these materials in a poorly ventilated area.

On January 17, 1984 the insurer issued a "de facto" denial of claimant's request for mileage reimbursement from claimant's home in the Salem and Corvallis area to Dr. Meagher's Oregon City office. Relying on then OAR 436-54-245(4) (since renumbered OAR 436-60-050(4), May 1, 1985), the insurer enclosed a check designed to reimburse claimant for her mileage to and from her home to the nearest available physician in her geographical area. The seven dates for travel reimbursement roughly correspond to the dates claimant was examined by Dr. Meagher. Claimant testified that all but one of the dates related to her eye condition and eyedrop prescriptions.

On January 25, 1984 the insurer issued a denial, contending that claimant's current disabling eye condition was not related to her accepted nondisabling claim. The insurer described its denial as a denial of claimant's separate claim for an allergic condition.

In March 1984 Dr. Meagher responded to the insurer's request for medical records concerning claimant's August 18, 1983 eye injuries. Dr. Meagher stated that he had not treated claimant for this condition, but that he had treated her for an unrelated condition. Subsequently, Dr. Meagher opined that claimant had sustained an allergic reaction as a result of her work activities. Dr. Meagher apparently based his opinion on claimant's lack of symptoms before her employment and her pattern of symptoms since her employment. Dr. Meagher conceded that he had not reviewed the allergists' reports which had been unable to diagnose an allergy. Furthermore, Dr. Meagher acknowledged that he had submitted an insurance claim form to a general health carrier in June 1984 indicating that claimant's eye condition was not work-related.

The Referee found that claimant had failed to establish that her disabling condition, which the insurer had denied in January 1984, was materially caused by her accepted August 1983 nondisabling eye injury. However, the Referee concluded that claimant should be reimbursed for her travel expenses to Dr. Meagher's Oregon City office. In addition, the insurer was assessed penalties and accompanying attorney fees for an unreasonable denial of these expenses.

OAR 436-54-245(4), (renumbered 436-60-050(4), May 1, 1985), provides that, if like treatment is available in the geographical area where a claimant resides, he or she is not entitled to mileage reimbursement for travel to another area for that treatment. In SAIF v. Holston, 63 Or App 348, 352 (1983), the court cited the provision, but did not rule upon its validity. However, in a footnote, the court stated that "[I]n other than the relocated worker situation, the rule makes reimbursement for travel expense subject to a test of reasonableness." Holston, supra., at 352.

This "reasonableness" issue becomes purely an academic exercise because in order to be compensable, claimant's travel expenses must also result from medical services for conditions resulting from the compensable injury for such period as the nature of the injury or the process of the recovery requires. See

ORS 656.245(1). Inasmuch as the preponderance of the evidence fails to establish that Dr. Meagher's treatments were compensable, it follows that claimant's travel expenses to and from these treatments are likewise noncompensable. Accordingly, the insurer's "de facto" denial should not be considered unreasonable and, furthermore, should be upheld.

ORDER

The Referee's order dated July 10, 1985 is affirmed in part and reversed in part. Those portions which set aside the insurer's "de facto" denial of claimant's travel expenses and assessed a penalty and accompanying attorney fees is reversed. The insurer's "de facto" denial is reinstated and upheld. The remainder of the Referee's order is affirmed.

DAVID C. DAINING, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-09355
April 28, 1986
Order on Reconsideration

After publication of the Board's Order on Review dated February 7, 1986, the Board received a fee agreement between claimant and his attorney and a request that the Board authorize a fee to claimant's attorney for services on Board review. The Board withdrew its Order on Review to consider the arguments of the parties.

The Board's Order on Review dated February 7, 1986 is adhered to and republished with the following modifications. Claimant's attorney fee agreement is approved. OAR 438-47-010(3). Claimant's attorney is allowed as a reasonable attorney fee 25 percent of the increased compensation awarded by the Board, not to exceed $3,000. OAR 438-47-040(1). The date of the Determination Order referred to in the Order on Review was August 2, 1984.

IT IS SO ORDERED.

IVAN N. DOAK, Claimant
Quintin B. Estell, Claimant's Attorney
Davis, et al., Defense Attorneys

WCB 85-03646
April 30, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Seifert's order which: (1) found that his back injury claim had not been prematurely closed; and (2) affirmed the March 20, 1985 Determination Order that awarded no unscheduled permanent disability. On review, the issues are premature closure and, in the alternative, extent of permanent disability.

The Board affirms the order of the Referee with the following comment.

Inasmuch as claimant's appellant's brief was clearly untimely filed, it has not been considered on review. OAR 438-11-010(3); Vanessa Dortch, 37 Van Natta 1207 (1985); and Dan W. Hedrick, 37 Van Natta 1200 (1985).

ORDER

The Referee's order dated July 24, 1985 is affirmed.

MICHAEL P. DUNDON, Claimant
Steven C. Yates, Claimant's Attorney
Cowling & Heysell, Defense Attorneys
Bottini & Bottini, Defense Attorneys

WCB 84-08785 & 84-08786
April 30, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Loggers Assurance Company (Loggers) requests review of Referee Michael Johnson's order, as adhered to on reconsideration, that set aside its denial of claimant's accidental injury claim involving the right knee and affirmed Mission Insurance Company's (Mission) denial of claimant's aggravation claim also for the right knee. The issue is responsibility. We reverse.

Claimant compensably injured his right knee on February 25, 1984 while employed by Mission's insured. He continued to work for approximately five days before seeking treatment. Dr. Ross diagnosed a strain of the right knee lateral collateral ligament. He offered conservative treatment and anticipated no permanent residuals from the injury.

Claimant next visited Dr. Schachner, who became the attending physician throughout the remainder of the claims period. Dr. Schachner confirmed the diagnosis of a lateral strain and found little in the way of objective knee pathology. He released claimant to return to work on March 26, 1984 and anticipated no permanent impairment.

Claimant did return to work, but for a new employer insured by Loggers. After working for the new employer for approximately two weeks, claimant suffered a second right knee injury on April 11, 1984. Claimant dismounted a piece of heavy equipment and, upon alighting, suffered a renewed strain of the right knee. He immediately returned to Dr. Schachner, who observed "slight tenderness" over the medial aspect of the right knee, but "sharp discomfort" over the lateral aspect upon palpation. Dr. Schachner suspected a meniscus tear, ordered an arthrogram and took claimant off work. The arthrogram proved essentially negative.

Claimant first filed a claim with Mission, alleging an aggravation of the original knee condition. When Mission issued a denial on July 3, 1984 claimant filed with Loggers, alleging the occurrence of a new contributory injury in the course of the later employment. Loggers issued a denial two days after receipt of the claim. Compensability was conceded by both insurers and the Workers' Compensation Department soon issued an order designating Mission as paying agent pending resolution of the responsibility issue. ORS 656.307. Mission had paid benefits from the time of claimant's initial injury through the date of the second. It unilaterally closed the claim and issued its denial on April 25, 1984.

Some time after filing his second claim claimant signed a statement prepared by an unknown party, indicating that his pain never resolved following the first injury. The statement also indicated that claimant's condition following the second incident was essentially the same as it had been following the first, and that the symptoms had remained constant. Claimant's testimony at hearing generally corroborated his written statement, although at hearing claimant indicated that his pain and other symptoms worsened following the second incident. He also stated that the medial aspect of his knee was symptomatic for the first time following the second incident.

The medical evidence consists primarily of the reports and deposition testimony of Dr. Schachner. In his May 14, 1984 report, Dr. Schachner refers to claimant's second incident as "a new and separate injury" that "insulted" the effects of the first. He testified by way of deposition, however, that claimant's second injury did not objectively contribute to the lateral condition caused by the first. He noted the new medial symptoms generated by the second incident, however.

Although he noted that no objective evidence of knee pathology had been discovered either before or after the first or second injuries, the Referee concluded that claimant suffered a "condition" consisting largely of subjective right knee pain. He further concluded that claimant's second injury worsened the pain "condition," thereby allocating responsibility to Loggers, the second insurer. In reaching his holding, the Referee cited Industrial Indemnity v. Kearns, 70 Or App 583 (1984), for the proposition that a rebuttable presumption exists that a claimant's last injury contributed independently to the worsened condition, and that the last insurer is responsible.

From the outset we disagree with the Referee's reliance on Kearns. As we noted in Stanley C. Phipps, 38 Van Natta 13 (1986), the Kearns presumption applies in cases involving multiple accepted injuries involving the same body part. It does not apply when the question is whether a claim is compensable as an aggravation of an old injury or as a new contributory incident. The present case involves that question. Kearns does not apply.

Further, although the question is a close one, we disagree with the Referee that the second insurer is responsible. In an aggravation/new injury context, allocation of responsibility is dependent on whether claimant's present condition is a continuation of his original injury or the result of a subsequent incident that independently contributed to his condition in a material way. See Ceco Corp. v. Bailey, 71 Or App 782, 785 (1985). If the second injury merely aggravates the effects of the first and results in a second period of disability without independently contributing to claimant's condition, the first insurer remains liable. Smith v. Ed's Pancake House, 27 Or App 361 (1976).

We recognize that claimant experienced new symptoms in the form of medial ligament pain following the second incident. While it may be arguable that these new symptoms resulted from a "contribution" by the second incident, it is difficult to find the contribution to be "material" when claimant apparently suffered no objective pathology either before or after the second incident. It appears more likely to us that claimant developed a knee "condition" at the time of his first injury and that the condition never resolved. The second incident merely exacerbated claimant's pain without contributing to the pathology of the right knee. We are therefore persuaded that the "cause" of claimant's condition was the first work injury and that the second incident represented, at most, an aggravation of the first. Mission, the first insurer, is responsible.

ORDER

The Referee's order dated July 31, 1985, as adhered to on reconsideration on August 27, 1985, is reversed. Loggers

Assurance Company's denial of claimant's right knee claim is reinstated. Mission Insurance Company's denial of claimant's right knee aggravation claim is set aside and the claim is remanded to Mission for processing and payment according to law. Mission shall reimburse Loggers Assurance Company for all claim costs paid pursuant to the Referee's orders.

NORMA J. FOSTER, Claimant
Ringo, et al., Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 85-03750
April 30, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Seifert's order which dismissed her request for hearing as abandoned. On review, claimant contends that she has established good cause for her failure to appear at hearing.

Following our de novo review of the record, which includes claimant's attorney's October 14, 1985 affidavit, we are not persuaded that claimant has established good cause for her failure to appear at hearing. Furthermore, inasmuch as the self-insured employer requested dismissal, we infer that it would not be prejudiced by granting the request. Accordingly, we affirm the Referee's order of dismissal. See OAR 438-06-070; Michael R. Douglas, 37 Van Natta 65, 66 (1985).

ORDER

The Referee's order dated September 30, 1985 is affirmed.

LA WEDA N. HORNSETH, Claimant
SAIF Corp Legal, Defense Attorney
Liberty Northwest, Defense Attorney
Acker, et al., Claimant's Attorneys

WCB 84-09942 & 85-03026
April 30, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant appears without counsel and requests review of Referee Holtan's order that upheld the denial of Liberty Northwest Insurance Corporation that claimant sustained an injury to her back in the course of her employment and upheld the denial of the SAIF Corporation that claimant's accepted back injury was a material contributing cause of claimant's present disability. The issues on review are compensability of an alleged injury on October 5, 1984 as a new injury or the aggravation of claimant's 1977 back injury.

Claimant was assisted by counsel at hearing. The Referee considered medical reports, a deposition, and the testimony of claimant and the employer. The Referee found that claimant was not a truthful witness based on demeanor, substance of testimony, and manner of testifying at the hearing. The Referee found that the employer was totally credible based on demeanor and substance of testimony. The Referee found that claimant's back condition did worsen during the first week of October 1985 but that there was not a work-related incident nor a contribution by prior industrial injuries to the worsening of claimant's back condition.

Based on the record as it was developed before the Referee, the Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated September 23, 1985 is affirmed.

RONALD D. McCARTY, Claimant
Peter O. Hansen, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 84-01350
April 30, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of those portions of Referee Galton's order which: (1) awarded claimant additional temporary total disability; (2) declined to grant permission to offset overpaid temporary disability benefits created by a prior unappealed Determination Order; and (3) increased claimant's scheduled permanent disability award for loss of use of his right leg (knee) from 15% (22.5°), as awarded by a February 17, 1984 Determination Order and prior awards, to 35% (52.5°). On review, the insurer contends that claimant's awards of temporary and permanent disability should be reduced and that it is entitled to an offset.

The insurer further requests remand for the taking of "new" evidence pertinent to the computation of claimant's temporary disability. This "new" evidence apparently will pertain to materials which allegedly indicate claimant received unemployment benefits while he was also receiving temporary total disability benefits. The insurer contends that it had no reason to believe that claimant was simultaneously receiving these benefits and, thus, argues that it should not have been expected to uncover evidence indicating that claimant was engaging in such conduct.

We deny the insurer's request for remand. We are not persuaded that this evidence was not obtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985).

We reverse that portion of the Referee's order which awarded claimant additional temporary disability benefits.

Claimant sustained a compensable right knee injury in September 1979. Dr. North, claimant's treating orthopedist, eventually performed a medial meniscectomy. A November 1982 Determination Order closed the claim, awarding claimant approximately one year of temporary disability and 15 percent scheduled permanent disability.

Thereafter, claimant became employed as an accountant through a six month wage subsidy program. He apparently continued to work as an accountant until April 1983.

On May 13, 1983 claimant returned to Dr. North, who noted that claimant complained of right knee pain with activity. Claimant did not describe any complete instability or locking in the knee. Dr. North concluded that claimant was medically stationary and had a mild amount of decreased durability in his knee. These observations were similar to Dr. North's findings in July 1982, when he last examined claimant, at which time Dr. North had recommended claim closure.

In his May 1983 chart note Dr. North further stated that claimant "could be improved somewhat from physical therapy and hamstring stretching and quad strengthening" and noted that claimant "may need some type of patellar procedure at some point in the future, but none is planned at the present time." Claimant was instructed to return to Dr. North following his physical therapy series.

Claimant's discomfort continued, prompting his return to Dr. North in August 1983. Suspecting a posterior horn tear, Dr. North scheduled an arthrogram. The arthrogram confirmed Dr. North's suspicion, also revealing a mild lateral patellar shift and some degenerative changes.

Concluding that the tear in the posterior horn was most probably a natural progression from claimant's compensable injury, Dr. North recommended an arthroscopy. Dr. North further opined that claimant's "time loss benefits should start on the day of surgery." The operation was performed on September 14, 1983, which was the date the February 1984 Determination Order designated for reopening of the claim.

The Referee found that the claim should be reopened effective May 13, 1983. Dr. North's chart note reference to a potential improvement in claimant's condition, persuaded the Referee that claimant's condition had worsened as of that date. We disagree with the Referee's conclusion.

Claimant is entitled to the reopening of his claim when the evidence establishes that his condition has worsened since the last arrangement of compensation and that the worsening is causally related to the industrial injury. See generally, Clark v. SAIF, 70 Or App 150, 153 (1984).

Following our review of the medical and lay evidence, which included claimant's credible testimony, we are persuaded that claimant's condition did not worsen until the date of claimant's surgery. Accordingly, the claim should be reopened effective September 14, 1983. Claimant's recurring symptoms, as recited in the May 13, 1983 chart note, closely resemble those described in Dr. North's July 1982 closing examination. Furthermore, Dr. North's suggestion that claimant undergo physical therapy and other supportive measures did not cause him to alter his opinion that claimant's condition was medically stationary. Moreover, Dr. North's ultimate conclusion that claimant's temporary disability compensation should commence once surgery was performed stands unchallenged.

The remainder of the Referee's order is affirmed.

ORDER

The Referee's orders dated January 31, 1985 and February 13, 1985 are affirmed in part and reversed in part. That portion which increased claimant's temporary total disability award is reversed. The February 17, 1984 Determination Order's award of temporary total disability is reinstated. The remainder of the Referee's orders are affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the insurer.

BILL STANAWAY, Claimant
Leonard W. Pearlman, Dept. of Justice

WCB CV-85004
April 30, 1986
Crime Victim Compensation Order
on Review

Claimant requested review by the Workers' Compensation Board of the Department of Justice Crime Victim Compensation Fund ("Fund") Findings of Fact, Conclusions and Order on Reconsideration dated August 15, 1985. The Fund denied claimant's claim for compensation as the victim of a crime under ORS 147.005 to 147.365. The Fund based its denial on: (1) claimant's failure to report the crime within 72 hours to the appropriate law enforcement officials and the lack of "good cause" for this late notification; and (2) notations in claimant's medical records that his injuries were sustained in a fall, not from criminal actions. We review pursuant to ORS 147.155. At claimant's request, an evidentiary hearing was conducted on March 21, 1986 by a special hearings officer appointed by the Board. On April 9, 1986 the special hearings officer entered Findings of Fact, Conclusions and a Proposed Order, which we set forth in relevant part.

"FINDINGS OF FACT

"Claimant testified that two men accosted him in the early morning hours of December 18, 1984. The assailants struck him from behind, knocking him to the sidewalk. His wallet and a baseball cap were taken. Claimant received some preliminary first aid from the owners of a nearby restaurant. Although his left arm bothered him, he initially believed the injury was minor.

"Claimant stated that he called the Salem Police Department on December 18, 1984 and again on December 19, 1984. Each time he asked whether his wallet had been recovered. He also reported the attack. On each occasion claimant was advised that he would have to come to the police station to make a written report of the incident.

"Following the incident claimant's left elbow and arm continued to swell and his pain intensified. He found it increasingly difficult to perform his daily chores and activities. Finally, on December 20, 1984, he sought medical care from Dr. Reid. X-rays confirmed the existence of a transverse supracondylar fracture of the left humerus. Thereafter, claimant was referred to Dr. Shaw, who performed surgery later that same day.

"The medical history taken by Dr. Shaw indicates that claimant injured his left elbow when he 'slipped on some ice and fell.' Claimant conceded that he might have initially advised Dr. Reid's nurse that he had slipped and fallen, because he was embarrassed to admit that he had been 'mugged.' However, he insisted that he told Dr. Shaw and the Salem Hospital personnel of the attack.

"For the limited purpose of impeachment, medical records from Dr. Reid, Dr. Shaw, and the hospital were admitted into evidence. Most of the documents were already present in the record, but a few of the documents contained additional medical histories and descriptions of claimant's injury. Each of the histories described the incident leading to claimant's injury as a 'fall' or as a '[slip] on the ice.' There is no mention of an assault, robbery, or any other type of crime.

"While claimant was recuperating in the hospital a social worker advised him that he might be eligible for benefits under the Crime Victim's Program. He was given a phone number to call in order to request an application for benefits. Claimant requested these application materials prior to his release from the hospital on December 22, 1984.

"Upon his return home, claimant found it extremely difficult to fend for himself. He particularly had trouble dressing. He primarily remained at home and had his meals delivered. Claimant considered visiting the police station to file a written report, but decided to wait due to the Christmas holidays. Although claimant did not recall receiving further medical care between his release from the hospital and the end of the calendar year, the record indicates that Dr. Shaw casted the left arm on December 26, 1984.

"On December 31, 1984 claimant came to the front desk of the Salem Police Department and reported the December 18, 1984 incident. Inasmuch as claimant could not describe the assailants and since there were no additional leads, the case was placed on inactive status. In early June 1985 claimant's wallet turned up at the Department of Motor Vehicles. It was unclear how they came into posssession of the wallet. Claimant's cap has apparently never been found.

"For the limited purpose of impeachment, Ms. Robbie Guttry, a Communications Supervisor for the Salem Police Department, was called as a witness. Ms. Guttry is a ten year veteran with the Department and in December 1984 was a Communications Center Operator. The duties of the operator include receiving incoming calls to the Department. Ms. Guttry testified that when a telephone call is received reporting an assault or robbery, standard operating procedure requires that an officer be sent out to investigate. It is contrary to standard operating procedure to require a victim to come to the station and file a report. Ms. Guttry further testified that claimant's incident report indicated that he had first reported the attack on December 31, 1984. If claimant had reported the attack earlier, Ms. Guttry testified that according to standard operating procedure the incident report would have indicated the earlier date.

"Claimant testified that he had checked with Salem Police Department officials concerning the length of time that phone messages are retained. He was told that messages are destroyed following the expiration of ninety days.

"For the limited purpose of impeachment, claimant was allowed to submit a document listing the number of street robberies reported in Salem between January 1984 and September 1985. Finally, also for impeachment purposes, a Department of Commerce 'Climatological Data' summary was admitted. The summary depicts the amount of precipitation and temperatures during December 1984. Claimant stated that on the date of the attack the temperature was approximately 30 degrees and there was no ice on the sidewalk.

"Based upon my personal observation of Ms. Guttry, I find that she is a credible and reliable witness. Based upon my personal observation of claimant I detected nothing from his mannerisms and general demeanor which would cause me to doubt his credibility as a witness. However, based on the documentary and impeachment evidence, claimant's credibility and reliability is questionable.

CONCLUSIONS

"Pursuant to ORS 147.015, claimant is entitled to an award of compensation under the Compensation of Crime Victims Act, if, among other requirements:

> "(1) [He] is a victim, or is a dependent of a deceased victim of a compensable crime that resulted in a compensable loss of more than $250; and
>
> "(2) The appropriate law enforcement officials were notified of the perpetration of the crime allegedly causing the death or injury to the victim within 72 hours after its perpetration, unless the department finds good cause exists for the failure of notification."

'Good cause for failure to notify the appropriate law enforcement officials within 72 hours after the perpetration of the crime' means physical or mental incapacity to report the crime as required. OAR 137-76-010(6).

"The standard of review for cases appealed to the Board under the Compensation of Crime Victims Act is de novo on the entire record. ORS 147.155(5); Jill M. Gabriel, 35 Van Natta 1224, 1226 (1983). Following my de novo review of the documentary and testimonial evidence, I find that the preponderance of the credible evidence fails to establish that claimant is entitled to benefits.

"The preponderance of the persuasive evidence indicates that claimant failed to notify the appropriate law enforcement officials within 72 hours. Claimant insists that he placed calls to the Police Department on successive days immediately following the attack. He further alleges that he was told to make a written report on both occasions. However, Ms. Guttry testified that such information would be contrary to standard operating procedure in that an officer would have been promptly dispatched to interview the victim. Moreover, Ms. Guttry stated that had claimant contacted the police prior to his December 31, 1984 visit, the initial incident report would have contained a notation documenting this prior contact. Even claimant admitted that the Department kept phone messages for 90 days. Thus, if he had called the police on December 18 and 19, 1984 as he alleges, these phone messages should have still been in existence on December 31, 1984, when the incident report was filed.

"The 72-hour notification requirement can be overlooked if 'good cause' is established for the late notification. However, the evidence fails to preponderate in favor of a finding of 'good cause.' 'Good cause' means physical or mental incapacity to report the crime as required. OAR 137-76-010(6). Assuming that claimant's physical infirmities prevented him from reporting the attack prior to his hospitalization, he still failed to notify law enforcement officials until December 31, 1984. This date was some nine days after he was released from the hospital. Claimant contends that due to his inability to care for himself he remained at home and could not personally report the attack as he asserts he was told he must do. As discussed above, the evidence indicates

that a telephonic report would have been sufficient to trigger the investigation. Furthermore, the record indicates that claimant was able to seek treatment from Dr. Shaw on December 26, 1984. Thus, he was not totally immobilized during this recuperative period. Claimant also argues that he chose not to report the attack because of the holiday season and his understanding that the police were operating with a 'skeleton crew,' during this time. I find this argument unpersuasive, especially when claimant ultimately filed his report on December 31, 1984, a date very much identified with the holiday season, when it can be reasonably assumed the department's facilities would also be severely tested.

"Finally, assuming for the sake of argument, that the evidence established timely notification, the preponderance of the credible evidence fails to establish that claimant was the victim of a crime. Claimant acknowledged that he might have told Dr. Reid's nurse that he slipped and fell on the ice, rather than tell her of the 'embarrassing' attack. However, he insists that he advised Dr. Shaw and the rest of the hospital personnel of the physical assault. None of the medical records support claimant's version. All of the medical histories refer to a slip and/or fall. As discussed above, these documents suggest a number of inconsistencies and call claimant's credibility into question. Since claimant's credibility as a witness is critical to his claim for benefits, these inconsistencies significantly diminish the general persuasiveness of his evidence. Accordingly, based upon the credible evidence, I am unable to conclude that claimant's request for benefits is compensable."

We adopt the above findings and conclusions and, in conformity therewith, order that the Department of Justice Crime Victim Compensation Fund's Findings of Fact, Conclusions and Order on Reconsideration dated August 15, 1985 be affirmed.

IT IS SO ORDERED.

DEBRA A. YAMADA, Claimant
Malagon & Moore, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-13320
April 30, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of Referee Daron's order that increased claimant's award for unscheduled permanent partial disability from the 15 percent (48 degrees) awarded by Determination Order to 35 percent (112 degrees). The issue is extent of disability.

On our de novo review of the record, we judge claimant's impairment to be in the lower end of the mildly moderate category. Considering claimant's impairment together with the pertinent social and vocational factors, see ORS 656.214 (5); OAR 436-30-380 et seq., we find that claimant is adequately and appropriately compensated for the permanent loss of earning capacity due to her compensable injury by an award of 48 degrees for 15 percent unscheduled permanent partial disability. We, therefore, reinstate the Determination Order award.

ORDER

The Referee's orders dated September 18, 1985 and

October 11, 1985 are reversed. The Determination Order dated September 5, 1984 with its award of 48 degrees for 15 percent unscheduled permanent partial disability for injury to claimant's back is reinstated and affirmed.

KENNETH BALZER, Claimant
Bernt A. Hansen, Claimant's Attorney
Bottini & Bottini, Defense Attorneys

WCB 84-04887
May 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Michael Johnson's order which: (1) affirmed that portion of the Determination Order dated April 4, 1984 which found claimant was medically stationary on February 24, 1984; (2) awarded 48 degrees for 15 percent unscheduled permanent partial disability in lieu of the Determination Order award of 16 degrees for 5 percent unscheduled permanent partial disability for injury to claimant's upper back; and (3) ordered the insurer to pay for one chiropractic adjustment per month after October 1, 1984. Claimant contends that he is entitled to unlimited chiropractic adjustments for treatment of his industrial injury. The insurer cross-requests review of those portions of the order which increased the award for unscheduled permanent partial disability and which ordered payment for any chiropractic adjustments after October 1, 1984. The issues on review are premature closure, compensability and frequency of chiropractic treatment, and extent of unscheduled permanent partial disability.

Claimant was injured on July 30, 1983 in a motor vehicle accident in the course of his employment as a gravity meter reader for a petroleum exploration company. He suffered whiplash-type injuries to his upper back. He has never returned to work since the date of injury. He has obtained treatment only in the form of chiropractic adjustment. The claim was first closed by Determination Order dated April 5, 1984 which awarded 16 degrees for 5 percent unscheduled permanent partial disability, temporary disability compensation, and found claimant was medically stationary on February 24, 1984.

Claimant has obtained treatment from two chiropractors: Dr. Ken Kelley in Sheridan and Dr. Strom in Lincoln City. Claimant has been examined by orthopedic surgeons Blake and Scheinberg as consultants to his treating chiropractors. Dr. Blake found claimant's only impairment was a 50 percent limit on rotation and recommended three weeks of physical therapy. After the physical therapy failed to produce any results by February 24, 1984 Dr. Blake reported that no further treatment was warranted. Dr. Scheinberg examined claimant in April 1984 and found no impairment, recommended that claimant return to work without limitation, and reported his opinion that claimant overdramatized his symptoms. Dr. Blake concurred with Dr. Scheinberg's opinion.

Two orthopedic surgeons, a rheumatologist, and a chiropractic orthopedist examined claimant at the insurer's request. Drs. Thompson and Utterback, orthopedic surgeons, agreed with the report of Dr. Scheinberg that claimant had no impairment and could return to work. Dr. Thompson suggested that claimant might limit the weight of his backpack without providing a specific limit and opined that continuing chiropractic treatment was worsening claimant's symptoms. Dr. Thompson also reported

that claimant did not report pain in his back but did report an occasional uncomfortable stiffness. Dr. D. Wayne Kelley, chiropractic orthopedist reported that claimant had no impairment and that X-ray examination revealed no spinal abnormality. He opined that no treatment was necessary. Dr. Rosenbaum, rheumatologist, reported claimant's physical examination was completely normal and opined that there was no justification for any type of therapy. He stated that the osteoarthritis observable by some X-ray exposures was normal for claimant's age and was not related to his industrial injury. He noted that claimant had received treatment for almost two years prior to the accident for what Dr. Ken Kelley described as an upper thoracic strain and brachial plexus condition. He also felt claimant overdramatized his complaints.

The primary treating chiropractor, Dr. Ken Kelley, felt that claimant suffered a loss of mobility of the lower three cervical vertebrae due to the accident and hypermobility of the upper two cervical vertebrae which resulted in the appearance of a normal range of motion but which was actually a pain producing means for the body to accommodate the injury. By using a technique developed by a teacher at a chiropractic college, Dr. Kelley measured angles of movement of cervical vertebrae in successive X-rays to arrive at an estimate of claimant's impairment of approximately 30 percent of the whole person.

The other chiropractor who adjusted claimant was Dr. Strom. He reported that claimant needed palliative care when his condition was aggravated by cold weather. The form of aggravation was that claimant's cervical and thoracic spine became somewhat stiff. Otherwise, claimant had full range of motion and mild disability "in common terminology." He also felt claimant could return to regular work as of February 24, 1984.

Claimant obtained chiropractic treatment 96 times by January 1985 of which at least 35 were after the publication of the Determination Order in April 1984.

The Referee found that claimant had limited credibility. He based that finding on inconsistencies noted by the doctors in the record and on claimant's actions at hearing. He specifically took notice of claimant's ability to rotate his head when seated at the counsel table as compared to his demonstration on the witness stand and claimant's demeanor and method of answering questions as a witness. The Referee had the opportunity to observe the witness at two hearings separated by two months.

On review of the evidence, the Board agrees with the Referee's assessment of claimant's credibility. It follows from that finding that the chiropractic opinions that rely largely on claimant's complaints are also not trustworthy as objective observations and opinions of claimant's limitations. Therefore, we accord the opinions of the treating chiropractors little weight. See Richard L. Schoennoehl, 31 Van Natta 25, aff'd mem., 54 Or App 998 (1981).

Comparing the opinions of six doctors finding no justification for therapy and no reason for claimant not to return to work and claimant's own testimony that he does not suffer from pain but occasional stiffness related to cold, damp weather, the

Board is persuaded that chiropractic treatment for claimant's industrial injury was probably not justified in any amount after the first part of April 1984. However, the insurer did not deny payment for chiropractic treatment until January 25, 1985. Until the denial, claimant had no notice that any aspect of his chiropractic treatment was not accepted as palliative continuing care necessitated by his permanent partial disability. The denial can only relate back for 60 days before its issuance. Billy J. Eubanks, 35 Van Natta 131 (1983). Consequently, the denial was only effective to deny treatment after November 25, 1984 and the insurer shall pay for the chiropractic treatments through that date. After November 25, 1984 there was no further justification for treatment, therefore, the insurer need pay for no chiropractic treatments after that date.

The remaining issues relate to the Determination Order dated April 4, 1984. At the time of the publication of the Determination Order, there was no evidence that claimant was not medically stationary. The Referee and the Determination Order are affirmed. Sullivan v. Argonaut Ins. Co., 73 Or App 694 (1985).

The Referee found that claimant's impairment was in the mild to mildly moderate range. We are persuaded by the opinions of the doctors and claimant's testimony and actions at hearing that claimant's impairment was in the minimal range. Claimant has no significant limitations on his physical exertions and has been released to return to work. Claimant is age 35 and has an associate degree. Social and vocational factors are considered in the totality of claimant's circumstances. OAR 436-30-380; Howerton v. SAIF, 70 Or App 99 (1984); Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982).

The Board finds that claimant was adequately compensated for his permanent disability by the award of 16 degrees for 5 percent unscheduled permanent partial disability. Therefore, the Referee's order is reversed and the Determination Order dated April 5, 1984 is reinstated in its entirety.

Claimant has succeeded on one part of one of his claims for compensation. Therefore, he is entitled to attorney fees. The claim upon which claimant prevailed was the frequency of chiropractic care between October 1, 1984 and November 25, 1984. There was no increase in compensation payable to claimant awarded by this order and there was no denial overturned. Therefore, claimant's attorney is awarded a fee of 25 percent of the amount claimant would be relieved of paying to the chiropractor for services between October 1, 1984 and November 25, 1984 as a result of this order. The fee is to be paid by claimant out of the award of payment for medical services and is not an award to be paid by the insurer in addition to payment for medical services. OAR 438-47-010(4).

ORDER

The Referee's order is reversed in part and affirmed in part. Those portions of the order which ordered payment for chiropractic treatment at the rate of one visit per month after October 1, 1984, and which awarded 48 degrees for 15 percent unscheduled permanent partial disability in lieu of the Determination Order dated April 5, 1984 are reversed. The insurer is ordered to pay for all chiropractic treatment through November 25, 1984 but no chiropractic treatment after that date. The April 5, 1984 Determination Order is reinstated in its

entirety. The remainder of the order is affirmed. Claimant's attorney is awarded 25 percent of the amount claimant would be relieved of paying to the chiropractor for services between October 1, 1984 and November 25, 1984 as a result of this order to be paid by claimant out of the award of payment for medical services and is not an award to be paid by the insurer in addition to payment for medical services.

JUNE M. BROWN, Claimant
Stark & Hammack, Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

WCB 84-02181
May 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of those portions of Referee Brown's order that set aside its denial of claimant's claim for injury to her left foot and set aside the Determination Order of July 11, 1984 on the ground of premature closure. The issues are compensability, premature closure and, assuming the claim was not prematurely closed, extent of scheduled disability for claimant's left knee.

Claimant injured her left foot at home in early 1984 when she dropped a bag of groceries on it. Claimant contends that because of a previous industrial injury to her left knee, her knee gave way causing her to drop the bag of groceries on her foot. Claimant contends, therefore, that her left foot injury is causally related to her industrial injury and compensable.

Claimant injured her left knee on August 31, 1982 when she kneeled on a rock while planting bulbs at a bulb farm. Claimant's initial treating orthopedist could find no objective evidence of serious injury to claimant's knee and administered conservative treatment. Claimant continued to experience considerable pain in her knee and in January 1984 she began treating with another orthopedist, Dr. Bert. During arthroscopic exploration of claimant's knee on February 7, 1984, Dr. Bert discovered a tear in the posterior horn of the lateral meniscus and performed a lateral meniscectomy.

A month after the surgery, Dr. Bert's chart notes reflect that claimant's knee was weak, but improving. Dr. Bert decided to start claimant on formal physical therapy. Claimant received physical therapy for a month and then was reexamined by Dr. Bert on April 20, 1984. At that time, Dr. Bert noted no swelling of the knee and good range of motion. He discontinued physical therapy and stated that he anticipated performing a final evaluation the following month.

When claimant returned to Dr. Bert on May 18, 1984, he noted that claimant's knee was improved. He also noted that the dorsum of claimant's left foot was tender and swollen and stated that claimant had told him that her knee had given out and she had dropped a bag of groceries on her foot. Dr. Bert X-rayed claimant's foot, found no abnormalities and recommended no treatment for this injury. In June 1984 Dr. Bert declared claimant's knee medically stationary noting good range of motion, no instability and no swelling. With regard to claimant's foot, he noted swelling over the anterior medial aspect of the left ankle. Dr. Bert prescribed pain medication for claimant's foot condition and asked her to return in three weeks. No return visit is reflected in the record. Claimant's left knee claim was closed

by Determination Order dated July 11, 1984 with an award of 7.5 degrees for 5 percent scheduled permanent partial disability.

In August 1984 claimant began treating with another orthopedist, Dr. Strukel. She told Dr. Strukel about the incident with the groceries and also mentioned two apparently subsequent incidents involving her left foot. The first incident was a fall while walking with crutches. The other incident involved a truck bumper which had been dropped or knocked off of something onto claimant's foot. Dr. Strukel recommended conservative treatment.

In a letter to claimant's attorney in September 1984, Dr. Strukel opined that "it is very reasonable to assume that since the foot injury occurred after the knee surgery and she had apparently not rehabilitated the knee well, that the knee could have given way on her, and she dropped the bag of groceries on her foot."

Claimant's left foot improved until October 1984 when she reported to Dr. Strukel that she had reinjured it after tripping over her dog. The following month claimant reported to Dr. Strukel that she had again injured her left foot after her husband's truck had become stuck and she had attempted to help him extricate it. Claimant was operating a tow vehicle and hurt her foot when, at one point, she had to step hard on the clutch. Dr. Strukel continued to administer conservative treatment.

In December 1984 the insurer denied the compensability of claimant's left foot condition. Claimant requested a hearing on this denial.

At the hearing, claimant testified that her original left foot injury occurred when she was carrying a sack of canned food into her house from her car across uneven ground. Claimant described the ground on which she was walking as a series of stones, "a stone here and a stone there." She stated that she went to take a step and her knee felt like it was folding up. She attempted to catch herself and dropped the groceries on her foot. Claimant stated that her leg had never folded up like that prior to this incident. Claimant also recounted an incident not mentioned elsewhere in the record in which she injured her left foot when she dropped a bottle of shampoo on it.

The Referee expressed considerable doubt concerning the compensability of the claim for claimant's left foot injury but finally ruled it compensable. Given his conclusion concerning the compensability of claimant's left foot injury and the fact that this injury was not medically stationary at the time of the July 1984 Determination Order, the Referee set aside the Determination Order and remanded the case to the Evaluation Division for further proceedings.

Claimant's left foot condition was compensable, at least initially, if there was a direct causal connection between her compensable left knee condition, the giving way of her left leg, the dropping of the groceries and the injury to her foot. See Smith v. Brooks-Scanlon, 54 Or App 730, 735 (1981), rev. den. 292 Or 450 (1982); Eber v. Royal Globe Ins. Co., 54 Or App 940, 943 (1981); Ernest A. Annette, 35 Van Natta 35, 38 (1983). For the reasons which follow, we conclude that claimant has failed to

establish a causal connection between her compensable left knee injury and the giving way of her left leg.

First, there is little, if any, evidence of instability or giving way in claimant's left knee throughout the history of her claim for that condition. Indeed, in testimony at the hearing claimant expressly denied that she had experienced any giving way in her knee prior to the grocery bag incident. Second, from claimant's description of the grocery bag incident we conclude that the collapse of her left leg was a product of the uneven surface over which she was walking and that her compensable left knee condition was not a material contributing cause of the incident. Third, Dr. Strukel's opinion regarding the causation issue, although favoring claimant's case, is equivocal and is based on an inaccurate history. The opinion is framed in terms of assumptions and possibilities rather than medical probabilities. In addition, the opinion makes it clear that Dr. Strukel was under the impression that claimant's left knee had not been significantly rehabilitated after her surgery prior to the grocery bag incident. This is clearly inaccurate in light of Dr. Bert's chart notes. We conclude, therefore, that Dr. Strukel's opinion is insufficient to satisfy claimant's burden of proof, see George E. Johnson, 37 Van Natta 547, 548, 37 Van Natta 673 (1985); Bonnie M. Danton, 37 Van Natta 561, 569 (1985), and that claimant has failed to establish the compensability of her left foot injury.

Further, even assuming a compensable injury, an insurer is responsible for a condition only as long as the compensable injury remains a material contributing cause of the disability associated with that condition. See Grable v. Weyerhaeuser, 291 Or 387, 400-01 (1981). In light of the multiple injuries to claimant's left foot after the grocery bag incident, we are not persuaded that her initial injury, even if compensable, continues to be a material contributing cause of her left foot disability. Claimant has not established the compensability of any of the subsequent injuries to her left foot.

In light of the medical evidence regarding claimant's left knee condition and our conclusion that claimant's left foot condition is not compensable, we conclude that claimant's left leg claim was not prematurely closed. On our de novo review of the record, we affirm the Determination Order award for claimant's left knee of 7.5 degrees for 5 percent scheduled permanent partial disability.

ORDER

The Referee's order dated July 9, 1985 is affirmed in part and reversed in part. Those portions of the order that found claimant's left foot condition compensable, found the claim prematurely closed and awarded claimant's attorney a fee of $1,000 are reversed. The Determination Order dated July 11, 1984 with its award of 7.5 degrees for 5 percent scheduled permanent partial disability is reinstated and affirmed. The remainder of the Referee's order is affirmed.

RICHARD M. DESKINS, Claimant
Evohl F. Malagon, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB 85-00088
May 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Lipton's order which: (1) assessed a 10 percent penalty and accompanying attorney's fee for the self-insured employer's failure to comply with a prior Referee's order; and (2) found that claimant's condition was medically stationary and, thereby, allowed the employer to offset allegedly overpaid temporary disability against temporary disability awarded by the Referee's order. Claimant contends that a 10 percent penalty was inadequate and that claim closure was inappropriate. The employer cross-requests review, contending that claimant was not entitled to temporary disability and that a penalty and attorney fees should not have been assessed.

In October 1979 claimant sustained a compensable low back injury. His claim was initially closed by a December 1980 Determination Order. By virtue of a September 1983 Referee's order, the last award of compensation, claimant had received a permanent disability award totalling 35 percent.

In February 1984, Dr. Robertson, claimant's treating orthopedist, reported that claimant was experiencing back and leg complaints. Dr. Robertson further noted that claimant had a heart problem diagnosed as cardiomyopathy. Because of the combination of these problems, Dr. Robertson opined that claimant was totally disabled for work and would remain so for the foreseeable future. The employer interpreted Dr. Robertson's report as a claim for aggravation.

In March 1984 the employer denied claimant's aggravation claim. Claimant requested a hearing, which took place in November 1984. Thereafter, by a Referee's order dated November 26, 1984, the denial was set aside and the claim was remanded to the employer for "acceptance and claim reopening as of the date claimant returned to see Dr. Robertson in February 1984 and for further claim processing consistent with the Board's recent decision in Sharon Bracke, 36 Van Natta 1245, 1248 (August 30, 1984)." In Bracke, the Board had held that under particular circumstances, within 14 days of a litigation order finding a claim compensable, the insurer should pay time loss benefits until the date that claimant returned to work, was released to return to regular work, or was declared (as opposed to being determined under ORS 656.268) to be medically stationary. We note parenthetically that Bracke has since been reversed by the Court of Appeals in an opinion which did not specifically discuss the Board's reasoning regarding this issue. See Bracke v. Baza'r, 78 Or App 128 (February 26, 1986).

By letter dated December 6, 1984 the employer asked Dr. Robertson whether any further improvement in claimant's back condition was expected. In a December 21, 1984 memorandum, a secretary from Dr. Robertson's office reported that claimant was not medically stationary and that time loss authorization began December 4, 1984. Within 14 days after receiving this memorandum, the employer paid temporary disability beginning December 4, 1984. However, no benefits were paid for the period between

January 13, 1984, the date of Dr. Robertson's examination which had prompted his February 1984 report, and December 4, 1984.

Claimant requested a hearing, contending that the employer had failed to pay temporary disability pursuant to the November 1984 Referee's order. In response to the hearing request, the employer asserted that claimant was not entitled to the relief he was requesting. No further issue was listed in the employer's response.

In January 1985 Dr. Robertson reported that he had not examined claimant between his February 1984 report and December 1984. However, claimant had advised Dr. Robertson that his back pain had plagued him continuously during this time. Furthermore, although claimant had not sought medical treatment during this period, he had requested refills for sleep medication on a "fairly regular basis." Claimant attributed his failure to seek further treatment during 1984 to the pending litigation over his aggravation claim.

In February 1985 claimant was examined by Dr. Holmes, medical director for the Western Pain Center. Dr. Holmes noted that it was difficult to separate the symptoms claimant was currently experiencing between his back and heart conditions. Claimant also exhibited a moderate depressive reaction. Dr. Holmes felt that a pain center program would be physically, vocationally, and emotionally beneficial to claimant. Yet, claimant's cardiac condition made rehabilitation efforts less certain. Considering only claimant's back condition, Dr. Holmes opined that claimant was capable of light work.

In March 1985 Dr. Robertson concluded that claimant was stationary. However, Dr. Robertson also noted that claimant was currently being evaluated and treated at the pain center. In a subsequent deposition, Dr. Robertson stated that there had been no specific authorization for time loss in February 1984. Dr. Robertson suggested that claimant's heart condition in February 1984 had precluded further testing. Other than claimant's recent referral for pain center treatment, Dr. Robertson had not undertaken any further medical care.

At hearing, the employer argued that it was not required to comply with the prior Referee's order. The employer based its argument on subsequent information which, it contended, suggested that claimant's physician had not authorized temporary disability and, furthermore, that claimant's inability to work was not the result of his compensable condition.

The Referee found that the employer should have paid temporary disability pursuant to the prior Referee's order. Although Dr. Robertson's subsequent statements might have brought the compensability of claimant's previous aggravation claim into question, the Referee reasoned that the prior Referee had already addressed that issue. Thus, the issue could not be relitigated. Inasmuch as claimant had neither returned to work, been released to regular work, nor been declared medically stationary since Dr. Robertson's February 1984 report, the Referee concluded that the employer was required to pay temporary disability benefits within 14 days of the prior Referee's order. The Referee further ruled that the effective date for these benefits would be January 13, 1984, the date of claimant's examination which had prompted Dr.

Robertson's February 1984 report. Finally, since Dr. Robertson's later comments raised a "legitimate doubt as to whether [temporary total disability] benefits were due," the Referee assessed only a 10 percent penalty.

We agree with the Referee that the employer was required to pay temporary disability benefits as directed by the prior Referee's order. However, we conclude that the employer should be assessed a 25 percent penalty for failing to comply with that prior order.

Temporary disability benefits are due no later than the 14th day after the date of any determination or litigation order which orders temporary disability. OAR 436-60-150(3)(c); C.D. English, 37 Van Natta 572, 573 (1985).

The employer argues that enforcement of the prior Referee's order "exalts a legal technicality over common sense." Specifically, the employer asserts that Dr. Robertson's subsequent comments strongly question whether claimant was entitled to temporary disability benefits as awarded by the prior Referee.

We find the employer's argument unpersuasive. The "legal technicality" the employer proposes that we overlook pertains to the employer's defiance of a clear direction from a prior Referee to pay temporary disability benefits. Should we accede to such an argument, even implicitly, we would be sending a message that it is not always necessary to comply with a Referee's order. Such a message could cause irreparable damage to the workers' compensation system, which relies, to a great extent, on the basic principle that Referees' orders will be followed.

The time for the employer to respond to the conclusions expressed in Dr. Robertson's February 1984 report was at the hearing before the prior Referee. The employer's subsequent cross-examination of Dr. Robertson is nothing more than a belated attempt to address the issue of compensability for the aggravation claim, which has already been litigated and ruled upon. Although the deposition of Dr. Robertson arguably contradicted his earlier statements, these later statements do not excuse the employer's failure to timely comply with the prior Referee's order as required by OAR 436-60-150(3)(c). Accordingly, the employer shall be assessed a 25 percent penalty based on temporary disability benefits payable between January 13, 1984 and December 4, 1984.

As a final matter, the employer contended that claimant's condition had become medically stationary on February 6, 1985. Since it had paid temporary disability benefits beyond this date, the employer requested permission to offset these "overpayments" against future permanent disability awards or temporary disability that the Referee might order. Claimant objected to the employer's request, stating that any offset to which the employer might be entitled should be creditted against future permanent disability benefits awarded once the claim was closed by the Evaluation Division. Furthermore, claimant asserted that there was evidence not in the record which would indicate that claimant was not psychologically stationary. This evidence had not been admitted into evidence because claimant had understood that the sole issue before the Referee was the employer's failure to comply with the prior Referee's order.

Based on the evidence in the record, the Referee found that claimant's condition was medically stationary as of February 6, 1985. Therefore, "consistent with the philosophy of Sharon Bracke," the Referee permitted the employer to offset temporary disability paid subsequent to February 6, 1985 against the temporary compensation awarded by the Referee's order.

We reverse this portion of the Referee's order for several reasons. To begin, we find that claimant was surprised by the employer's late attempt to raise the issues of claim closure and permission to offset. There is no reference to these issues in the employer's response to claimant's hearing request. The record suggests that prior to the hearing, claimant was proceeding on the reasonable assumption that the sole issue at the hearing would be the employer's failure to comply with the prior Referee's order. Secondly, offsetting temporary disability "overpayments" against other awards of temporary disability benefits is of highly questionable validity. See ORS 656.268(4); OAR 436-60-170; Bernie Hinzman, 37 Van Natta 1059, 1063

Most important, the Referee's decision on the medically stationary issue, and concurrently the offset issue, was premature and contrary to law. The decision has, in effect, short-circuited the system. Claim closure is perfected through the issuance of a Determination Order or a Notice of Closure. See ORS 656.268(2) and (3). The Referee incorrectly applied the reasoning expressed in the Board's Bracke decision. As discussed above, with the Court of Appeals' subsequent reversal, our decision in Bracke is of dubious precedential value. However, even prior to its reversal, Bracke did not stand for the proposition that a claim could be closed without processing the claim according to the closure procedures of ORS 656.268. We emphasized that our holding was a narrow exception to ORS 656.268 and Jackson v. SAIF, 7 Or App 109 (1971), with which the insurer/employer was allowed to "unilaterally terminate time loss only when ordered to accept a claim which has been in denied status." (Emphasis in original.) Bracke, supra., 36 Van Natta 1248. Bracke did not allow a Referee to intercede in a manner contrary to statutory procedures for achieving claim closure. In fact, we specifically stated that any decision by an insurer/employer to declare a claimant medically stationary and terminate temporary disability payments prior to claim closure was subject to independent assessment by the Evaluation Division.

Claimant is entitled to a reasonable attorney fee for the employer's unreasonable refusal to pay compensation. ORS 656.262(10); ORS 656.382(1). Pursuant to OAR 438-47-010(2), the amount of the fee shall be based on the efforts of the attorney and the results obtained. In determining the reasonableness of attorney fees, several factors must also be considered. These factors include: (1) the time devoted to the case; (2) the complexity of the issues presented; (3) the value of the interest involved; (4) the skill and standing of counsel; (5) the nature of the proceedings; and (6) the results secured. Barbara A. Wheeler, 37 Van Natta 122, 123 (1985), Charlene K. Brotherton, 38 Van Natta 256 (1986).

After conducting our review of the record and considering the aforementioned factors, we conclude that $1,500 is a reasonable fee for claimant's attorney's services concerning the penalty issue at the hearing level and on Board review.

Inasmuch as we have found that the Referee should not have addressed the issues of claim closure and offset, claimant's request for remand has become moot.

ORDER

The Referee's orders dated July 15, 1985 and July 29, 1985 are affirmed, modified, and reversed. Those portions concerning the issues of claim closure and offset are reversed. The claim is remanded to the self-insured employer to be processed according to the Workers' Compensation Law. In lieu of the Referee's assessment of a 10 percent penalty and an accompanying attorney's fee, the employer is assessed a 25 percent penalty based on temporary total disability benefits due and payable between January 13, 1984 and December 4, 1984. Claimant's attorney is awarded $1,500 for services concerning the penalty issue at the hearing level and on Board review, to be paid by the self-insured employer. The remainder of the Referee's order is affirmed.

DUANE B. DRIVER, Claimant
Welch, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-10533 & 84-10534
May 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Pferdner's order that upheld the denials of both the Farmers Insurance Group (Farmers) and the SAIF Corporation regarding the compensability of claimant's occupational disease claim for vocal cord polyps. The threshold issue is whether claimant's claim is compensable. If it is, we must determine which insurer is responsible.

Claimant is an evangelist minister who first noticed problems with his voice in late 1980 or early 1981 while working in California. He ultimately sought treatment in that state and was diagnosed as having a polyp on the anterior surface of the right vocal cord. He underwent surgery in February 1981 for removal of the polyp. As surgery progressed, however, claimant's surgeon noted a larger polyp on the left vocal cord. A surgical decision was made to remove the left cord polyp and to leave the right cord intact. Claimant credibly testified that following this 1981 surgery he was symptom-free for approximately two years.

Claimant began work for a church in Oregon insured by Farmers in August 1981 and remained employed there through June 1983. His duties included conducting evangelical services, during which he spoke and sang in a loud and sometimes strained voice. He generally worked six days per week. He continued to work for Farmers' insured into early 1983 when he noted a return of the symptoms he had experienced before his 1981 surgery. Claimant did not seek medical treatment nor lose time from work while employed by Farmers' insured, however.

In June 1983 claimant began work for a church insured by SAIF. After a few months he sought medical treatment for sustained and worsening symptoms. He was ultimately diagnosed as having a right vocal cord polyp. It is uncertain from the medical record whether the polyp was the same one first diagnosed in California or one that developed some time after claimant began work in this state. On May 10, 1984 the polyp was removed and

claimant was off work for approximately two months. He subsequently filed claims with both Farmers and SAIF, alleging that one or both of the employments resulted in the worsening of his vocal cord polyp condition. Both insurers issued denials of the compensability of the condition.

The medical evidence regarding compensability comes primarily from Dr. Everts, an otolaryngologist who first examined claimant in November 1983 and became the treating doctor thereafter. Dr. Everts noted that claimant has two distinct voice patterns; one is used in day-to-day speech while the other is used on the job. Dr. Everts found claimant's work voice to be of an extraordinarily harsh quality, inappropriately high in pitch, with excessive voice inflection and "hard glottal attacks in the severe range." Dr. Everts concluded in his November 4, 1983 report that claimant's work activity was "extremely abusive to the [voice] mechanism."

Dr. Everts also performed the May 1984 surgical removal of claimant's right vocal cord polyp. Following the surgery, Dr. Everts stated that the "polyp resulted from inappropriate speech patterns used in [claimant's] job," and that "speaking and singing played a significant role in the formation and persistence of [claimant's] laryngopolyp." In Dr. Everts' final report, he states that claimant's lesions are common in those who use their voices professionally and "are definitely related to excessive voice use and abuse." He also excluded specific trauma or organic disease as potential causes of claimant's polyp condition.

The Referee found that claimant's condition preexisted his employment at Farmers' insured's. He, therefore, correctly applied the standards set forth in Weller v. Union Carbide, 288 Or 27 (1979), and Dethlefs v. Hyster Co., 295 Or 298 (1983). Under those standards, in order for claimant to prove the compensability of his occupational disease claim he must prove that his preexisting condition was worsened by one or more of his industrial exposures, and that the work was the major contributing cause of the worsening. The Referee found that claimant's preexisting polyp condition was worsened by his employment, but that he had failed to prove that the employment was the major contributing cause. The Referee noted that Dr. Everts' opinion stated only that claimant's work played a "significant" role in the worsening of his condition. The Referee found that he could not equate "a significant role" with "the major contributing cause," and upheld the denials of claimant's claim.

A physician may lend sufficient support to a claimant's occupational disease claim without necessarily using the words "major contributing cause." If the physician's opinion supports compensability and is accompanied by other persuasive evidence, the claim may be found compensable. McClendon v. Nabisco Brands, Inc., 77 Or App 412 (1986). In the present case, although Dr. Everts never uses the term "major cause" to describe the relationship between claimant's work and the worsening of his condition, we are persuaded by the context of Dr. Everts' reports that his opinion strongly supports compensability. When his opinion is coupled with evidence of the purported mechanism of claimant's disease and the lack of evidence of other potential causes, we are persuaded that claimant's work is the major, if not sole, cause of the worsening of his polyp condition. Claimant's claim is compensable.

We must now determine which of the two insurers joined to this claim is responsible. In an occupational disease context, if a disease is contracted and disability occurs during one employment as a result of conditions of that employment even though work conditions of a later employment could have caused that disease, the earlier employer is liable if the later employment did not contribute to the cause of, aggravate, or exacerbate the underlying condition. Boise Cascade Corp. v. Starbuck, 296 Or 238, 243 (1984). If the later employment does contribute to the causation of claimant's condition, however, liability shifts to the later employer. In the present case, although claimant's condition first recurred while he was employed by Farmers' insured, he did not seek treatment nor lose time from work until he had worked for SAIF's insured for several months. His ultimate surgery and accompanying time off from work occurred during the second period of employment. Dr. Everts was of the opinion that "any vocal activity to the extent that [claimant] used his voice could have predictably caused [a] worsening of his condition." Claimant testified that his condition worsened during the second employment.

From these facts, we find that it is more likely than not that claimant's later employment independently contributed to the worsening of his polyp condition. For the later insurer (SAIF) to avoid liability, therefore, it must prove that the first employment was the sole cause of claimant's worsening or that it was impossible for the later employment to have contributed to the polyp condition. FMC Corp. v. Liberty Mutual Ins. Corp., 70 Or App 370 (1984). We find that SAIF has failed to sustain its burden of proof. It is responsible for claimant's condition.

ORDER

The Referee's order dated September 25, 1985 is reversed in part. That portion of the order that upheld the SAIF Corporation's denial of claimant's occupational disease claim is reversed. The claim is remanded to SAIF for processing and payment of compensation according to law. Claimant's attorney is awarded a fee of $1,350 for services at hearing and $600 for services on Board review, both fees to be paid by the SAIF Corporation.

DALE L. HULT, Claimant
Hayner, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 85-00774
May 6, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of those portions of Referee Myers' order that: (1) ordered the payment of temporary total disability compensation for the period of March 11 through March 22, 1985; and (2) assessed a 25 percent penalty and an associated attorney fee for the employer's alleged untimely payment of temporary total disability compensation for the period of November 30, 1984 through February 14, 1985. The issues on review are entitlement to temporary total disability compensation and penalties and attorney fees. We rely on and draw from the Referee's statement of facts.

Claimant compensably injured his low back in June 1983. At the time of his injury claimant was employed as a transitman on

a survey crew. After a period of conservative treatment claimant was released to return to regular work in November 1983. Claimant did in fact return to his job as a transitman on November 28, 1983. The claim was closed on August 13, 1984.

After returning to work claimant continued to work as a transitman until November 1984, when he was reassigned to a timber cutting crew. He cut timber for approximately three weeks before having to leave that work as a result of back pain. On November 30, 1984 claimant was examined by Dr. Gurney, who reported that the timber cutting work had aggravated claimant's back condition. Dr. Gurney felt that claimant was incapable of timber cutting work, but that operating a transit was within his capabilities.

Following a January 7, 1985 examination of claimant, Dr. Whitney found him medically stationary, placed him in a moderate work classification and released him "to work at his previous surveying job." Claimant did return to operating a transit a month later and continued until mid-March 1985 when he was once again assigned to the timber cutting crew. Because he had no release to return to timber cutting, claimant did not return. He did return to surveying on March 22, 1985, however, and continued to work in that capacity up to the time of the hearing.

On February 20, 1985 the employer accepted claimant's aggravation claim. As of January 21, 1985, however, claimant had been paid temporary total disability only for the period of December 17 through December 30, 1984. Benefits were eventually paid for the period of November 30, 1984 through February 13, 1985 and claimant received his first payment in early January 1985.

At hearing claimant argued entitlement to temporary disability payments for the period of March 11 through 22, 1985, during which he was released for work as a member of the survey crew, but not as a timber cutter. Timber cutting was the only work available during that period. As the Referee noted, the cornerstone of claimant's argument was that as of the time of his aggravation his "regular work" was timber cutting, and he had not been released to perform that work. The employer argued that claimant's job as a transitman was his "regular work." See Georgia Pacific v. Awmiller, 64 Or App 56 (1983).

The Referee held that the term "'regular employment' must be understood in the factual context of the individual case." The Referee then concluded that at the time of claimant's aggravation, claimant's regular work was the work he was doing at the time, i.e., cutting timber. Because claimant was not released to cut timber at the time the work was available, the Referee concluded that claimant was entitled to temporary total disability compensation until the issuance of the March 18, 1985 Determination Order.

Subsequent to the Referee's order we decided Melvin L. O'Brien, 37 Van Natta 1478 (1985). In O'Brien, the claimant worked as a heavy equipment operator during good weather. During bad weather, however, that work was unavailable, but the claimant was able to remain employed by "bumping down," (displacing a less senior employe) to a job setting chokers. At the time of the claimant's injury he was operating heavy equipment. After a period of injury-related lost time from work, the claimant was

released to return with limitations compatible with heavy equipment operation. He did in fact return to that work until bad weather once again made it unavailable.

Subsequent to his compensable injury, the claimant was no longer able to "bump down" to choker setting because of his treating physician's refusal to release him to that kind of work for more than two hours per day. As a result, the claimant argued that he was entitled to temporary disability compensation for periods in which the only work available was work for which he was not released. The Referee agreed, holding that the claimant's "regular work" consisted of both heavy equipment operation and choker setting. The Referee concluded, therefore, that if the claimant were incapable of performing one of those duties as a result of his compensable injury, he was entitled to temporary disability compensation during the pertinent period.

We disagreed with the Referee's holding, concluding inter alia that the claimant's industrial injury had nothing to do with his ability to operate heavy equipment; that ability was undiminished by the injury during the period in question. The reason the claimant was unable to work as an equipment operator, which was clearly "regular employment," was that there was no such job available to him; it was not because his treating physician had not fully released him to perform that work. See Gloria J. Bas, 36 Van Natta 174 (1984); Thomas C. Harrell, 34 Van Natta 589 (1982). We held, therefore, that the claimant had not left regular employment as a result of his injury and was, therefore, not entitled to temporary disability compensation. See Bono v. SAIF, 298 Or 405 (1984).

Although O'Brien, supra, is not on all fours with the present case, we find that its essential principle controls. Like the claimant in O'Brien, the present claimant was never rendered incapable of performing the work he performed at the time of his injury. The only reason for claimant's inability to return to that work was its lack of availability. Thus, claimant did not leave the regular employment for which he was fully released as a result of his injury. Temporary disability compensation was, therefore, not due.

The remaining issue is whether the Referee properly assessed a penalty and an associated attorney fee for the employer's alleged untimely payment of compensation for the period of November 30, 1984 through February 13, 1985. On that issue we affirm the Referee's order. Silsby v. SAIF, 39 Or App 555 (1979).

ORDER

The Referee's order dated September 27, 1985 is reversed in part and affirmed in part. That portion of the Referee's order that awarded claimant temporary total disability compensation for the period of March 11, 1985 through March 18, 1985 is reversed. The remainder of the order is affirmed.

JACK N. ONG, Claimant
Burt, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-05325
May 6, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of that portion of Referee Michael Johnson's order that awarded claimant 96 degrees for 30 percent unscheduled permanent partial disability in lieu of a Determination Order award of 64 degrees for 20 percent unscheduled disability for the low back. On review claimant asserts entitlement to an award of permanent total disability or, in the alternative, an increased unscheduled award. The issue is extent.

Claimant is a former baker who compensably strained his low back in March 1983. Although lumbar disk involvement was suspected, all treatment has been conservative. Claimant's claim was closed by way of a February 13, 1984 Determination Order with an award of 20 percent unscheduled disability.

The medical evidence is that claimant suffers mildly moderate impairment as a result of his compensable injury. This impairment rating appears to account for both objective and subjective elements. The Referee found, and we agree, that claimant exaggerates his subjective complaints, which are out of proportion with the verifiable findings. The Referee found claimant's credibility to be "marginal," but concluded that he does suffer restrictions in sitting, standing, walking, driving and lifting. Claimant was 55 years old at the time of the hearing and had an eleventh grade education, with no GED. Whereas claimant's work before and at the time of his injury was "heavy," he is now precluded from all but "light" duty. He appears to have few transferable skills.

After reviewing the record, we find that claimant has failed to establish entitlement to an award of permanent total disability. He is clearly not totally disabled from a medical standpoint alone, and the vocational testimony suggests several areas of employment both suitable and available to claimant. In addition, because claimant has not looked for employment since his injury, his motivation to return to work is questionable. See ORS 656.206(3).

We are persuaded, however, that claimant is entitled to an increased award of unscheduled disability. Although claimant does embellish the degree to which he is impaired, we find sufficient medical evidence to support the Referee's finding that claimant is mildly moderately impaired. This impairment, coupled with claimant's relatively advanced age, limited education and substantial work restrictions leads us to conclude that he is entitled to an award of 128 degrees for 40 percent unscheduled low back disability. The Referee's award shall be modified accordingly.

ORDER

The Referee's order dated October 16, 1985 is modified in part and affirmed in part. That portion of the order that awarded claimant 96 degrees for 30 percent unscheduled permanent partial disability is modified. In lieu of the Referee's award and all prior awards, claimant is awarded 128 degrees for 40

percent unscheduled permanent partial disability. Claimant's attorney is allowed a fee of 25 percent of the increased compensation awarded by this order, not to exceed $3,000. The remainder of the Referee's order is affirmed.

DARRELL L. RAMBEAU, Claimant
Bennett, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB TP-85011
May 6, 1986
Third Party Order on Reconsideration

Claimant requested reconsideration of our Third Party Order dated February 18, 1986 that disallowed the cost of an independent medical examination and allowed recovery of reimbursed vocational assistance costs as part of the insurer's just and proper share of the proceeds of a third party settlement. ORS 656.593(3). We abated our order to fully consider claimant's arguments. The essence of claimant's argument is that we erred in concluding that amendments to ORS 656.202 and 656.593 effective January 1, 1986 should be applied retroactively. We based our holding upon our conclusion that the amendments were procedural, rather than substantive.

The request for reconsideration is allowed. On reconsideration, we adhere to our previous decision, with the following comments. As early as 1980, ORS 656.593(1)(c) provided for inclusion in an insurer's third-party lien of "any reimbursements made pursuant to ORS 656.728(3) . . . ," the previous vocational assistance statute (now ORS 656.340). See 1979 Or Laws, Chapter 829, Section 12. Thus, a procedure was in place to allow recovery by the Department of reimbursed vocational assistance costs, although as a practical matter the procedure was useless because of a definitional anomaly. The anomaly compelled our decision in Raymond D. Taylor, 37 Van Natta 1082 (1985). The existence of the procedure was expressly acknowledged by the court in Denton v. EBI Companies, 67 Or App 339, 347 (1984). The 1985 Legislative Assembly removed the definitional anomaly, making the procedure viable. No new rights were created, nor were any existing obligations impaired. The legislature also made it clear, by the amendment to ORS 656.202, that it intended that existing law relating to vocational assistance apply to all claims, regardless of the injury date.

ORDER

As supplemented herein, we adhere to and republish our Third Party Order dated February 18, 1986, effective this date.

MICHELLE RICKARDS, Claimant
Gatti, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-02545
May 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of that portion of Referee Lipton's order which set aside its denial of claimant's occupational disease claim for a back condition. On review, SAIF contends that claimant failed to establish that her work activities were the major contributing cause of the worsening of her condition. We agree and reverse.

Claimant was 19 years of age at the time of hearing. She initially injured her back in 1978 or 1979, when she fell on a rock and landed on her tailbone. X-rays were taken, but claimant

received no further treatment. Since that time she has periodically experienced stiffness and soreness in her neck and back, particularly following physical activity. In July 1983 claimant sought treatment from Dr. Flaming, osteopath. Recording a history of chronic problems and detecting muscle tension spasms, Dr. Flaming diagnosed myositis. Claimant apparently did not seek additional treatment for her neck and back complaints until October 1984.

From December 1983 through June 1984 claimant worked as a waitress and cook for another employer. She experienced stiffness and soreness, but sought no medical treatment. In July 1984 claimant began working for SAIF's insured as a restaurant waitress. Thereafter, her symptoms gradually increased, eventually resulting in her need for further medical care.

In November 1984 claimant sought treatment from Dr. Leary, chiropractor. Dr. Leary recorded a history of a previous low back injury while claimant was working as a waitress for her prior employer. There is no indication that Dr. Leary was aware of claimant's "tailbone" fall. In fact, Dr. Leary reported that he was having difficulties obtaining claimant's prior medical records. Claimant's condition was diagnosed as acute exacerbation, aggravation of a chronic lumbar sprain/strain with associated radiculopathy and acute exacerbation of a chronic cervical sprain/strain.

In Dr. Leary's opinion claimant's recent work activities for SAIF's insured had materially worsened her previous condition. Dr. Leary based his opinion on claimant's subjective complaints, the examination's findings, and his personal knowledge of claimant.

Claimant was taken off work for one week, but on her return her problems continued. She stopped working in February 1985. Since leaving work she still experiences back and neck symptoms, but not as frequently and severely as she did while working for SAIF's insured.

In February 1985 Dr. Bolin, chiropractor, performed an independent medical examination. Claimant reported a history which included her "tailbone" fall, her back complaints while working for a previous employer, and several other minor off-the-job incidents, some of which had triggered her back pain. Dr. Bolin attributed claimant's lumbar complaints to an L4 extension subluxation and possible herniated disc, which were probably caused by her prior fall. These complaints were aggravated by claimant's mild obesity and an anatomically short right leg. Dr. Bolin also attributed claimant's cervical complaints to her prior fall, concluding that a numbness in her right hand was related to a carpal tunnel entrapment and not to a cervical condition. Dr. Bolin recommended that an orthopedic examination be conducted to rule out the possibility of a herniated disc and to determine whether the carpal tunnel entrapment was causing a nerve deficit. In Dr. Bolin's opinion there was no objective evidence or history demonstrating any material worsening of claimant's condition as a result of her work activities for SAIF's insured.

In August 1985 Dr. Bolin reviewed claimant's medical record, which included Dr. Flaming's chart notes from July 1983. Dr. Bolin concluded that this record supported his earlier opinion

concerning the etiology of claimant's current neck and back condition and its relationship to her work activities for SAIF's insured.

Dr. Leary credibly testified at the hearing. Dr. Leary became acquainted with claimant first as a waitress. Prior to treating claimant, Dr. Leary had observed her "essentially on a daily basis for several months as my waitress." Based on these observations and her subsequent treatments, Dr. Leary reiterated his opinion that claimant's work activities for SAIF's insured had caused a worsening of her preexisting condition. Dr. Leary described the worsening as an increase in claimant's pain and a reduction in her freedom of movement. When questioned about claimant's prior neck and back problems, Dr. Leary continued to relate the onset of claimant's condition to an injury while working as a waitress for a previous employer. Dr. Leary gave no indication that he was aware of claimant's "tailbone" fall.

The Referee set aside SAIF's denial, finding that claimant's work activities for SAIF's insured were the major contributing cause of a worsening of her chronic back strain. The Referee acknowledged that both examining physicians' opinions could be attacked inasmuch as Dr. Leary had an incomplete history and Dr. Bolin's recommendations for further testing were not followed. However, taking the evidence as a whole and giving great weight to claimant's credible testimony, the Referee found that claimant had established that her preexisting back condition had worsened as a result of her work activities for SAIF's insured.

To establish an occupational disease claim relating to a preexisting condition, claimant must prove that work conditions caused a worsening of the underlying condition producing disability or the need for medical services. Weller v. Union Carbide, 288 Or 27 (1979). In addition, claimant must establish that her work conditions were the major contributing cause of the worsening of her preexisting condition. Dethlefs v. Hyster Co., 295 Or 298 (1983); SAIF v. Gygi, 55 Or App 570, rev den 292 Or 825 (1982).

Following our de novo review of the medical and lay evidence, which includes claimant's and her husband's credible testimony, we are not persuaded that claimant's work activities as a waitress for SAIF's insured were the major contributing cause of any worsening of her underlying neck and back condition. Consequently, she has failed to establish that her occupational disease claim is compensable.

Dr. Leary had the opportunity to not only treat claimant, but to observe her performing her work activities prior to her seeking treatment. Generally, his opinion as the treating physician would be accorded great weight, absent persuasive reasons not to do so. See Taylor v. SAIF, 75 Or App 583, 585 (1985); Weiland v. SAIF, 64 Or App 810, 814 (1983). However, Dr. Leary was under the erroneous impression that claimant had sustained an injury while working for a previous employer. Moreover, Dr. Leary was apparently unaware of claimant's prior "tailbone" fall. Inasmuch as Dr. Leary based his opinion on an incomplete and inaccurate history, we find his opinion unpersuasive. See Miller v. Granite Construction Co., 28 Or App 473 (1977); Mark T. Sturgis, 37 Van Natta 715, 718 (1985).

We agree with Dr. Bolin's conclusion that claimant's preexisting condition had not worsened as a result of her work activities with SAIF's insured. Unlike Dr. Leary, Dr. Bolin had

based his medical opinion on claimant's entire medical record, as well as on an accurate medical history. In addition, Dr. Bolin's opinion provides a clear and reasonable explanation regarding claimant's current condition and its relationship to her recent work activities. The fact that Dr. Bolin's recommendation for further examination and testing was not followed has an effect on the weight to be accorded his opinion. However, it does not cause us to completely disregard his otherwise persuasive opinion.

ORDER

The Referee's order dated September 12, 1985 is reversed. The SAIF Corporation's denial issued February 12, 1985 is reinstated and approved.

DONALD R. SINGER, Claimant
Sellers & Jacobs, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-08121 & 85-09704
May 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Pferdner's order pertaining to WCB Case Number 84-08121 dated August 16, 1985, as adhered to on reconsideration on September 11, 1985, that dismissed claimant's request for hearing on an aggravation claim as having been filed outside the five-year aggravation rights period. ORS 656.273(4)(a). Claimant asserts that he perfected an aggravation claim within the five-year period, and that his aggravation claim is compensable. In the event we disagree, claimant has separately requested that we exercise our Own Motion jurisdiction and reopen his claim. ORS 656.278(1). A separate Own Motion order has issued this date. The self-insured employer cross-requests review of the Referee's order pertaining to WCB Case Number 85-09704 dated August 16, 1985. In that order the Referee set aside what he identified as the employer's de facto denial of claimant's medical services claim. The issues on review are the de facto denial of medical services, whether claimant perfected an aggravation claim before his aggravation rights expired and, if so, whether his aggravation claim is compensable.

We agree with the Referee that claimant failed to perfect a claim for aggravation within the statutory period. We need not, therefore, determine whether the claim for aggravation is compensable.

We disagree with the Referee that the employer denied de facto claimant's claims for medical services, and we reverse the Referee's August 16, 1985 order in WCB Case Number 85-09704. The medical services subject to this controversy consist of billings from claimant's treating chiropractor, Dr. Hagen. Dr. Hagen submitted a series of billings for chiropractic treatment in early 1984. Although the employer did not issue a formal acceptance or denial, the record reveals that all billings were promptly paid.

The Referee found that he could not categorize the employer's silent payment of billings as an unqualified acceptance. He therefore found that the employer's silence constituted a de facto denial of services, even though billings were clearly paid. We disagree. We find no authority for the proposition that silent payment of medical services constitutes a denial. In Billy J. Eubanks, 35 Van Natta 11, 135 (1985), we held that each billing from a physician constitutes a medical services

claim that must either be paid or formally denied within 60 days of the employer/insurer's receipt of the billing. This suggests, and we now hold, that if billings are timely paid, no further formal acceptance is required. Indeed, to require a formal acceptance under those circumstances would be to require an unnecessary and somewhat redundant gesture.

ORDER

The Referee's order dated August 16, 1985 in WCB Case Number 84-08121, as adhered to on reconsideration on September 11, 1985, is affirmed. The Referee's order dated August 16, 1985 in WCB Case Number 85-09704 is reversed.

JACK W. TUCKER, Claimant
Royce, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 81-09929
May 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Mulder's order which set aside its denial of claimant's occupational disease claim for a bilateral foot condition. On review, the insurer contends that claimant failed to establish that his work activities worsened his underlying condition. We agree and reverse.

Claimant was 36 years of age at the time of hearing. In October 1981 he filed his claim for "painful feet", alleging that his feet and ankles had become progressively sore as a result of his work activities as a pressman for a newspaper. Specifically, claimant related his increasing discomfort to vibrations from a steel plate upon which he stood.

Dr. Neufeld, claimant's treating orthopedist, diagnosed a bilateral cavus foot condition. X-rays demonstrated some mild degenerative changes which Dr. Neufeld related to wear and tear. Arthritic and neurological studies were negative. Dr. Neufeld prescribed arch supports, which gave claimant some relief.

In November 1981 the Orthopaedic Consultants performed an independent medical examination. Claimant was still experiencing foot problems, but had returned to work. The Consultants diagnosed bilateral moderately increased pes cavus deformity and chronic foot strain. Claimant was encouraged to continue wearing good arch supports in a "work type shoe." The Consultants concluded that claimant's feet were likely to become symptomatic as long as he stood for prolonged periods on a hard surface.

By February 1982 claimant's pain became overwhelming and he was unable to continue working. Dr. Neudall recommended a job change to a position in which claimant could sit "75% of the time." Since the employer did not have such a position, claimant was taken off work.

In April 1983 Dr. Neufeld referred claimant to Dr. Tindall, rheumatologist. Claimant's symptoms were continuing, but they were not as severe as he experienced while he was working as a pressman. Neurological studies and laboratory analyses for arthritis were negative. Claimant exhibited high-arched feet, with valgus deformities of the ankles. Dr. Tindall suspected that

claimant's structural problems made him susceptible to the type of complaints he was presently experiencing. In Dr. Tindall's opinion, claimant's work was a major cause of the worsening of his disease.

Dr. Neufeld concluded that claimant's job as a pressman had caused an aggravation of his underlying cavus foot problem. Dr. Neufeld specifically defined claimant's aggravation as an increase in pain due to prolonged standing. However, there was no objective evidence of a worsening of claimant's underlying problem. Consequently, Dr. Neufeld was unsure whether claimant's cavus foot problem had worsened.

Claimant credibly testified that he worked for the employer as a pressman from 1969 through February 1982. The job entailed prolonged standing in one position. In 1975 a new press was installed on an all metal press deck. Whenever the press was in operation, which ranged between seven and a half and three hours a shift, there was a "good deal of vibration." Claimant's feet and legs began bothering him around Christmas 1980. His feet felt as though he "had slivers driven into the bottoms of my feet, the balls and the heels." Claimant also experienced pain in his ankles, up to his knees. In September 1981 his symptoms became so severe that he sought treatment from Dr. Neufeld. Since ending his pressman duties, claimant continues to experience pain, particularly when he engages in physical activity. His symptoms are essentially in the same location, except they have "spread somewhat further up into [his] knees."

The Referee set aside the insurer's denial, reasoning that "but for" claimant's work activities he would not have suffered the pathology he did, when he did, and to the extent he did. The Referee concluded that the weight of the medical evidence clearly indicated a major connection between claimant's work and his underlying condition. Furthermore, the Referee found that claimant's condition had worsened, thus satisfying the requirements of Weller v. Union Carbide, 288 Or 27 (1979).

To establish an occupational disease claim relating to a preexisting condition, claimant must prove that work conditions caused a worsening of the underlying condition producing disability or the need for medical services. Weller v. Union Carbide, supra. In addition, he must establish that his work conditions were the major contributing cause of the worsening of his preexisting condition. Dethlefs v. Hyster Co., 295 Or 298 (1983); SAIF v. Gygi, 55 Or App 570, rev den 292 Or 825 (1982). The Weller analysis is applicable whether claimant's condition was symptomatic or asymptomatic at the time of his employment. Wheeler v. Boise Cascade, 298 Or 452, 457-58 (1984).

Following our de novo review of the medical and lay evidence, including claimant's credible testimony, we are persuaded that claimant's work activities as a pressman increased his symptomology. However, the preponderance of the evidence fails to establish that claimant's work activities worsened his underlying bilateral foot condition. Therefore, he has failed to establish the compensability of his occupational disease claim.

In reaching this decision, we draw heavily from the opinion of Dr. Neufeld, claimant's treating physician. Dr. Neufeld has repeatedly opined that although claimant's work activities had increased his pain, there was neither a structural

change nor any other objective evidence to indicate a worsening of his underlying foot condition. Consequently, Dr. Neufeld was unsure whether claimant's work had caused a worsening of the condition. This opinion appears to be shared by the Orthopaedic Consultants insofar as they predicted prolonged standing would elicit further symptoms.

Dr. Tindall's opinion supports the claim's compensability. However, the opinion fails to note any objective evidence to suggest a worsening. More important, it does not adequately explain how claimant's condition was worsened. Considering these deficiencies and the persuasiveness of the treating physician's opinion, we find Dr. Tindall's conclusions unpersuasive.

ORDER

The Referee's order dated January 9, 1984 is reversed. The insurer's denial issued October 23, 1981 is reinstated and upheld.

CHERIE H. IRELAND, Claimant
Doblie, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorneys

WCB 85-08851
May 7, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Neal's order which set aside its denial of claimant's low back injury claim. On review, SAIF contends that the preponderance of the credible evidence fails to establish compensability. In her respondent's brief, claimant contends that SAIF's denial was unreasonable. We have authority to consider claimant's contention notwithstanding the untimely filing of her cross-request for review. See Jimmie Parkerson, 35 Van Natta 1247, 1249-50 (1983).

Following our de novo review of the record, we are persuaded that the claim is compensable and that SAIF's denial was not unreasonable. Consequently, we affirm the order of the Referee.

Furthermore, we find that this case is of ordinary difficulty and usual probability of success for claimant. Accordingly, a reasonable attorney fee is awarded.

ORDER

The Referee's order dated September 11, 1985 is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by the SAIF Corporation.

JOHN M. LENNINGER, Claimant
Quintin B. Estell, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-04605
May 7, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Daron's order that set aside its denial of claimant's stress-related occupational disease claim and denied its motion to allow an offset of retroactive pay claimant received in a labor grievance settlement against temporary disability compensation awarded in the Referee's order. The issues are compensability and offset.

On the compensability issue, we affirm the order of the Referee. We reverse on the offset issue.

Claimant began missing work because of psychological difficulties in May 1982 and left work altogether in July 1982. The employer placed claimant on unauthorized leave status without pay on August 18, 1982 and terminated claimant's employment on October 15, 1982. Claimant filed the present workers' compensation claim for his psychological condition and also filed a grievance through his labor union for wrongful termination.

Settlement of claimant's labor grievance was reached on August 8, 1984. As part of this settlement, claimant was granted retroactive pay from August 18, 1982 through the date of the settlement.

Claimant's workers' compensation claim went to hearing in November 1983 and the hearing was completed in June 1984. On July 2, 1985 the Referee issued an Opinion and Order finding claimant's condition compensable and ordering payment of temporary disability compensation beginning May 15, 1982. Shortly thereafter, SAIF filed a motion with the Referee requesting authorization to offset the retroactive pay claimant had received in his labor grievance settlement against the temporary disability compensation due under the Referee's order. The Referee denied SAIF's motion and republished his original order on September 5, 1985.

The purpose of temporary disability compensation is to replace wages lost as a result of the worker's injury or occupational disease. Cutright v. Weyerhaeuser Co., 299 Or 290, 302 (1985). Through the labor grievance settlement, the employer has already compensated claimant for the wages he lost during the period from August 18, 1982 through August 8, 1984. We see no reason why claimant should be compensated twice for the same loss. The Court of Appeals and the Board have allowed offsets under circumstances similar to those presented here. See Mavis v. SAIF, 45 Or App 1059, 1063 (1980); Candee v. SAIF, 40 Or App 567, 570-71, rev den 287 Or 335 (1979); James R. Frank, 37 Van Natta 1555, 1556 (1985); Rufus G. Whitaker, 36 Van Natta 1193, 1194 (1984); Donald R. Patterson, 36 Van Natta 777, 778 (1984), aff'd mem., 73 Or App 344 (1985). We conclude, therefore, that the Referee erred in denying SAIF's motion to offset.

Claimant's attorney is entitled to a nominal attorney fee pursuant to our decisions in Betty J. McMullen, 38 Van Natta 117 (1986) and Arthur D. Roppe, 38 Van Natta 118 (1986).

ORDER

The Referee's order dated September 5, 1985 is affirmed in part and reversed in part. That portion of the order that set aside the SAIF Corporation's denial dated April 29, 1983 is affirmed. That portion of the order that denied the SAIF Corporation's motion to offset is reversed. The SAIF Corporation is authorized to offset temporary disability compensation paid for the period from August 18, 1982 through August 8, 1984 against any future award of temporary or permanent disability relative to this claim. Claimant's attorney is awarded a reasonable attorney fee of $50 for having prevailed without having filed a brief on Board review, to be paid by the SAIF Corporation.

HARRIET S. WALKER, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Miller, et al., Defense Attorneys

WCB 83-10085 & 84-09780
May 7, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Michael V. Johnson's order that set aside its denial of claimant's occupational disease claim for bilateral carpal tunnel syndrome and found it, rather than Liberty Northwest Insurance Corporation, responsible for claimant's condition. The issues are compensability and responsibility.

Claimant filed occupational disease claims against SAIF and a subsequent insurer, Liberty Northwest, alleging that her bilateral carpal tunnel syndrome condition was related to her employment as an I.V. therapy nurse. Claimant attributed her condition to the large round doorknobs and heavy doors at her place of employment. The doors and doorknobs became a part of claimant's environment in February 1982 when a new wing was added to the hospital where she worked. Claimant testified that during an average shift she had to grip, twist and pull on these doorknobs from eight times on a slow night up to 50 times on a busy night.

Claimant began to complain of right wrist and hand symptoms in late 1982 to Dr. Schroeder, an orthopedist who was treating her for a number of other conditions. Dr. Schroeder prescribed a short arm extensor splint. The condition gradually worsened throughout 1983 and in September of that year Dr. Schroeder tentatively diagnosed her condition as extensor tendinitis of the right wrist.

Claimant was examined at the request of SAIF by a hand specialist, Dr. Nathan, in Janaury 1984. After nerve conduction studies, Dr. Nathan diagnosed claimant's condition as mild bilateral carpal tunnel syndrome, worse on the right than on the left. On the issue of causation, Dr. Nathan considered claimant's condition idiopathic. He stated that carpal tunnel syndrome is associated with excessive, repetitive flexion and extension of the wrist. In his opinion, the activity of opening doors as described by claimant was not the type of activity which would cause or aggravate carpal tunnel syndrome.

Claimant returned to Dr. Schroeder after the examination by Dr. Nathan. In chart notes, Dr. Schroeder stated that claimant was frustrated that Dr. Nathan had not found her condition work-related and noted her intention to see Dr. Jewell, a plastic and reconstructive surgeon, for another opinion. Dr. Schroeder stated that he had no opinion on the causation issue at that time.

Claimant visited Dr. Jewell in April 1984. Dr. Jewell thought that claimant's carpal tunnel syndrome was related to the repetitive hand motions associated with her work as aggravated by the splint prescribed by Dr. Schroeder. Dr. Jewell performed a right carpal tunnel release in November 1984.

Dr. Schroeder ultimately agreed with Dr. Nathan that claimant's condition was not caused by her work activity. He suggested hypothyroidism as a possible alternate cause. In a

later deposition, Dr. Schroeder indicated that claimant's work activity did not involve the kind of repetitive extension and flexion of the wrist generally associated with carpal tunnel syndrome. He stated that even assuming some causal connection between claimant's work activity and her carpal tunnel syndrome, her work activity was not the major contributing cause of her condition.

On the compensability issue, we conclude that the evidence preponderates against a finding that claimant's work activity was the major contributing cause of her carpal tunnel syndrome. Neither Dr. Nathan nor Dr. Schroeder thought that claimant's work activity was of a type that would be likely to cause or aggravate this disease. In light of their expertise with this kind of problem and the fact that we see the medical question presented in this case as calling primarily for expert analysis rather than expert observation, we consider their opinions worthy of great weight. See Harris v. Farmers' Co-op Creamery, 53 Or App 618, 625 & n.4, rev den 291 Or 893 (1981); Abbott v. SAIF, 45 Or App 657, 661 (1980); Hammons v. Perini Corp., 43 Or App 299, 301 (1979). To the extent that expert observation is important in answering the medical causation question, Dr. Schroeder's status as claimant's long-time treating doctor adds to the weight of his opinion. See Weiland v. SAIF, 64 Or App 810, 814 (1983). In addition, the opinions of Drs. Nathan and Schroeder explain the bases of their conclusions and we find their reasoning persuasive. See Somers v. SAIF, 77 Or App 259, 263 (1986); Hammons v. Perini Corp., supra, 43 Or App at 301-02.

We also give Dr. Jewell's opinion considerable weight. He treated claimant's carpal tunnel syndrome and performed her surgery. On balance, however, his opinion does not outweigh those of Dr. Nathan and Dr. Schroeder. Dr. Jewell does not explain in any detail how claimant's work activity of grasping, turning and pulling doorknobs on a regular but relatively infrequent basis could have caused carpal tunnel syndrome. His specialty, plastic and reconstructive surgery, would seem to render him less expert in dealing with carpal tunnel syndrome than either Dr. Nathan, a hand specialist, or Dr. Schroeder, an orthopedist. There is no persuasive evidence to the contrary in the record. We also note that nowhere in the record does Dr. Jewell state with any clarity that claimant's work activity was the major contributing cause of her condition.

For all of the above reasons, we accept the opinions of Dr. Nathan and Dr. Schroeder and conclude that claimant has failed to establish that her work activity was the major contributing cause of her carpal tunnel syndrome. We, therefore, reverse that portion of the Referee's order which found claimant's condition compensable. Given our conclusion on the compensability issue, we do not reach the responsibility issue.

ORDER

The Referee's order dated September 23, 1985 is reversed in part. The denial issued by the SAIF Corporation dated May 21, 1984 is reinstated and affirmed. That portion of the order which upheld the denial issued by Liberty Northwest Insurance Corporation dated September 4, 1984 is affirmed.

MOHAMMAD ZARIFI, Claimant
Samuel Hall, Jr., Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 82-10479
May 7, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Foster's order that: (1) upheld a Determination Order award of 112 degrees for 35 percent unscheduled permanent partial disability for the low back; and (2) denied claimant's request to have his claim reopened. Claimant asserts entitlement to an award of permanent total disability or, in the alternative, an increased unscheduled award. He also asserts that his condition has worsened since the last arrangement of compensation, thereby entitling him to a reopening of his claim.

We agree with the Referee that claimant has not shown a worsening of his condition since the last arrangement of compensation. We also agree that claimant is not permanently and totally disabled. We find, however, that he is entitled to an increased permanent disability award. We, therefore, modify the Referee's order.

Claimant was born and educated in Afghanistan. He holds Bachelor's and Master's degrees in minerology from an Afghani university. He immigrated to the United States in 1970 and began searching for employment within his profession. He found American technology to be far advanced over that of Afghanistan, however, and found that his skills were not transferable to the American scientific community. As a result, all of claimant's employment in this country has involved kitchen labor such as dishwashing and bussing. Claimant was employed as a kitchen worker when he suffered a compensable low back injury in 1980. He was 51 years old at the time of the hearing.

Claimant was diagnosed as having suffered a herniated disk, but he steadfastly refused prescribed surgical treatment. His injury has left him unable to return to heavy kitchen employment. The record reveals that claimant suffers from emotional instability, manifest primarily in the form of tremors in the upper extremities. These tremors make it difficult for claimant to do work requiring fine motor movements. Although he has lived in the United States for more than 15 years, claimant speaks little English. His failure to learn the language is partially the result of a hearing loss.

Claimant was examined by a number of physicians during the claim history. Three were of Indian descent and were able to communicate with claimant in his native Farsi. All three were of the opinion that claimant was totally disabled as a result of his combined physical and social disabilities. Two examining physicians were Americans who could communicate with claimant only through an interpreter. They rated claimant's physical impairment at between 10 and 20 percent, and suggested that a 35 percent disability award would be adequate.

The early vocational reports were discouraging and suggested that claimant had few transferable skills. The testimony of a second vocational expert, however, suggests that claimant may have abilities in the field of electronics assembly.

While this may be true we note that at one time, claimant's apparent lack of manual dexterity resulted in his being terminated from a subsidized employment position.

The Referee found that claimant had failed to prove entitlement to an increased unscheduled award. After a review of the record, however, we find that claimant is entitled to a modest increase. While claimant may be educated, his education is not transferable. Nor are his employment skills in mineralogy. This is best evidenced by claimant's inability to obtain any but the most menial jobs despite his advanced Afghani education. While claimant's hearing loss, severe language difficulties and tremor condition preexisted his injury, we consider the effects of the compensable injury as superimposed on these conditions. Barrett v. D & H Drywall, 300 Or 325, aff'd on reconsideration 300 Or 553 (1985).

After considering claimant's mild physical impairment and his substantial social and vocational deficits, we find that he is entitled to an award of 160 degrees for 50 percent unscheduled permanent partial disability. This award shall be in lieu of all prior awards.

ORDER

The Referee's order dated August 23, 1985 is modified in part and affirmed in part. That portion of the order that affirmed the Determination Order award of 112 for 35 percent unscheduled permanent partial disability is modified. In lieu of all prior awards claimant is hereby awarded 160 degrees for 50 percent unscheduled permanent partial disability. Claimant's attorney is allowed a fee in the amount of 25 percent of the increased compensation awarded by this order, not to exceed $3000. The remainder of the Referee's order is affirmed.

Margaret F. Blakeley, Claimant
David C. Force, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Cummins, et al., Defense Attorneys

WCB 84-02190
May 8, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Brown's order that upheld the denials of Western Employers Insurance Company and the SAIF Corporation of the claim for carpal tunnel syndrome. Claimant proffers a statistical report of the Workers' Compensation Department and requests that the Board take notice of the report for the substantive purpose of establishing that carpal tunnel syndrome is an occupational disease. In addition, claimant requests remand to allow claimant to develop the claim further against SAIF as an aggravation of claimant's accepted low back injury under the theory that Barrett v. D & H Drywall, 300 Or 325 (1985), held "that an aggravation of a previously asymptomatic condition by an increase in symptoms alone may be compensable. . . ." The issues on review are whether the case should be remanded for hearing under a different theory of compensability, the jurisdiction of the Board to take notice of a statistical report, and compensability.

On the issue whether the case should be remanded so that claimant may further develop her case against the SAIF

Corporation, the Board finds that claimant had opportunity to develop the facts that might have indicated that SAIF could be the responsible insurer for claimant's carpal tunnel syndrome but produced no persuasive evidence on that claim. Remand is not necessary to argue a new legal theory based on the facts. Joseph N. Thomas, 37 Van Natta 501 (1985); Anita Bade, 36 Van Natta 1093 (1984), aff'd mem., 73 Or App 344 (1985). The Board finds that the case has not been "improperly, incompletely or otherwise insufficiently developed or heard by the referee," ORS 656.295(5), therefore, the request to remand is denied.

Claimant proffered a three-page statistical report from the Workers' Compensation Department to buttress her conclusion "that the Referee adopted the theory of Dr. Nathan that carpal tunnel syndrome is not an occupational disease within the meaning of Oregon law, but merely a symptom of underlying median nerve neuropathy which is never compensable." The proffered report contains a handwritten caveat: "Note: all claims tabulated here may not be 'occupational disease' claims or may not represent all occupational disease claims." The Referee summarized Dr. Nathan's opinion as stating "very clearly that the claimant's work activity was not the major or even a material contributing factor in the development of her carpal tunnel syndrome; that the claimant's syndrome and consequent disability and need for treatment arose from the natural progression of an underlying condition." The insurer argues, among other things, that the Board has no authority to take "judicial" notice of the materials claimant has submitted. Whatever authority the Board has to take "judicial" or other notice of information submitted for substantive purposes, that notice must conform to the requirements set forth in Groshong v. Montgomery Ward Co., 73 Or App 403 (1985), and cases cited therein. The Board denies consideration of the proffered statistical report because it does not meet the clear requirements for the taking of notice by the Board.

On the issue of compensability of claimant's carpal tunnel syndrome as either an aggravation of claimant's low back injury or as an occupational disease arising out of claimant's employment, the Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated June 14, 1985 is affirmed.

DARREL P. TARTER, Claimant
Bennett, Hartman, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 85-0345M
May 8, 1986
Own Motion Order

Claimant has requested that the Board exercise its own motion authority and reopen his claim for an alleged worsening of his December 9, 1978 industrial injury. Claimant's aggravation rights have expired. The Board postponed action on claimant's request until resolution of WCB Case No. 84-11564, then pending in the Hearings Division. That case has been resolved by stipulation and claimant has requested that the Board proceed with the own motion request.

Claimant's 1978 injury was initially classified as non-disabling. Within one year of the date of injury, i.e., November 2, 1979, Dr. Pasquesi indicated that claimant was 10

percent disabled as a result of the injury. This report is the sole medical evidence provided the Board in support of claimant's request that he be allowed an award for permanent partial disability. Claimant had one year to contest the non-disabling classification place on her claim. She failed to do so. She has also failed to show an aggravation of her condition so as to justify reopening of her claim. Deborah L. Greene, 37 Van Natta 575 (1985). The request for own motion relief is hereby denied.

IT IS SO ORDERED.

BARR V. WASHBURN, Claimant
James E. Dodge, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 86-0194M
May 9, 1986
Own Motion Determination

Claimant has objected to the April 7, 1986 closure of his claim under the Board's own motion jurisdiction. ORS 656.278. Since the issuance of our Own Motion Determination, we have been furnished further documentation relating to the processing of this claim over the past eleven years. We now conclude that claimant is entitled to a closure under the provisions of ORS 656.268.

Claimant made his claim as one for industrial injury on August 4, 1975. The claim was accepted as a nondisabling industrial injury. At the time of claimant's injury, ORS 656.262(10), now ORS 656.262(12), provided that a claim that a nondisabling injury has become disabling, if made more than one year after the date of injury, must be made as a claim for aggravation. Less than five years after the injury date in this case, see ORS 656.273(4), claimant made a claim for aggravation, which was denied on September 8, 1978. However, the claim was later accepted by a stipulation approved April 6, 1979. The claim was never thereafter closed. Claimant is, therefore, entitled to a claim closure under the provisions of ORS 656.268. Owen v. SAIF, 77 Or App 368, 372 (1986).

The Own Motion Determination entered April 7, 1986 is vacated. This claim is remanded to the SAIF Corporation for submission forthwith to the Evaluation Division of the Workers' Compensation Department for closure pursuant to ORS 656.268(4).

IT IS SO ORDERED.

DAVID A. JOHNSON, Claimant
Emmons, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 85-03350
May 13, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Michael Johnson's order that denied authorization to offset allegedly overpaid temporary disability compensation by reduction of future awards of compensation and awarded 67.5 degrees for 50 percent scheduled permanent partial disability in lieu of the Determination Order dated July 31, 1985 that awarded 20.25 degrees for 15 percent loss of use or function of claimant's right ankle. The issues on review are extent of scheduled permanent partial disability and offset.

On the issue of offset, the Board affirms the Referee's order.

Claimant's right ankle was compensably injured on July 13, 1984. Claimant had a preexisting foot and ankle deformity that had not been disabling before the injury. Claimant has received conservative treatment for the symptoms related to the injury, and he became medically stationary in June 1985. The treating doctors have prescribed a brace which helps claimant get around on the leg but claimant cannot return to work in the woods due to pain in the ankle. Claimant has obtained full-time employment with the help of his vocational rehabilitation counselor.

Claimant was examined by a panel of surgeons at Orthopaedic Consultants. They provided detailed physical findings that allow precise determination of the loss of range of motion of claimant's left ankle. Claimant has lost a moderate amount of use of his lower leg due to pain which results from the industrial injury as well. The Board finds that claimant would be adequately compensated for his injury by an award of 33.75 degrees for 25 percent scheduled permanent partial disability for loss of use or function of claimant's right ankle.

ORDER

The Referee's order dated November 8, 1985 is modified in part and affirmed in part. That portion of the order which awarded 67.5 degrees for 50 percent scheduled permanent partial disability is modified to award 33.75 degrees for 25 percent scheduled permanent partial disability for loss of use or function of the right ankle in lieu of all prior awards. Claimant's attorney's fee for services at hearing shall be adjusted accordingly. The remainder of the order is affirmed. Claimant's attorney is awarded a fee of $400 for services on Board review on the issue of reduction of claimant's compensation award by offset in the future, to be paid by EBI Companies.

SCOTT R. PHOENIX, Claimant
Bernt A. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 84-0251M
May 13, 1986
Own Motion Order

Claimant has requested that the Board reopen his 1979 industrial injury claim for injury to the left knee under our continuining own motion jurisdiction. ORS 656.278(1). Claimant was injured January 4, 1979. His claim was accepted as one for a nondisabling industrial injury, but was never closed. His aggravation rights, therefore, expired January 4, 1984. See ORS 656.273(4)(b). Claimant's most recent claim for aggravation was made on or about October 26, 1983, within five years from the date of injury. Claimant's request for relief is made under ORS 656.273 and is not properly a request for own motion relief. ORS 656.278(2). The own motion petition is dismissed.

IT IS SO ORDERED.

SCOTT R. PHOENIX, Claimant
Bernt A. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-05368
May 13, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Michael Johnson's order that: (1) upheld the SAIF Corporation's 1981 denial of aggravation as a bar to future claims of aggravation; (2) upheld SAIF's 1983 denial of aggravation on procedural grounds; and (3) denied penalties and attorney fees for unreasonable denial. Claimant's request for own motion relief is addressed in a companion order. The issues on review are whether a final denial of aggravation is res judicata to foreclose any further claim of aggravation, aggravation, and penalties and attorney fees.

The Board affirms the Referee's order but on a different basis. Claimant's left knee was injured in the course of his employment as a high school wrestling instructor on January 4, 1979. Drs. Fax and Teal, orthopedic surgeons, diagnosed a strained and torn medial collateral ligament. An arthrogram was negative for a torn meniscus. The claim was accepted as a non-disabling injury and was not closed.

In 1981 claimant submitted an aggravation claim because the knee became painful after running in a marathon race and he suspected that the 1979 injury was causative. Dr. Teal examined claimant and opined that the 1979 injury was not causative of the 1981 symptoms. Claimant voluntarily withdrew his aggravation claim and SAIF issued a denial of aggravation.

Claimant continued running and continued to have intermittent pain in the left knee. In 1983 claimant sought the opinion of Dr. Graham, orthopedic surgeon, about the continuing knee symptoms. Dr. Graham obtained an arthroscopic examination which revealed torn lateral and medial menisci in the left knee. Claimant stated that he had done nothing which could have caused the torn menisci since the 1979 injury and he requested reopening of the claim. Dr. Graham opined that the 1979 injury was the sole cause of the torn menisci and that the 1979 arthrogram was not reliable for diagnosis of torn menisci.

Dr. Norton, orthopedic surgeon, reviewed claimant's records and opined that the 1979 injury was not causative of claimant's 1983 symptoms, based (1) on the diagnosis of torn menisci which do not require excessive force to produce and (2) on claimant's history of relative comfort for almost two years after the initial injury. Dr. Teal reviewed Dr. Norton's opinion, agreed with it completely, and provided details about treatment of the knee in 1981.

The Referee found claimant was intelligent, articulate, and totally credible. He ruled that SAIF's denial in 1981 served as a bar to any future claim for aggravation of claimant's left knee injury because claimant's torn menisci must have existed at the time of the denial. When claimant failed to request a hearing on the issue of the aggravation, the denial became final and the Referee found that the torn menisci were irrevocably denied.

We are persuaded by the reports of Dr. Teal at the time of the 1981 claim that the denial was correct because at that time claimant was not in fact suffering symptoms which were related to

the 1979 industrial injury. Regardless of whether the torn menisci existed at the time of the 1981 denial, claimant was not having symptoms of torn menisci at that time. He was also not having symptoms which were related to the ligament injured in 1979. However, that SAIF correctly denied that the 1979 injury was aggravated in 1981 in no way precludes either the medical or legal possibility that claimant's 1979 injury might worsen at some future time. Thomas A. Beasley, 37 Van Natta 1514 (1985); David A. Smith, 35 Van Natta 1400 (1983). The Referee was incorrect when he decided that the 1981 aggravation denial was effective to forever bar claimant from claiming that his industrial injury worsened after that point in time.

The Referee made an alternative finding that the 1979 industrial injury was the cause in fact of the torn menisci which were diagnosed in 1983. The Referee relied on the opinion of Dr. Graham, claimant's current treating doctor, to arrive at this conclusion. The first time Dr. Graham examined claimant was in 1983. Dr. Graham provided a reasonable explanation for the connection between the 1979 industrial injury and the 1983 diagnosis of torn menisci, but he failed to account for the period after the initial injury during which claimant was subjected to rigorous testing by Dr. Teal, who was specifically looking for such an injury. Dr. Teal is an expert in the diagnosis and treatment of knee injuries due to running and was claimant's treating doctor in 1979 and 1981. Dr. Teal completly agreed with the opinion of Dr. Norton that the torn menisci diagnosed by arthroscopy in 1983 were more likely due to some later event, possibly non-traumatic, rather than to the 1979 industrial injury.

The Board is persuaded by the opinions of Drs. Teal and Norton that the 1979 injury was not a material cause of the torn menisci diagnosed in 1983. They were both aware of all of the relevant facts in claimant's history and Dr. Teal had the advantage of having examined and treated claimant in 1979 and 1981 and could compare those injuries with claimant's current diagnosis. Dr. Graham's opinion omits material facts from consideration and dismisses marathon running and other non-traumatic causes as possible causes of the injury without persuasive explanation. On the whole of the record, the Board finds that claimant has not carried his burden of proof that the 1979 industrial injury to the left knee was a material contributing cause of the torn menisci diagnosed in 1983.

Because the Board finds that the denial in 1983 was substantively correct, no penalties and attorney fees are awarded.

ORDER

The Referee's order dated August 20, 1985 is affirmed.

ALFRED F. PUGLISI (Deceased), Claimant
SAIF Corp Legal, Defense Attorney
Moscato & Byerly, Defense Attorneys

WCB 85-00169
May 15, 1986
Order of Remand

The alleged beneficiary of the deceased claimant has requested Board review of Presiding Referee Daughtry's order that dismissed the request for hearing on the SAIF Corporation's denial of claimant's claim for asbestosis. SAIF has moved to dismiss the request for review on the grounds that: (1) there is insufficient evidence that the person who requested Board review is a statutory beneficiary of the deceased claimant and, therefore, is entitled

to continue claimant's request for relief; and (2) that the request for review was not served upon a necessary party. We conclude that this matter must be remanded to the Hearings Division for further proceedings.

Prior to his death, claimant made claims for his lung condition against the SAIF Corporation as insurer for the Westin Benson Hotel and against Georgia-Pacific Corporation ("G-P"), a self-insured employer. It is clear from the record that the SAIF claim was denied and we infer from the record that the G-P claim was likewise denied. There are in the record two requests for hearing, one bearing WCB case number 85-11069 relating to the SAIF claim, and the other bearing no WCB case number relating to the G-P claim. We conclude that the G-P request for hearing was never acknowledged and that no WCB case number was ever assigned.

After claimant's death, his attorney moved to dismiss the pending matters. The motion recited both the SAIF and G-P claim numbers, but used only the WCB Case Number assigned to the SAIF claim. The Presiding Referee allowed the motion. His order dismissed WCB case number 85-11069, but did not mention and was not mailed to G-P or its attorneys. Within 30 days from the order of dismissal, Joyce Townley filed a request for Board review, in which she alleged that she is the principal beneficiary of the deceased claimant.

We conclude from this record that, given Ms. Townley's current allegation that she is entitled to pursue claimant's claims, the record was insufficiently developed at the hearing level. ORS 656.295(5). Therefore, WCB case number 85-11069 is remanded for further proceedings. We also conclude that there remains a valid request for hearing on the G-P claim. The Hearings Division is, therefore, ordered to acknowledge and process the request for hearing on the G-P claim.

ORDER

This matter is remanded to the Hearings Division for further proceedings and action consistent with this order.

ARBRA WILLIAMS, Claimant
Richard A. Sly, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Schwabe, et al., Defense Attorneys

WCB 82-11453, 82-06901 & 81-03038
May 15, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of those portions of Referee Menashe's order which: (1) found that claimant had timely requested a hearing from its denial of claimant's "new injury" claim for a low back condition; and (2) set aside the aforementioned denial. On review, SAIF contends that: (1) claimant's hearing request was untimely; (2) the claim, whether analyzed as an injury or occupational disease, was not compensable; or alternatively, (3) EBI Companies, as insurer on the risk for a prior injury, is responsible for claimant's current condition.

Following our de novo review of the record, we agree with the Referee's conclusions that claimant timely filed a request for hearing from SAIF's denial and that SAIF is responsible for claimant's current condition. Consequently, we affirm the Referee's order.

Furthermore, we find that this is a case of ordinary difficulty and usual probability of success for claimant. Accordingly, a reasonable attorney fee is awarded.

ORDER

The Referee's order dated May 29, 1985 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

ALICE M. WORKMAN, Claimant
Francesconi & Cash, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 83-06558
May 15, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Leahy's order that: (1) upheld the insurer's denial of claimant's aggravation claim for the left elbow; (2) denied claimant's request for temporary total disability compensation for the period of October 15, 1982 through January 20, 1983; (3) and declined to remand claimant's claim to the Evaluation Division for closure. In addition, claimant asks the Board to remand this case to the Referee for the imposition of penalties and attorney fees for the employer's alleged refusal to provide claimant with a copy of her personnel file. The issues are aggravation, entitlement to temporary disability compensation, whether the claim should be remanded to the Evaluation Division for closure and remand for the imposition of penalties and attorney fees.

We agree with the Referee that claimant has failed to establish a worsening of her elbow condition. Neither temporary disability compensation nor closure by the Evaluation Division, therefore, are due.

With regard to her request for penalties and attorney fees, claimant asserts that the Referee erred in refusing to apply a sanction against the employer for an alleged violation of ORS Chapter 652. Even if the Referee had found that a violation had occurred, and even if there were a penalty for said violation, neither the Referee nor this Board have jurisdiction to impose a sanction for an alleged violation of Chapter 652. Further, because of our holding on the merits, there are no amounts due in this case from which to calculate a penalty. Claimant's request is denied.

ORDER

The Referee's order dated October 17, 1985 is affirmed.

MICHAEL T. BALDWIN, Claimant
Cash R. Perrine, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-03560
May 16, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Howell's order that set aside its denial of claimant's claim for medical services for treatment for low back pain. The issue is compensability of medical services. Claimant has also requested that his 1978 claim be reopened for the payment of temporary

disability compensation pursuant to our own motion jurisdiction under ORS 656.278. We have this date issued our separate Own Motion Order on that aspect of claimant's requests for relief.

Claimant was injured January 12, 1978 when he was pinned briefly between two tow trucks which were being used on an icy road to pull another vehicle out of a ditch. Claimant was hospitalized with a diagnosis of contusions and abrasions to his left thigh and abdomen and low back pain. X-rays of the lumbar spine were normal. Claimant was released to return to regular work as of February 2, 1978. On March 27, 1978 claimant sought medical treatment for an unrelated condition. Dr. Combs' history at the time discussed the January 12, 1978 incident and noted, "[Claimant] sustained no fracture at that time and has no residual problems."

Claimant did not follow through with a recommended orthopedic evaluation and both the employer and SAIF lost contact with him around the first part of April 1978. On May 22, 1978 SAIF requested an administrative claim closure based upon claimant's release to work. On June 8, 1978 claimant's claim was closed by a Determination Order that stated that permanent disability was not rated due to lack of a closing medical report. Claimant's statutory aggravation rights expired June 8, 1983. ORS 656.273(4)(a).

In October 1983 claimant sought treatment from Dr. Kemper, a family practioner, for pain in the left hip and left sacral area. Dr. Kemper requested claim reopening on November 8, 1983. His report noted pain over the left hip with tenderness to palpation over the hip and greater trochanter. The neurological examination was within normal limits. He concluded, "It is apparent that this problem [claimant] is now having is, in my judgment, associated with the injury of 1977 [sic]." SAIF referred the reopening request to its "own motion" section, which proceeded to investigate the claim.

Initially, a SAIF investigator took claimant's statement. Claimant related that approximately one and one-half to two months after the 1978 accident his pain was manageable and he thought nothing about it. He stated that he had not noticed pain until approximately two years before the statement when he experienced low back and left hip pain after bowling. He stopped bowling and the pain subsided. Six to eight months later he experienced an onset of pain while engaging in sexual intercourse. Since that time, the pain had been more or less constant.

SAIF sent a copy of its medical file to Dr. Kemper for review. Dr. Beamer, Dr. Kemper's partner and also a family practioner, reported that both he and Dr. Kemper felt that claimant's problems were related to the industrial injury because the same body part was involved and because claimant had not engaged in any signifcant activity since the injury. SAIF then requested an independent medical examination by Dr. Sulkosky, an orthopedist.

Dr. Sulkosky's initial impression was that claimant's pain was due to facet trophism at L5-S1. He recommended further diagnostic tests and referred claimant to Dr. Newby, a neurologist. Claimant also underwent a bone scan, a myelogram and a CT scan. Other than reflecting minimal disc compression at the lower lumbar levels, all tests were within normal limits. Dr.

Newby ultimately opined that claimant's need for medical treatment was related to the 1978 industrial injury because claimant had not been completely asymptomatic since the injury. Dr. Sulkosky opined that claimant's need for treatment was due to the definite facet trophism, however, he could not render an opinion whether the facet trophism was the normal degenerative progression of a preexisting condition or was secondary to the 1978 injury. Dr. Brown, SAIF's neurological consultant, after a medical records review, opined that claimant's pain was due to facet trophism. He further opined that facet trophism is not due to trauma.

The Referee acknowledged that this was a close case. He concluded that the medical evidence slightly preponderated in favor of claimant and, together with claimant's credible testimony, the entire record showed by a preponderance of the evidence that the treatment since October 1983 was materially related to the 1978 injury. On de novo review, we agree with the Referee that this is a close case, but we find that claimant has failed to sustain his burden of proof.

We find that the key to this case is the assertion that claimant was never completely asymptomatic following the 1978 injury. Although Dr. Newby stated that claimant never was completely asymptomatic, and the only reasonable inference is that he got that impression from claimant, we find that the statement is directly contrary to claimant's statement given to SAIF in December 1983 and his credible testimony at the hearing.

Based upon the entire record, including claimant's credible testimony, we find that claimant sustained normal work activities without pain during the years between 1979 and 1982. It was not until he began bowling in late 1982 that he began experiencing pain. At that time, claimant had worked as a bartender for over a year without pain and had worked previously for several months as a janitorial supervisor, also without pain. We are unable to agree with the Referee's finding that during this four-year period claimant did have pain, but that it was masked by excessive use of prescription pain medication and alcohol. Such a finding is not supported by the evidence.

In view of claimant's testimony, the opinions of Doctors Kemper, Beamer and Newby are cancelled out by those of Doctors Sulkosky and Brown. See Eugene R. Jones, 36 Van Natta 1517, 1518 (1984), aff'd mem 73 Or App 824 (1985). We conclude that claimant has failed to establish by a preponderance of the evidence that his need for medical treatment in October 1983 and following was materially related to the 1978 industrial injury. Accordingly, the SAIF Corporation's formal denial will be reinstated.

ORDER

The Referee's order dated July 15, 1985 is reversed. The SAIF Corporation's denial dated May 1, 1984 is reinstated and approved.

ANNA M. DAVIS, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-13273
May 16, 1986
Order on Reconsideration

On March 27, 1986 the SAIF Corporation requested that we abate our Order on Review dated March 18, 1986 for the purpose of determining whether we had received, before the order issued, the insurer's Motion to Dismiss its request for Board review. In our order we affirmed without opinion the Referee's order finding

claimant entitled to vocational assistance. We awarded claimant's attorney a fee of $550, although there were no briefs filed on review. In its request for abatement SAIF asked that claimant's attorney fee be reduced or eliminated.

We abated our order on April 8, 1986 and reviewed the correspondence received from the parties prior to the issuance of our order. SAIF's Motion to Dismiss was not among the correspondence. SAIF was so advised and on April 25, 1986 it wrote to the Board admitting its error and asking that the matter not be further investigated. It renewed its request for reconsideration of the attorney fee awarded to claimant's attorney, however.

SAIF's request for reconsideration is granted. Pursuant to SAIF's request, we shall terminate our investigation of this matter. In addition, on reconsideration we agree with SAIF that the attorney fee awarded in our March 18 order was excessive, considering that no briefs were filed on review. Claimant's attorney did expend efforts on behalf of his client, however, both in preparation for review and subsequent to the issuance of our order upon SAIF's request for abatement. Considering the efforts expended and the results obtained, we hereby award claimant's attorney a reasonable fee in the amount of $300 in lieu of the fee awarded in our March 18, 1986 order.

IT IS SO ORDERED.

JOHN L. DOWNEY, Claimant
Robert L. Burns, Claimant's Attorney
Moscato & Byerly, Defense Attorneys
Schwabe, et al., Defense Attorneys

WCB 85-05103 & 85-10853
May 16, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Freightliner Corporation requests review of those portions of Referee Shebley's order that set aside its denial of claimant's aggravation claim for his right shoulder, upper back and neck condition and simultaneously awarded claimant 20 percent (64 degrees) unscheduled permanent partial disability for the same condition. Claimant cross-requests review of those portions of the order that: (1) found the original claim for claimant's right shoulder, upper back and neck condition was not prematurely closed; (2) failed to award more than 20 percent unschedulued permanent partial disability for that condition; (3) failed to award penalties and attorney fees for allegedly improper claims processing; and (4) upheld denials of claimant's claim for medical services by Freightliner Corporation and a previous employer, Consolidated Freightways, for a low back injury. The issues with regard to claimant's right shoulder, upper back and neck condition are premature closure, aggravation, extent of disability, penalties and attorney fees. The issue with regard to claimant's low back claim is medical services.

The Board affirms the order of the Referee with the exception of that portion of the order that awarded claimant 20 percent (64 degrees) unscheduled permanent partial disability for his right shoulder, upper back and neck condition. Claimant's original claim for this condition was closed by Determination Order dated February 19, 1985 with no award of permanent partial disability. The Referee concluded that at the time of claim closure the evidence did not support a permanent disability award. We agree.

Claimant's condition subsequently worsened as indicated in a report dated April 18, 1985 by claimant's treating family practitioner, Dr. Biska. Eight days later, Freightliner issued an aggravation denial. The Referee set aside this denial and ordered Freightliner to pay claimant all benefits required by law until reclosure of the claim pursuant to ORS 656.268. We affirm this action.

The Referee awarded claimant 20 percent (64 degrees) unscheduled permanent partial disability for his right shoulder, upper back and neck condition based upon medical reports generated subsequent to the worsening of claimant's condition and upon testimony at the hearing regarding claimant's then current limitations. In light of the Referee's action in reopening the claim and the lack of evidence indicating that claimant was medically stationary at the time of the hearing, the Referee erred in determining the extent of claimant's disability. See Kociemba v. SAIF, 63 Or App 557, 560 (1983); Pauline L. Travis, 37 Van Natta 194, 195 (1985) rev'd on other grounds, 79 Or App 126 (1986). We, therefore, reverse the Referee's permanent disability award. The extent of claimant's disability will be determined at the time of claim closure pursuant to ORS 656.268.

ORDER

The Referee's order dated October 10, 1985 is reversed in part. That portion of the order that awarded claimant 20 percent (64 degrees) unscheduled permanent partial disability for injury to his right shoulder, upper back and neck is reversed. The remainder of the order is affirmed.

PHILLIP E. HAGER, Claimant
Pozzi, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 84-11306
May 16, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of Referee Menashe's order that approved that portion of the Determination Order dated October 11, 1984 which awarded temporary partial disability compensation from July 6, 1983 through September 10, 1984 and that awarded a penalty of 10 percent for unreasonable failure to pay compensation awarded by the Determination Order. The employer requests authority to recoup temporary disability payments made pursuant to the Referee's order by an offset against future awards of compensation.

The Board notes that the June 7, 1984 order by Referee Braverman which set aside the employer's denial of compensability has become final by operation of law. Phillip E. Hager, [sic] (WCB Case No. 83-06039); aff'd mem., 36 Van Natta 1877, (1984); aff'd mem., 76 Or App 212 (1985); rev. den., 300 Or 477 (1986).

The Board affirms and adopts the well-reasoned order of the Referee. The employer shall not recover any compensation paid or payable pursuant to the order of the Referee because the offset requested is contrary to law. ORS 656.313; OAR 436-60-150.

ORDER

The Referee's order dated August 7, 1985 is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by the self-insured employer.

TINA M. REAGLE, Claimant
Roll, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-07210
May 16, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Pferdner's order that: (1) affirmed the Determination Order dated June 8, 1984 which awarded 16 degrees for 5 percent unscheduled permanent partial disability for injury to claimant's left shoulder; (2) upheld the suspension authorized by the Director of the Workers' Compensation Department of temporary disability compensation during absence from a program at the Callahan Center; (3) upheld the denial by the SAIF Corporation of out-of-state chiropractic services; (4) awarded $122 for babysitting expenses while claimant attended a program at the Callahan Center; (5) approved the offset of overpaid temporary disability compensation out of permanent partial disability compensation as authorized by the Determination Order; and (6) awarded a penalty of $150 and attorney fees of $300 for unreasonable delay in providing discovery of medical and claims records. The issues on review are: (1) extent of unscheduled permanent partial disability; (2) suspension of temporary disability compensation; (3) compensability of out-of-state chiropractic services; (4) babysitting expenses; (5) offset of overpaid temporary disability compensation; and (6) penalties and attorney fees.

On the issues of extent of unscheduled permanent partial disability, suspension of temporary disability compensation benefits while absent from a program at the Callahan Center, and offset of overpaid temporary disability compensation the Board affirms the order of the Referee. On the issue of babysitting expenses, the Board affirms the order of the Referee with the following comment. SAIF has not requested reduction of the award and has requested that the Referee's award be affirmed. Cf. Robert E. Martell, 37 Van Natta 1074 (1985) (no reduction of disability award absent request to reduce).

Claimant injured her left shoulder in the course of her work as a cook on October 30, 1982. She obtained treatment from chiropractors in Oregon through February 1983. In March 1983 she began obtaining chiropractic treatment from Dr. Kent in Washington. Dr. Kent supplied chartnotes and report letters upon request to SAIF. SAIF paid Dr. Kent's bills until July 11, 1983 when it issued a partial denial of further payment for any out-of-state chiropractic services based on Rivers v. SAIF, 45 Or App 1105 (1980). Claimant continued to obtain treatment from Dr. Kent but paid the bills herself.

The claim was closed by Determination Order dated June 8, 1984 with temporary disability compensation awarded from December 11, 1982 through January 4, 1984 and February 23 through April 24, 1984 and an award of 16 degrees for 5 percent for unscheduled permanent partial disability.

Claimant requested a hearing on the Determination Order and requested medical and claims documents on July 5 and August 21, 1984 and on February 15 and February 22, 1985. SAIF did not produce documents relevant to the dates of temporary disability compensation payments and the amounts of permanent disability payments and offset calculations until February 20, 1985; the documents relevant to the babysitting reimbursement issue and the

calculation of the overpaid temporary disability compensation issue were not furnished until the claim file was produced at the hearing on February 25, 1985; and no proof of payment of Dr. Kent's bills in 1983 before the denial was ever produced by SAIF.

On the issue of compensability of the chiropractor's bills for services provided by an out-of-state chiropractor, the case of Rivers v. SAIF, supra has subsequently been overruled by the Supreme Court in Reynaga v. Northwest Farm Bureau, 300 Or 255 (1985). We find that the services of Dr. Kent were reasonable and necessary and related to claimant's industrial injury. Therefore, the Referee's order is reversed and the partial denial is set aside. Claimant's attorney is entitled to a fee for services in relation to this issue. Shoulders v. SAIF, 73 Or App 811 (1985).

On the issue of unreasonable delay of discovery, penalties and attorney fees may be assessed under ORS 656.262(10) pursuant to OAR 438-07-015(2). Penalties for unreasonable delay are to be assessed as a percentage of amounts then due. When the delay relates to payment of medical benefits found to be compensable, the penalty can be assessed on the amounts then due for medical services. Whitman v. Industrial Indemnity, 73 Or App 73 (1985); Brad T. Gribble, 37 Van Natta 92 (1985). "Amounts then due" can be amounts due at the time of the action being penalized. Harold A. Lester, 37 Van Natta 745 (1985). At the time of the delay of the discovery of documents, claimant was receiving all of the temporary disability compensation to which she was entitled, but the chiropractor's services were wrongfully (but not unreasonably) denied. The Referee's award of a penalty and associated attorney fee was, therefore, correct.

ORDER

The Referee's order is reversed in part and affirmed in part. That portions which upheld the SAIF Corporation's partial denial of chiropractic services by an out-of-state chiropractor is reversed. The denial of out-of-state chiropractic services is set aside and the claim for services is remanded to the SAIF Corporation for payment according to law. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $500 for services at hearing and $500 on Board review on the issue of the denial of chiropractic services, to be paid by the SAIF Corporation.

JOHN M. TIBBETTS, Claimant
Merrill Schneider, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Roberts, et al., Defense Attorneys

WCB 85-00459, 84-10051 & 84-11152
May 16, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Menashe's order that: (1) upheld the SAIF Corporation's formal denial of an industrial injury claim for injury to the low back; and (2) upheld Cascade Corporation's denials of claims of aggravation of accepted low back claims in 1978 and 1981. The issues are compensability of a new injury claim and, in the alternative, compensability of aggravation claims.

On the issue of the compensability of claimant's alleged June 18, 1984 industrial injury while employed by SAIF's insured, we affirm and adopt the relevant portions of the Referee's order.

After de novo review of the entire record, we agree with the Referee that claimant failed to prove by a preponderance of the evidence that he was injured as claimed.

On the issue of aggravation, we reverse. A preponderance of the credible evidence establishes that claimant suffered an onset of low back pain after becoming ill after drinking alcohol and vomiting at home. If a previous compensable injury remains a material contributing factor to the current disability, the current disability is compensable, even though it may have been precipitated by a non-work related event. Grable v. Weyerhaeuser Co., 291 Or 387 (1981). The preponderance of the medical evidence is that either or both of claimant's previous, 1978 and 1981, low back injuries remain as a material contributing factor to the current disability. The Referee gave no weight to this medical evidence because none of the doctors were informed of the vomiting incident.

We conclude that even if claimant concealed or misrepresented the vomiting incident, that fact has nothing to do with whether the prior injuries remain contributory to current disability. It matters only that there was an incident that rekindled the disability, not its character or where it occurred. See Peterson v. Eugene F. Burrill Lbr. Co., 294 Or 537 (1983); Westmoreland v. Iowa Beef Processors, 70 Or App 642, rev den 298 Or 597 (1985). We hold that claimant's current disability and need for medical services is compensable.

Although both the 1978 and 1981 injuries are the responsibility of Cascade Corporation, because claimant's aggravation rights have expired, ORS 656.273(4)(a), on the 1978 claim, we must determine "responsibility" for processing purposes. The medical evidence does not establish which prior injury has been aggravated; only that the prior injuries remain a material contributing factor to the current disability. In cases involving aggravation of prior successive injuries to the same body part, there is a presumption that the most recent accepted injury remains contributory. Industrial Indemnity Co. v. Kearns, 70 Or App 583 (1984). There being no evidence counter to the presumption in this case, the 1981 injury is "responsible."

ORDER

The Referee's order dated June 24, 1985 is affirmed in part and reversed in part. Those portion of the Referee's order that upheld the SAIF Corporation's denial dated October 16, 1984 and Cascade Corporation's denial dated January 3, 1985 are affirmed. That portion of the Referee's order that upheld Cascade Corporation's denial dated September 13, 1984 is reversed, the denial is set aside and this claim is remanded to Cascade Corporation for acceptance, processing and payment of compensation according to law as an aggravation of the accepted 1981 industrial injury. For services in overcoming the denial, claimant's attorney is awarded a reasonable attorney fee of $1,250 for services at hearing and $550 for services on Board review, to be paid by the Cascade Corporation in addition to compensation.

RICHARD K. ADAMS, Claimant
Emmons, et al., Claimant's Attorneys
Mitchell, et al., Defense Attorneys

WCB 85-05007
May 19, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of those portions of Referee Myers' order that upheld a Determination Order which had granted claimant no award of permanent partial disability for his upper back condition, ruled that a medical report generated subsequent to claim closure did not constitute a claim for aggravation and denied claimant's request for interim compensation, penalties and attorney fees. The issues are extent of disability, aggravation, interim compensation, penalties and attorney fees.

The Board affirms and adopts the order of the Referee on the issue of extent of disability. On the issues of aggravation, interim compensation, penalties and attorney fees, the Board affirms the order of the Referee with the following comment. Claimant injured his upper back in August 1984. In late February or early March 1985, claimant began treating with Dr. Davis, an orthopedist. Dr. Davis released claimant for regular work on March 29, 1985 noting persistent dull aching with occasional clicking and popping in claimant's right scapular region. Claimant's claim was closed by Determination Order dated April 24, 1985 with no award for unscheduled permanent partial disability. On June 6, 1985 claimant requested an expedited hearing on this Determination Order.

On June 14, 1985 claimant returned to Dr. Davis for the first time in two and a half months stating that five days previously he had experienced a popping sensation in his upper back followed by temporary neurological symptoms in his upper extremities. Dr. Lewis noted tenderness in the T4-5 region and an audible "clunk" with motion of the left scapula over the rib cage. He recommended physical therapy. Dr. Lewis sent a letter and a copy of his chart notes to the insurer. The letter stated in pertinent part:

> "I have re-evaluated [claimant] on June 14, 1985. He states that despite his release for work he has been unable to work secondary to persistent symptoms of popping and snapping in the left scapular region and persistent discomfort. He also states that employers will not hire him in his present condition. I have restarted him on a physiotherapy program but feel that he should undergo an Independent Medical Examination at this point."

This letter was received by the insurer on June 24, 1985. On June 28, 1985 Dr. Lewis sent the insurer a Form 829 with a box checked indicating that claimant was not medically stationary. On July 9, 1985 claimant submitted a supplemental request for hearing on the issues of temporary total disability and premature claim closure.

On July 10, 1985 the insurer issued payment of temporary total disability for the period from June 14 through July 14, 1985. On July 26, 1985 the insurer issued a like payment for the

period from July 15 through July 28, 1985. After that the insurer ceased all payments. The case came up for hearing on August 22, 1985. Prior to going on the record, the issue of an aggravation of claimant's condition was discussed among the parties, was denied by the insurer and was added as an issue at the hearing. In his Opinion and Order, the Referee expressly found claimant not credible based primarily upon the wide discrepancy between the physical limitations demonstrated by claimant during his testimony and the physical movements performed by claimant during the rest of the hearing. We accept this credibility finding.

On the aggravation issue, the Referee concluded that the letter received by the insurer from Dr. Lewis on June 24, 1985 did not constitute an aggravation claim under ORS 656.273. We disagree. The letter stated that claimant was receiving renewed medical treatment for symptoms apparently related to his compensable condition and repeated claimant's statement that he was unable to work as a result of this condition. We conclude that this is sufficient to constitute a claim for aggravation. See ORS 656.273(3); Smith v. SAIF, 78 Or App 443 (1986).

On the merits of claimant's aggravation claim, we find that claimant has failed to establish a worsening of his compensable condition since the last arrangement of compensation. The only evidence of a worsening was presented through claimant's testimony and the history he gave to Dr. Lewis. In light of the Referee's credibility finding, this evidence is of little or no probative value and we conclude that it is insufficient to carry claimant's burden of proof.

On the issue of interim compensation, we find that claimant has failed to establish a medically verified inability to work. ORS 656.210(3); 656.273(6); Bono v. SAIF, 298 Or 405, 410 (1984). The only items of evidence in the record which could have satisfied this requirement (claimant's testimony and Dr. Lewis's letter to the insurer in which he repeated claimant's assertion that claimant was unable to work) were rendered without probative value by the Referee's credibility finding.

On the issues of penalties and attorney fees, given our conclusions above, no compensation was due claimant as a result of his aggravation claim and hence there is no basis to assess a penalty or attorney fee. See ORS 656.262(10); 656.382(1).

ORDER

The Referee's order dated September 6, 1985 is affirmed.

RON C. KENDALL, Claimant
Robert J. Thorbeck, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 83-08287
May 19, 1986
Order on Reconsideration

The insurer has requested reconsideration of the Board's Order on Review dated April 22, 1986. The insurer repeats its argument that it should not be assessed penalties and accompanying attorney fees for improper claim processing.

In its request, the insurer does not address the Court of Appeals' recent decision in Smith v. SAIF, 78 Or App 443 (April 9, 1986), upon which we based our conclusion that claimant had filed a claim for aggravation. Moreover, the insurer

primarily concentrates on an interpretation of Dr. Thompson's July 26, 1983 report. Although we found this report sufficient to constitute an aggravation claim, we also relied on Dr. Thompson's July 28, 1983 time loss authorization. The insurer does not discuss the aforementioned authorization. This authorization for time loss was important to our decision in that it established the effective date for calculating claimant's entitlement to interim compensation benefits. Since the insurer failed to pay temporary disability benefits until it eventually accepted the aggravation claim, which was more than three months after receiving the July 1983 medical report and time loss authorization, we continue to find that its conduct was unreasonable.

Accordingly, the insurer's request is granted. On reconsideration, the Board adheres to and republishes its former order, effective as of the date hereof.

IT IS SO ORDERED.

JAMES A. LEVINGSTON, Claimant
Robert L. Chapman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-00718
May 19, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Brown's order that upheld the SAIF Corporation's denial of claimant's low back injury claim, on grounds of both failure to prove causation and untimely claim filing. The issues are timeliness of claim filing and compensability.

Claimant alleges that he was injured on September 29, 1984 when he slipped and fell on a wet roof. We find from the entire record that this event did occur as claimed by claimant. Claimant did not notify his employer of the incident, however, until November 7, 1984, when he completed Form 801 after having received medical treatment. ORS 656.265(4) provides that failure to make a claim for injury within 30 days of the injurious event bars the claim unless, among other reasons, the insurer or employer was not prejudicied by failure to receive notice of the injury. The Referee found that SAIF was prejudicied in this case. We are unable to agree. Claimant made his claim on the thirty-ninth day after the allegedly injurious event. SAIF has not demonstrated how it may have been prejudiced, and claimant has persuaded us that SAIF was not prejudiced. We conclude that the claim is not barred.

We nevertheless affirm the Referee's order. After de novo review of the entire record, we conclude that it is more probable that claimant's current condition and need for treatment is directly related to his noncompensable 1972 low back vertebral fracture than it is that the condition may be related to the rather benign incident of September 29, 1984. We find that claimant has failed to sustain his burden of proof.

ORDER

The Referee's order dated August 30, 1985 is affirmed.

BRIAN K. PALMER, Claimant
David C. Force, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-06780
May 19, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Palmer v. SAIF, 78 Or App 151 (1986). The court has ordered that claimant's occupational disease claim for pansinusitis be accepted. Now, therefore, the SAIF Corporation's formal denial dated July 8, 1983 is set aside and this claim is remanded to the SAIF Corporation for acceptance and processing according to law.

IT IS SO ORDERED.

HERIBERTO PEREZ, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Brian L. Pocock, Defense Attorney

WCB 82-10307
May 19, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of Referee Podnar's order which granted permanent total disability, whereas an October 26, 1983 Determination Order had awarded 45 percent (144 degrees) unscheduled permanent disability. On review, the employer contends that claimant is not entitled to an award of permanent total disability. We agree and reverse.

Claimant was 43 years of age at the time of hearing. In June 1980, while pushing a load of veneer, he "felt something pop in [his] back." Dr. Fleshman diagnosed acute low back strain. Following a period of conservative treatment, claimant returned to light work in September 1980. His claim was closed by an April 1981 Determination Order which awarded no permanent disability.

Claimant continued to work despite increasing low back complaints. Finally, in September 1981, he returned to Dr. Fleshman and was taken off work. Thereafter, Dr. Fleshman recommended a referral to the Callahan Center.

In December 1981 claimant arrived at the Callahan Center. Initial evaluations indicated that claimant was a native of Puerto Rico with a seventh grade education. He immigrated to the United States at age 18 and had primarily worked as a manual laborer in the wood products industry since his immigration. Claimant received no formal education in the English language, but considered himself able to read commonly-encountered written materials. His writing skills were not good. A full evaluation was not completed since claimant believed he would soon be returning to work with his employer.

However, before claimant could return to work his low back pain increased, prompting his return to Dr. Fleshman. Although Dr. Fleshman noted some minimal low back spasms, he began "to wonder then if there is more subjective than objective involvement here." Suspecting a definite psychological overlay, Dr. Fleshman again recommended the Callahan Center.

In April 1982 claimant returned to the Callahan Center. However, he balked at submitting to entrance tests, expressing concern that his limited education and reading skills would make him "look very dumb on the tests." Consequently, due to his

refusal to perform psychological testing and a general lack of cooperation, he was discharged from the center. Thereafter, Dr. Fleshman requested that claimant seek care from another physician.

In June 1982 Dr. Stolzberg, neurologist, performed an independent medical examination. Claimant complained of constant low back pain, radiating into both legs, but especially the right upper buttock. Due to a fear of needles, claimant would not allow Dr. Stolzberg to perform an EMG. Stating that claimant's history strongly suggested degenerative disc disease, Dr. Stolzberg recommended further testing.

In July 1982 claimant was examined by Dr. Steele, orthopedist. Tests for malingering were not positive. Diagnosing chronic low back strain, Dr. Steele did not recommend surgery. Instead, Dr. Steele suggested abdominal strengthening, back exercise, and physical therapy.

In September 1982 claimant returned to Dr. Fleshman "very disturbed." Apparently, claimant was concerned that he had cancer. Dr. Fleshman ordered further testing which resulted in normal findings. It was Dr. Fleshman's opinion that claimant had underlying severe psychological problems with almost a conversion reaction. Based on inconsistencies in claimant's examinations, Dr. Fleshman ultimately concluded that claimant was attempting to deceive him. Accordingly, Dr. Fleshman again dismissed claimant from his care.

In January 1983 claimant was examined by Dr. Stanley, orthopedist, who recommended a myelogram. The myelogram revealed a disc herniation at L4-5, more marked on the right side. In March 1983 surgery was performed by Dr. Tsai, neurosurgeon.

In June 1983 Dr. Karasek, neurologist, reported that claimant was experiencing daily, constant low back pain. Pain and numbness also radiated into both legs. Dr. Karasek attempted to determine what activities claimant could perform. However, claimant was unable to acknowledge his ability to perform virtually any activity. Since Dr. Karasek found no evidence for ongoing denervation of claimant's lower extremities, he concluded that there was a very strong, elaborated component to claimant's symptomatology. Although claimant was "totally convinced that he [could] do no work at all," Dr. Karasek suggested that he could be released for any activity that did not involve heavy lifting.

In August 1983 Dr. Tsai opined that claimant's weight bearing should be limited to 10 pounds below the shoulder level and close to the body. Furthermore, Dr. Tsai recommended that claimant squat rather than bend and refrain from turning from the waist.

In September 1983 claimant's English proficiency was tested at the University of Oregon. Refusing to write, claimant reported that he had a fourth grade Puerto Rican education and could neither read nor write. Considering claimant's age and the literacy rate in Latin America, the counselor considered claimant's assertion to be truthful. Although claimant's spoken language was not grammatically correct, it was "abundantly clear" to the counselor that this lack of correct grammar did not hinder claimant's ability to communicate in English. The counselor did not recommend English training. Rather, the counselor suggested

that claimant receive basic literacy training if retraining was needed.

In March 1984 Ms. Hetfeld, CRC, interviewed claimant and performed a vocational assessment. Claimant reported that he had a third grade Puerto Rican education and could neither read nor write in the English language. He could not look up numbers in the telephone book, but could operate a telephone if shown which numbers to dial. When given a job application, claimant was unable to identify it. After rehabilitation procedures were explained to him, claimant seemed to be a cooperative and willing candidate. Considering claimant's significant language deficiencies, Ms. Hetfeld concluded that he had no transferable work skills.

In May 1984 claimant was evaluated by Dr. Holmes of the Western Pain Center. Claimant continued to complain of low back pain, radiating into both legs. He also described severe depressive symptoms, which were interrupting his sleep patterns and decreasing his energy level. Although Dr. Holmes saw little obstacle to claimant's return to work in the light to moderate range, he conceded that claimant saw himself as totally disabled. Concluding that claimant was suffering from depression and a secondary conversion disorder, Dr. Holmes recommended that claimant enroll in the center's multidisciplinary program.

Claimant participated in the pain center program for approximately two weeks in June 1984. Ms. McKinney, claimant's case manager at the center, testified that claimant had "no problem whatsoever" communicating. In fact, claimant seemed to understand English more readily than he did Spanish. She further stated that there were inconsistencies between what claimant said he could do and what he could actually do. For example, claimant contended that he was capable of sitting for no more than twenty or thirty minutes. However, Ms. McKinney frequently observed him sitting, with occasional breaks, through lectures and counseling sessions which lasted in excess of one hour. Ms. McKinney also noted an increase in claimant's pain behavior when he was scheduled for a doctor's evaluation or whenever claimant's wife was present. After claimant's discharge from the center, he did not comply with the center's instructions to return for his one, three, and six month evaluations. In Ms. McKinney's opinion claimant was malingering.

In July 1984 claimant was examined by Dr. McGee, neurosurgeon. Following another series of tests, Dr. McGee recommended conservative measures and suggested that claimant avoid returning to millwork. Furthermore, Dr. McGee strongly urged following through with vocational education programs and another pain center evaluation.

Mr. Hernandez, vocational consultant, testified that he was assigned claimant's file in July 1984. Mr. Hernandez had no difficulty communicating with claimant in the English language. The primary purpose of Mr. Hernandez' association with claimant was to determine if a return to work for the employer in a modified or light duty position was feasible. Several appointments to determine claimant's physical limitations and capacities were arranged. However, claimant failed to attend these appointments. Without an assessment of claimant's physical limitations and skill levels, Mr. Hernandez could not render an opinion concerning claimant's employability. Claimant and his

wife testified that he was initially unable to attend these vocational evaluations because of financial and transportation problems. Finally, claimant terminated these vocational rehabiliation efforts, stating that Dr. Tsai had determined that he was totally disabled.

In September 1984 claimant was reexamined by Dr. Tsai. He had not seen Dr. Tsai since June 1983, although he had received physical therapy during this interval. Claimant stated that he had received no lasting relief from Dr. Holmes' pain center program. Noting that further neurosurgical diagnostic or therapeutic procedures were not indicated, Dr. Tsai concluded that claimant could not be gainfully employed. Furthermore, considering claimant's physical limitations and lack of education, Dr. Tsai opined that vocational rehabilitation efforts would be futile.

Mr. Renz, a private investigator, testified at the hearing. Mr. Renz had observed claimant on two separate days immediately prior to the hearing. He testified that he saw claimant driving a pickup truck and walking without a cane. Claimant was seen using a cane only when he visited his physician's office. In addition, Mr. Renz had observed claimant on the day prior to the hearing driving to his physician's office. Claimant insisted that his wife had driven him on the preceding day. Furthermore, he contended that he always uses a cane for support. A surveillance film was admitted into evidence showing claimant driving a vehicle and going to a physician's office on the day preceding the hearing.

Claimant testified as follows: he experiences persistent low back pain, which radiates into both of his legs. He constantly limps, continually wears a back brace, and takes approximately 24 aspirin tablets daily. He can stand or sit for no more than fifteen or twenty minutes at a time. His wife usually does the driving, especially when he visits his physician. As a result of his compensable injury and surgery, he has curtailed, if not eliminated, most of his household and recreational activities. Claimant has also lost the distal phalanx of the thumb of his non-dominant left hand in a previous industrial injury.

Until Dr. Tsai advised him that he could no longer work, claimant continued to periodically contact his former employer concerning possible employment opportunities. Other than these contacts, claimant had unsuccessfully looked for employment at service stations and for light duty custodian positions.

Claimant's wife testified that claimant has become very depressed since his compensable injury. Because of her husband's inability to read English, she completes his employment applications and administers the family's finances.

The Referee was persuaded that claimant's physical problems, limited education, and lack of transferable skills prevented him from becoming gainfully employed. Accordingly, the Referee found that claimant was entitled to an award of permanent total disability under the so-called "odd lot" doctrine.

To establish permanent total disability, a claimant must prove that he is unable to perform any work at a gainful and suitable occupation. ORS 656.206(a); Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Permanent total disability may be established

through medical evidence of physical incapacity or through the so-called "odd lot" doctrine, under which a disabled person may remain capable of performing work of some kind but still be permanently disabled due to a combination of medical and non-medical disabilities which effectively foreclose him from gainful employment. Welch v. Banister Pipeline, 70 Or App 699 (1984). Whether a claimant is permanently and totally disabled must be decided on the basis of conditions existing at the time of the decision, not on the basis of a speculative future change in employment status. Gettman v. SAIF, 289 Or 609 (1980).

We find that claimant has failed to establish that he is unable to perform any work at a gainful and suitable occupation. Consequently, he is not entitled to an award of permanent total disability.

Although claimant has suffered significant permanent physical impairment, we are not persuaded that he is totally physically incapacitated from working. The only physician who supports claimant's contention that he is totally physically disabled is Dr. Tsai, his treating surgeon. However, Dr. Tsai apparently considered social and vocational factors in evaluating claimant's physical limitations. Inasmuch as Dr. Tsai introduced considerations outside of his area of expertise, we choose not to follow his conclusions. See Alvin L. Van Arnam, 36 Van Natta 1641, 1644-45 (1984), aff'd mem. 74 Or App 151 (1985). It would appear that when these social and vocational factors are excluded, Dr. Tsai's opinion concerning claimant's physical limitations compares favorably with those of Drs. Karasek, Holmes, and McGee. These medical opinions support the conclusion that claimant was capable of working as long as he avoided millwork, heavy lifting, and other strenuous physical activities.

We further conclude that when claimant's physical disabilities are combined with his social and vocational factors, he has not established permanent and total disability under the so-called "odd lot" doctrine. Although claimant's disabilities and lack of a formal education present him with a significant challenge, we are persuaded that he possesses sufficient physical capabilities, work experiences, and communication skills to achieve a successful return to the work force should he so desire.

In reaching this decision, we find the opinion of Mr. Hernandez more persuasive than that offered by Ms. Hetfeld. Mr. Hernandez apparently had the opportunity to both interview claimant and investigate the case more thoroughly than Ms. Hetfeld. More important, Ms. Hetfeld based her opinion that claimant lacked transferable skills on a significant language deficiency. Yet, testing at the University of Oregon suggested that although claimant's grammar was not always correct, he was able to communicate in English. Furthermore, claimant's proficiency in English is also supported by the testimony of Ms. McKinney and Mr. Hernandez, who experienced no difficulties in communicating with claimant.

The preponderance of the evidence establishes that claimant has short-circuited all vocational rehabilitation efforts. A portion of these efforts were apparently forestalled by Dr. Tsai's opinion that claimant was totally disabled. As discussed above, this opinion is unpersuasive based on its "social/vocational" foundation. Inasmuch as no vocational counselor has had the opportunity to assess claimant's physical

capacity and transferable skills, we are unable to conclude that claimant lacks marketable aptitudes within his physical limitations. In short, no vocational goal has ever been identified because, for one reason or another, claimant has not undergone an adequate evaluation of his physical and vocational capabilities. Claimant's failure to engage in vocational assessments is certainly his prerogative. However, it does not necessarily follow that such an omission supports his contention that he is unemployable, particularly when the record indicates that his physical infirmities are not so debilitating that his past work experiences and vocational aptitudes could not be transferable to a gainful and suitable occupation.

Furthermore, in order to receive permanent total disability claimant must establish that he is willing to seek regular and gainful employment and that he has made reasonable efforts to obtain such employment. ORS 656.206(3); Laymon v. SAIF, 65 Or App 146 (1983). He may be excused from this requirement if it would be futile for him to seek work based on his impairment or a combination of his impairment with his social and vocational factors. Butcher v. SAIF, 45 Or App 313 (1980); George M. Turner, 37 Van Natta 531 (1985), aff'd mem., 78 Or App 669 (April 9, 1986).

For the reasons discussed above, we are not persuaded that claimant is willing to seek a return to the work force nor do we find that he has made reasonable efforts to achieve a successful return. Moreover, we do not believe that it would be futile for claimant to engage in such activities.

We next turn to a determination of the extent of claimant's unscheduled permanent disability. We find that the Determination Order's award of 45 percent should be increased.

In rating the extent of claimant's permanent disability, we consider the physical impairment attributable to his compensable injury, which includes his apparent emotional difficulties in adjusting to his disability, and all of the other social and vocational factors contained in OAR 436-30-380 et seq. These rules are not applied as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). We note parenthetically that although claimant has apparently experienced some emotional adjustments, the evidence fails to establish that he has sustained any permanent psychological disability resulting from his compensable injury. Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that an award of 55 percent unscheduled permanent disability adequately compensates claimant for his compensable injury.

ORDER

The Referee's order dated April 19, 1985 is reversed. In addition to the 45 percent (144 degrees) unscheduled permanent disability awarded by the October 26, 1983 Determination Order, claimant is awarded 10 percent (32 degrees), which gives him a total award to date of 55 percent (176 degrees) unscheduled permanent disability for his compensable injury. Claimant's attorney's fee shall be adjusted accordingly.

JOAN M. SANDERS, Claimant
Douglas L. Minson, Claimant's Attorney
Spears, et al., Defense Attorneys

WCB 84-01476
May 19, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of Referee Thye's order that set aside its denial of claimant's occupational disease claim for mental stress. The issue is compensability. We reverse.

Claimant is a former electronics worker who worked in that industry for approximately 25 years for various employers. Her employment history is marked by several lawsuits filed against those employers. The first was a sex discrimination suit filed against one employer in 1975. The suit was ultimately settled by a payment of approximately $5,000 to claimant. In 1977 claimant filed complaints with the Oregon Bureau of Labor and Industries against two more employers, alleging discrimination in the form of a failure to hire due to the prior litigation against the first employer. Claimant also filed a second complaint against the first employer, asserting that it provided unfavorable references in retaliation for the filing of the initial sex discrimination suit. The Bureau of Labor and Industries dismissed claimant's complaints for insufficient evidence. A subsequent Federal suit against one of the employers was withdrawn.

Claimant began work for Intel Corporation, the present employer, in April 1979. She received her first performance appraisal, which was generally favorable, three months later. In September 1979, however, claimant filed a sex discrimination complaint against Intel with the Bureau of Labor and Industries, alleging discrimination in wages and promotions. In July 1980 she filed another complaint, alleging that she had been harrassed and given additional work in retaliation for filing the discrimination complaint. Despite the conflicts with Intel, claimant was given a promotion in August 1980. Soon after receiving the promotion, however, claimant was issued a "Corrective Action Notice" for allegedly "undermining a supervisor's ability to manage his personnel." The notice alleged that claimant made disparaging remarks to a fellow employe about a supervisor's management style. Claimant denied making the remarks in a written response to her employer. When claimant's performance later failed to improve, she was placed on a "Corrective Action Plan" directing her to improve specific areas of her work.

Claimant's next performance appraisal was completed on July 3, 1981. Her performance was assessed as "marginally" meeting requirements. The assessment listed unpredictable absences, technical errors and problems with other employes as areas needing correction. Claimant refused to sign the unfavorable appraisal. The earlier-imposed Corrective Action Plan was ultimately lifted on December 1, 1981 when claimant was found to have improved her work to a level of acceptability. Claimant was then transferred to a new project under another supervisor.

In May 1982 claimant and her husband filed a petition to dissolve their marriage of 24 years. Two weeks later claimant was involved in a motor vehicle accident, her second in two years. In July 1982 claimant's sex discrimination suit against Intel was decided adversely to claimant. The Circuit Court judge deciding

the case concluded that Intel had neither intended to discriminate nor retaliate against claimant. He further suggested that claimant had represented her employment as managerial and supervisory, when in fact it was not. He assessed costs and attorney fees against claimant and noted: "Several of [claimant's] comments to her supervisors would have resulted in termination in many employments."

Claimant's next performance appraisal was in August 1982. Her performance was listed as satisfactory, although claimant's supervisor suggested that she was abrasive and not a "team player." Two months later, claimant's husband filed a request with the court to have claimant removed from the family home. On December 10, 1982 the marriage was dissolved. According to claimant, the divorce was amiable and not stressful.

Intel underwent a significant corporate reorganization in January 1983. Among the changes was the assignment of a new supervisor to claimant's work area. The supervisor was aware of claimant's marginal past performance, and she required claimant to provide increased documentation of her work product. The supervisor also assigned additional responsibilities to claimant because of the supervisor's perception that claimant's workload was lighter than normal. Claimant soon complained of the increased load, however, and the supervisor reduced it to its original level within one month.

In July 1983 claimant sought medical attention for diarrhea, nausea and fatigue and missed two weeks of work. Upon returning she was assigned to a new project because of her supervisor's opinion that claimant's prior work had been unsatisfactory. The supervisor also increased the documentation required of claimant. Claimant's next performance appraisal was unfavorable, and upon returning from a three-week vacation in late September 1983, claimant found that her desk had been moved to a new work area. The supervisor explained at hearing that the move was necessitated by claimant's new work duties. Claimant again left work on sick leave approximately one week after returning from vacation.

On October 11, 1983 claimant sought medical attention from Dr. Pausig, an internist who diagnosed "severe anxiety reactions." Dr. Pausig referred claimant to Dr. Achar, a psychiatrist. Dr. Achar diagnosed " . . . anxiety neurosis with panic attacks caused entirely by work." He further noted:

> "The history she gives is one of undoubted harrassment at work . . . If her history holds out, undoubtedly Intel is causing a stress problem for this lady . . . She has had an excellent work record and has been a good mother . . . I have no doubt in my mind that Intel is going after her."

Claimant filed a workers' compensation claim on November 4, 1983, alleging that she had suffered a compensable occupational disease as a result of excessive pressure and "threats" from her supervisors. Dr. Achar thereafter took claimant off the job, but agreed to allow her to return in March 1984 on the condition that she be assigned to a new supervisor. Intel agreed and claimant was assigned to a supervisor found to be agreeable to her. The previous Corrective Action Plan continued

to be in effect, however, and when a progress report pertaining to the plan indicated that claimant's performance remained substandard, claimant asked Dr. Achar to further limit the conditions of her employment. Dr. Achar then requested another transfer for claimant, resulting in her assignment to yet a third supervisor. When the Corrective Action Plan remained in effect, claimant complained to Dr. Achar about continuing harrassment. He took her off work on April 25, 1984, noting, "I truly admire her strength for putting up with this travesty of justice." After leaving work, claimant filed a claim for unemployment compensation, which was ultimately denied as having been generated from a job resignation without good cause.

In January 1984 claimant was examined by Dr. Parvaresh, at the request of the employer. Dr. Parvaresh, a psychiatrist, noted that claimant was suffering anxiety as a result of her perception that she was being singled out for harassment by her employer. In Dr. Parvaresh's opinion, claimant perceived herself as being a better performer than her work record would indicate. He suggested that claimant was unable to accept critical statements made by supervisors and effectively exaggerated their effects.

A consulting psychologist administered a Minnesota Multiphasic Personality Inventory (MMPI) to claimant in June 1984. The test results characterized claimant's personality as somewhat paranoid and "rather immature." A hysteroid character was suggested. A month later claimant was examined by Dr. Shannon, another psychiatrist. Like Dr. Parvaresh, Dr. Shannon felt that claimant was experiencing anxiety as a result of perceived mistreatment on the job. Dr. Shannon suggested that the compensability of claimant's claim depended on whether claimant's perceptions were in fact correct.

Several Intel employes testified at the hearing. Three were former employes who worked either with or near claimant during the period at issue. Mr. Peterson testified that claimant's workload was substantial and required regular overtime hours. He further indicated that claimant's supervisor required a great deal of work product documentation. On cross-examination Mr. Peterson admitted that he had left Intel rather than be terminated after unsuccessfully completing a Corrective Action Plan imposed by his supervisor.

Ms. Caton testified that during the time she worked with claimant in early 1983 claimant was a very competent employee. She indicated that claimant often worked more than 12 hours per day and worked at least two weekends per month. Ms. Caton had also been placed on a Corrective Action Plan while at Intel and was ultimately terminated.

Mr. Nachtigal testified that he worked at Intel until his resignation due to job dissatisfaction in August 1983. He agreed with the prior testimony that claimant was very busy at work, and that when she was reassigned from one of her work projects she was replaced by four workers.

Claimant testified that her workload greatly increased subsequent to the 1983 corporate reorganization. She was given an assignment to write procedures for a product that had not yet been produced. She felt that she was being required to over-document her work and that her employer's demands were unreasonable.

The employer produced the testimony of three supervisory staff members, all of whom had been responsible for claimant's work product at some time. Ms. Foulk became claimant's supervisor subsequent to the 1983 reorganization. She testified that the documentation required of claimant and the various staff meetings held throughout claimant's employment were routine. She disagreed with the prior testimony regarding claimant's work hours and she testified that when claimant was reassigned from a work project, it was assigned to only one employe who was capable of completing the project without assistance. Ms. Foulk also testified that Corrective Action Plans were not designed to harrass workers, but rather to inform them of the specific steps necessary to bring their work product up to standard.

Mr. Phalen also testified regarding the value of the Corrective Action Plan. He indicated that he had once been placed on a plan himself and that he found it helpful as a guide to improving his work product.

Mr. Higgs testified that it was the intent of Intel to accommodate claimant's situation and that it repeatedly requested information from claimant's psychiatrist as to what steps were necessary to accomplish that goal.

The medical testimony was from claimant's treating psychiatrist, Dr. Achar, and from the two psychiatrists who examined claimant on behalf of the employer. Dr. Achar testified that he first saw claimant in October 1983, approximately one month before she filed her workers' compensation claim. He testified that while he felt a complete prior history was an important factor in reaching a causation opinion, he did not obtain claimant's medical history and did not read her Intel performance appraisals. He further testified that in reaching his conclusion that claimant was being harrassed on the job, he did not attempt to acquire independent confirmation of claimant's history, but rather relied entirely on claimant's representations. Finally, Dr. Achar stated that he was in fact an advocate for his client out of a "sense of duty" to her.

Dr. Shannon testified that she had reviewed claimant's prior medical history, and that the history was important in the formulation of a psychiatric opinion. In Dr. Shannon's opinion, claimant was a suspicious person who tended to exaggerate her at-work circumstances. Dr. Shannon felt that claimant's underlying personality make-up was such that a normal business procedure, such as a performance appraisal, would cause claimant to perceive that she was being personally attacked. Dr. Shannon felt that the results of the earlier MMPI were consistent with the aforementioned clinical observations.

Dr. Parvaresh testified that he, too, had reviewed claimant's prior medical record and performance appraisals. He found the appraisal documents to be in conflict with what claimant told him regarding her employment performance and working conditions. In Dr. Parvaresh's opinion, claimant is prone to perceive her environment as hostile whenever it does not meet her needs. He suggested that she suffered from a preexisting personality disorder that caused her to misperceive the conditions of her employment. He found the preexisting disorder to have been neither caused nor permanently worsened by claimant's employment. He felt that claimant's divorce and her daughter's decision to live with her father rather than claimant were the major causes of claimant's stress reaction.

In order to establish the compensability of her claim, claimant must prove that she suffers from a mental disorder resulting from real events and conditions of her employment. These real conditions must be objectively capable of producing stress and must have been the major contributing cause of claimant's mental disorder. McGarrah v. SAIF, 296 Or 145 (1983). If the conditions of the employment were merely imagined or misperceived by the claimant, the claim is not compensable. Leary v. Pacific Northwest Bell, 67 Or App 766 (1984). After reviewing the medical evidence we are persuaded that claimant suffers from a mental disorder in the form of anxiety. In addition, although we note the several off-the-job stressors to which claimant was subjected during the period at issue, we do not find them to have constituted the major cause of her disorder. Instead, we find from the evidence that claimant's disorder was primarily caused by her perception of being overworked, harassed and mistreated at work. The question, then, becomes whether claimant accurately perceived the conditions of her employment. If she misperceived them, they were, by definition, not "real" and her claim is not compensable. Leary, supra; Mary E. Williams, 38 Van Natta 115 (1986).

On de novo review we find that the majority of the work conditions alleged by claimant to have produced stress were either imagined or exaggerated. In reaching our conclusion we rely on the opinions of Drs. Parvaresh and Shannon. Unlike claimant's treating psychiatrist, Drs. Parvaresh and Shannon had the advantage of claimant's full medical and employment history. According to the testimony of all of the doctors, a complete history is an important element in forming an opinion regarding causation. Because of his lack of information, however, claimant's treating doctor based his diagnosis solely on claimant's representations. The evidence persuades us that those representations were erroneous and, therefore, of little value.

We are not persuaded that claimant was singled out by her supervisors for additional work and/or harassment. Rather, we find that the Corrective Action Plans imposed on claimant were simply tools for assisting claimant in meeting the demands of her job. By repeatedly shifting claimant's workload and supervision, claimant's employer made several attempts to accommodate her unique needs. It appears that claimant perceived these attempts at accommodation as harassment and mistreatment. The persuasive evidence is largely contrary to that perception. Claimant's occupational disease claim is not compensable.

ORDER

The Referee's order dated October 24, 1985 is reversed and the self-insured employer's denial is reinstated.

RICHARD E. SHROPE, Claimant
Malagon & Moore, Claimant's Attorneys
Fishleder & Wheeler, Defense Attorneys
SAIF Corp Legal, Defense Attorney
Michael G. Bostwick, Defense Attorney
Brian L. Pocock, Defense Attorney

WCB 85-07076, 85-06825, 85-05169 & 85-01969
May 19, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Tenenbaum's order which: (1) set aside its denial of claimant's aggravation claim for a low back condition; (2) upheld United Pacific Insurance's denial of claimant's aggravation claim; and (3) upheld EBI Companies' denial of claimant's "new injury" claim. On review, SAIF contends that it is not responsible for claimant's current low back condition.

We affirm the order of the Referee with the following comments concerning the issue of responsibility for claimant's condition between SAIF, as insurer on the risk for his 1982 injury, and United Pacific, as insurer on the risk for his 1983 injury.

Following our de novo review of the medical and lay evidence, we are persuaded that claimant's current condition was caused by his 1982 compensable injury. Furthermore, we find that the effects of claimant's 1983 compensable injury had resolved and did not contribute to his current condition. Inasmuch as we are convinced that claimant's disability was caused by his 1982 injury and not by his 1983 injury, the "last injurious exposure" rule, more appropriately identified for these purposes as the "last injury rule", has no effect. Boise Cascade Corp. v. Starbuck, 296 Or 238, 244 (1983); CECO v. Bailey, 71 Or App 782, 786 (1984). Consequently, SAIF is responsible for claimant's current condition.

Had we applied the rule, responsibility would still lie with SAIF because the preponderance of the evidence does not establish that claimant's 1983 injury independently contributed to his current low back condition. Therefore, United Pacific has persuasively rebutted the presumption that claimant's 1983 injury contributed independently to his current condition. See Industrial Indemnity Co. v. Kearns, 70 Or App 583, 588 (1984).

ORDER

The Referee's order dated October 23, 1985 is affirmed.

WILLIAM W. SODERWALL, Claimant
Vick & Associates, Claimant's Attorneys
Bottini & Bottini, Defense Attorneys
Miller, et al., Defense Attorneys

WCB 83-09263, 84-04675 & 84-10698
May 19, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Podnar's order which: (1) upheld North Pacific Insurance Company's denial of his aggravation claim for a low back injury; (2) upheld Mission Insurance Company's denial of his aggravation claim for a right elbow injury; (3) upheld North Pacific's denials of his "new injury" claims for low back and right elbow conditions; (4) upheld Mission's "de facto" denial of his claim for a low back condition; and (5) awarded interim compensation, penalties, and accompanying

attorney fees for Mission's alleged unreasonable failure to process his low back claim.

On review, claimant contends that his aggravation claims are compensable, or even if the claims are not compensable, he is entitled to an award of attorney fees for clarifying allegedly ambiguous denials. Furthermore, claimant argues that he is entitled to additional interim compensation, penalties, and attorney fees for Mission's unreasonable conduct. Mission cross-requests review, arguing that claimant was not entitled to interim compensation and that its conduct was not unreasonable.

Following our de novo review of the medical and lay evidence, we find that claimant has failed to establish that his current low back or right elbow conditions are related to his compensable injuries or that these conditions have worsened since their respective last awards of compensation. Furthermore, inasmuch as we conclude that the denials concerned claimant's aggravation claims, he is not entitled to an award of attorney fees for setting aside "alleged denials" of future responsibility for his compensable injuries. Accordingly, we affirm those portions of the Referee's order which pertained to the aforementioned issues. However, we modify that portion of the Referee's order which found that claimant was entitled to interim compensation. We conclude that he is entitled to additional interim compensation benefits.

In September 1983 Dr. Robinson, claimant's treating chiropractor, requested that North Pacific reopen claimant's January 1981 back claim. North Pacific denied the request. Thereafter, Dr. Robinson requested that Mission reopen claimant's March 1982 right elbow claim. Mission deferred the claim and paid interim compensation until it eventually issued its denial in January 1984.

On February 14, 1984 claimant requested a hearing concerning Mission's denial of his right elbow aggravation claim. That same day claimant forwarded a claim Form 801 to his employer. The claim pertained to claimant's back condition. The employer was instructed to complete the form and send copies to both North Pacific and Mission. North Pacific had insured the employer at all relevant times, except during 1982, when Mission was on the risk. Mission received a copy of claimant's back claim on February 17, 1984. Mission did not issue an acceptance or denial of this claim nor did it pay interim compensation. On May 9, 1984 claimant requested a hearing regarding Mission's "de facto" denial.

The Referee found that Mission had unreasonably failed to process claimant's back claim. Accordingly, he awarded claimant 60 days of interim compensation benefits and assessed Mission a 25 percent penalty and accompanying attorney fees. We agree with the Referee that Mission is obligated to pay interim compensation. However, we find that claimant is entitled to interim compensation from February 17, 1984, the date Mission received notice of the back claim, through May 9, 1984, when claimant requested a hearing concerning Mission's "de facto" denial.

The first installment of compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim. ORS 656.262(4). To receive interim

compensation, claimant must have "left work" as that phrase is used in ORS 656.210(3). Bono v. SAIF, 298 Or 405, 409 (1984). The insurer must pay this interim compensation if the claim is not accepted or denied within 14 days. Jones v. Emanuel Hospital, 280 Or 147 (1977). Where the insurer fails to issue an acceptance or denial of the claim and does not pay interim compensation, the insurer is obligated to pay from the date of notice of the claim until the date claimant requests a hearing on the "de facto" denial. See James E. Nelson, 37 Van Natta 645, 646-47 (1985); Joyce A. Morgan, 36 Van Natta 114 (1984), aff'd mem. 70 Or App 616 (1984).

Mission contends that it responded to claimant's back claim in March 1984 by filing a response to claimant's previous hearing request. We disagree. The response chronologically follows claimant's request for hearing from Mission's denial of the elbow aggravation claim. In addition, the response preceded claimant's hearing request concerning Mission's "de facto" denial of the back claim. In its response, Mission states that its "denial" was proper and that claimant was not entitled to any benefits. However, Mission's response specifically refers to a September 1983 denial, which, in fact, was North Pacific's denial of claimant's back aggravation claim.

Upon receipt of claimant's back claim Mission had an affirmative duty to process it pursuant to ORS 656.262. The fact that Mission was already in litigation concerning claimant's elbow claim does not excuse its failure to process the back claim. Accordingly, we agree with the Referee that Mission's conduct was unreasonable and that penalties and accompanying attorney fees are justified. ORS 656.262(10).

ORDER

The Referee's orders dated August 7, 1984 and August 31, 1984 are affirmed in part and modified in part. In lieu of the Referee's award of interim compensation, Mission Insurance Company is directed to pay interim compensation from February 17, 1984 through May 9, 1984. The 25 percent penalty is affirmed, but it shall apply to interim compensation benefits payable between the aforementioned dates. In lieu of the Referee's award of attorney fees, claimant's attorney is awarded 25 percent of these interim compensation benefits, not to exceed $750. In addition, claimant's attorney is awarded $300 for services concerning the penalty issue at the hearing level and on Board review. The remainder of the Referee's orders are affirmed.

MARTIN E. TRIPP, Claimant
Malagon & Moore, Claimant's Attorneys
Marcus K. Ward, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-01028 & 84-11895
May 19, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation, on behalf of Ridge Runner Timber Services (Ridge Runner), requests review of that portion of Referee Lipton's order, as amended on reconsideration, that: (1) set aside its denial of the compensability of claimant's occupational disease claim for a bilateral knee condition and; (2) affirmed SAIF's denial of the same condition on behalf of Briarwood Associates (Briarwood). The issues are whether

claimant's occupational disease claim is compensable and, if so, which of the employers insured by SAIF is responsible.

Claimant is a former tree planter who began working in that capacity in 1977 for an employer not joined to this proceeding. Claimant testified, and the medical records reflect, that he developed knee symptoms during the summer of 1982, approximately six months before beginning work for Ridge Runner in January 1983. Claimant initially had no problems at Ridge Runner, but within less than a month he developed left leg cramping. He visited Dr. Fergusson. Upon diagnosing left leg tendinitis, Dr. Fergusson directed claimant to do light duty work for three days and then return to regular duty, if possible. Claimant filed a claim for tendinitis with Ridge Runner, and the claim was accepted as nondisabling.

Claimant's knee pain continued and he ultimately left Ridge Runner on October 27, 1983. Two weeks later he went to work for Briarwood, where he worked until April 20, 1984. After leaving Briarwood, claimant attempted to return to Ridge Runner. He worked only two weeks, however, before increasing knee pain led him to resign on May 25, 1984. He filed a claim with Ridge Runner in September 1984, alleging that his tree planting employment caused or aggravated his knee condition resulting in the need for medical services. The claim was interpreted as one for aggravation and was denied on July 16, 1985. It appears that SAIF, on behalf of Ridge Runner, never specifically denied a claim for the bilateral knee condition for which claimant now seeks compensation.

A month before filing his claim, claimant was examined for complaints of left knee pain and swelling by Dr. Larson, an orthopedist. Dr. Larson took claimant's history of recurrent knee pain and swelling since approximately August 1982 and of a prior knee injury in 1980. The examination was essentially negative except for left knee "popping." Dr. Larson suspected a meniscus tear, which he could not confirm. He opined that claimant's pain "could very well be" the result of his work as a tree planter.

In December 1984 claimant filed a claim with Briarwood, alleging that that employment caused the onset of an occupational disease or an aggravation of a prior knee condition. SAIF issued a denial on behalf of Briarwood on January 16, 1985. Approximately two weeks later claimant changed physicians and began treating with Dr. Wichser, a general practitioner. In March 1985 Dr. Wichser issued a report in which he tentatively diagnosed torn cartilage or a femoral patella compression syndrome (chondromalacia), which he would attribute to claimant's employment if either condition could be demonstrated by way of an arthrogram. He directed claimant to return to Dr. Larson for the arthrogram.

Dr. Larson performed the arthrographic study on April 1, 1985 and issued a report on the same date, noting that claimant's primary problem was diffuse pain in both knees. X-rays showed no bony abnormality and claimant's patella was found to be correctly positioned. Dr. Larson concluded:

> "There is certainly nothing on evaluation to suggest any particular problem related to his knee . . . With the diffuse nature of

his symptomatology and the fact that it involves both knees, it is difficult to relate this to any internal derangement."

A week later Dr. Larson reported that claimant's arthrogram was normal and that he had suffered no specific injury. In July 1985 he further reported that he had never actually treated claimant, but had performed only diagnostic procedures. He indicated that claimant had no active disease process, but had experienced only pain symptoms for three years. Finally, Dr. Larson recommended a job change and suggested that claimant suffered from an "overuse" syndrome possibly produced by seven years of work activity.

With regard to compensability the Referee accepted the opinion of Dr. Wichser over that of Dr. Larson and found the claim compensable. Because he found the Briarwood employment to have made no contribution to claimant's condition, the Referee found Ridge Runner to be the responsible employer. He further found SAIF's denial on behalf of Ridge Runner to be unreasonable, but awarded no penalties nor attorney fees because he found no amounts due from which to calculate a penalty. On reconsideration the Referee awarded claimant interim compensation for the period of April 11 through July 16, 1985 and assessed penalties totalling 25 percent against SAIF for what the Referee found to be an unreasonable and untimely denial on behalf of Ridge Runner.

In reaching his compensability holding, the Referee did not discuss Weller v. Union Carbide, 288 Or 27 (1979). We find Weller controlling, for claimant seeks compensation for an alleged gradual worsening of a preexisting condition. In order to establish entitlement to compensation, therefore, claimant must prove that his employment at Ridge Runner resulted in an actual worsening of his underlying condition. If the employment precipitated mere symptoms without a worsening of claimant's condition, the occupational disease claim is not compensable.

After reviewing the record, we find that claimant's employment at Ridge Runner did no more than cause a recurrence of symptoms. Under Weller, therefore, the claim is not compensable. In reaching our conclusion we are persuaded by the opinion of Dr. Larson, the orthopedist who examined claimant with regard to a 1980 injury and also for the alleged occupational disease. Dr. Larson's examination revealed only worsened symptoms in the form of pain. He could find no pathological condition resulting from claimant's Ridge Runner employment, and he suggested that claimant would experience mere symptomatic flareups as a result of his employment activity.

We accept Dr. Larson's opinion over that of Dr. Wichser for the following reasons: First, Dr. Wichser is a general practitioner, while Dr. Larson is an orthopedist. While we recognize that Dr. Wichser is competent to offer an opinion with regard to an orthopedic problem, Thomas v. Liberty Mutual Ins. Corp., 73 Or App 128 (1985), we are, in this case, more persuaded by the opinion of a physician specializing in orthopedics. Second, we note that in Dr. Wichser's March 1983 report (upon which the Referee apparently relies), Dr. Wichser admitted that his opinion was based on incomplete information. In fact, he referred claimant back to Dr. Larson for an expert opinion and the performance of objective tests to determine the etiology of

claimant's condition. Third, we note that Dr. Wichser's opinion regarding causation appeared to be dependent on the outcome of the arthrogram. He stated that if the test were to reveal torn cartilage or chondromalacia, he would attribute those conditions to claimant's employment activity. As has been shown, however, the arthrogram revealed neither condition.

Because we find claimant's claim noncompensable we need not address the issue of responsibility.

ORDER

The Referee's Opinion and Order dated August 28, 1985 is reversed in part and affirmed in part. That portion of the order that set aside the SAIF Corporation's denial on behalf of Ridge Runner Timber Services is reversed and the denial is reinstated. The remainder of that order is affirmed. The Amended Order dated October 1, 1985 is affirmed.

JIM N. WARNER, Claimant
Evohl F. Malagon, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 85-02335
May 19, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Quillinan's order that reduced claimant's scheduled permanent partial disability award from the 10 percent awarded by a Determination Order to 5 percent. The issue is extent of scheduled permanent partial disability. We reverse.

Claimant is a timber cutter who compensably injured his left knee on May 23, 1984. The injury ultimately resulted in a partial meniscectomy. Upon claim closure, claimant was awarded 10 percent scheduled disability by way of the February 21, 1985 Determination Order. Five percent was awarded for the effects of the meniscectomy. The remainder of the award was to compensate claimant for disabling pain.

Claimant was able to return to his regular work after his injury. He credibly testified, however, that the injury and its sequelae resulted in knee pain, which in turn curtailed claimant's ability to do certain tasks. He is no longer able to jump from log to log or to walk on steep or uneven grades.

The Referee held that claimant's pain was not disabling because it did not "prevent or impede claimant's work performance and/or require medical treatment and time loss." She therefore reduced claimant's ten percent award by the five percent awarded for "disabling pain" by the Determination Order.

While extent of unscheduled disability is measured by loss of earning capacity, the extent of scheduled disability is determined by measuring loss of use or function of the scheduled member. ORS 656.214(5); Barbara A. Lawrence, 37 Van Natta 1612 (1985). Disabling pain resulting from the injury is to be considered when determining scheduled, as well as unscheduled, disability. See Harwell v. Argonaut Ins. Co., 296 Or 505 (1984); Annie L. Bounds, 36 Van Natta 775 (1984).

It appears that the Referee applied the wrong standard for measuring extent of scheduled disability. Her holding focuses on claimant's ability to work, whereas the proper analysis is the extent to which he has lost use or function of the left leg. We find that claimant has a scheduled loss equal to the 10 percent awarded by the Determination Order. That Order shall be reinstated.

ORDER

The Referee's order dated October 25, 1985 is reversed. The Determination Order dated February 21, 1985 is reinstated. Claimant's attorney is allowed 25 percent of the compensation reinstated by this order, not to exceed $3,000.

DARYL D. BRAUGHT, Claimant
William H. Skalak, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 84-10684
May 22, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Thye's order that upheld the self-insured employer's denial of claimant's occupational disease claim for left carpal tunnel syndrome. The issues are remand and, if remand is denied, compensability.

On the remand issue, claimant contends that he was unfairly surprised by the testimony of Dr. Nathan at the hearing and that he should have an opportunity to develop the record with medical theories contrary to that expressed by Dr. Nathan. He has submitted two written reports obtained after the hearing from claimant's treating doctors which indicate that Dr. Nathan's views are contrary to those generally accepted by the rest of the medical community.

Dr. Nathan examined claimant and submitted a report nearly eight months prior to the hearing in which he diagnosed claimant's condition as carpal tunnel "disease," concluded that this disease was ideopathic in origin and opined that the disease had not been worsened by claimant's work activity. Claimant had more than enough time to develop evidence refuting Dr. Nathan's medical theories and conclusions prior to the hearing. We conclude that remand is not appropriate under these circumstances. See Bernard L. Osborn, 37 Van Natta 1054, 1055 (1985); Delfina P. Lopez, 37 Van Natta 164, 170 (1985).

ORDER

The Referee's order dated June 7, 1985 is affirmed.

BRAD A. HAYES, Claimant
Cowling & Heysell, Defense Attorneys

WCB 85-06612
May 22, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Foster's order which: (1) affirmed a May 10, 1985 Determination Order that awarded 35 percent (112 degrees) for a back injury; and (2) awarded 10 percent (15 degrees) scheduled permanent disability for loss of use or function of the left forearm, whereas a May 14, 1985 Determination Order had awarded no permanent disability. On

review, claimant contends that he is entitled to additional awards of permanent disability, including a scheduled permanent disability award for his right wrist.

The insurer contends that claimant's permanent disability awards should be reduced. We have authority to consider the insurer's contentions nothwithstanding its failure to cross-request review. Miller v. SAIF, 78 Or App 158, 161 (1986); Jimmie Parkerson, 35 Van Natta 1247, 1249-50 (1983). Moreover, the insurer's contentions do not raise a new issue. See Gleason W. Rippey, 36 Van Natta 778 (1984).

We affirm those portions of the Referee's order which awarded claimant 10 percent scheduled permanent disability for his left forearm and no scheduled permanent disability for his right forearm. However, we modify that portion of the Referee's order which affirmed the Determination Order's award of 35 percent unscheduled permanent disability.

Claimant was 27 years of age at the time of hearing. In March 1984, while working on the clean-up crew for a lumber mill, he sustained a back injury in a lifting incident. X-rays were normal. Dr. Streitz, claimant's initial treating orthopedist, diagnosed thoracoscapular strain syndrome. Dr. Streitz recommended that claimant return to work, begin dieting, and engage in an exercise program. Claimant soon returned to work, but his back pain forced him to stop working in June 1984. He has not worked since.

In August 1984 the Orthopaedic Consultants performed an independent medical examination. Claimant complained of left parascapular pain, particularly when twisting to the right. X-rays revealed no abnormalities. Diagnosing thoracic strain, the Consultants suspected that claimant might be unable to return to heavy work activities on the green chain. Dr. Streitz shared the Consultants' concern over claimant's return to the green chain.

In October 1984 claimant was referred to Dr. Holmes of the Western Pain Center. Claimant's complaints included a pinching sensation along the thoracic spine to the base of the neck. This pain was exacerbated by any abrupt movement. He also experienced a constant burning sensation in the interscapular area. Recent manipulations from Dr. Monger, his treating chiropractor, were improving claimant's condition. Noting that claimant's objective impairment was minimal and would not preclude a return to mill work, Dr. Holmes suspected motivation and secondary gain factors.

Following claimant's three week program at the Pain Center, Dr. Holmes diagnosed cervicodorsal strain, hypochondriacal reaction, prominent secondary gain factors, exogenous obesity, and a history of alcoholism. Considering claimant's "exceptionally low" motivation, Dr. Holmes felt it unlikely that claimant would follow recommendations that he exercise and lose weight.

In November 1984 claimant was examined by Dr. Wong, neurosurgeon. Claimant complained of constant thoracic and low back discomfort. These symptoms increased whenever claimant was physically active or remained in one position for a prolonged period. Dr. Wong diagnosed chronic thoracic-lumbar strain with no objective evidence of discogenic involvement.

A vocational evaluation was conducted. Claimant was a high school graduate. His work experience consisted of heavy labor, primarily involving the lumber industry. He also had received training as a welder while serving in the Navy, but had never been employed in such a capacity. Dr. Monger recommended that claimant limit any activities involving bending, kneeling, stooping, crouching, and crawling. He was also admonished to lift no more than 20 pounds and avoid prolonged sitting or standing. Dr. Monger opined that claimant was capable of light duties.

Based on these physical limitations and his limited work experiences, claimant was recommended for vocational training. Results of vocational aptitude tests revealed scores in the medium or high range in 53 of 62 occupational aptitude patterns. Eventually, a vocational goal in Computer-Aided Drafting was identified. Thereafter, claimant enrolled in a nine month program in drafting at a community college. He participated in the program in half-day intervals, but found it difficult to sit through some of his classes and to carry his briefcase and books. At the time of the hearing, claimant was still participating in the program.

In January 1985 claimant was examined by Dr. Campagna, neurosurgeon. A battery of tests were conducted, including X-rays, an EMG, a CT scan, and a myelogram. All results were normal. Dr. Campagna diagnosed lumbar and cervical sprain.

In March 1985 Dr. Holmes reexamined claimant and found him unchanged from a previous examination in December 1984. At that time Dr. Holmes had concluded that claimant's objective impairment was minimal. Dr. Holmes opined that claimant was entrenched in a chronic pain syndrome, with very prominent psychogenic and secondary gain factors. Dr. Streitz reviewed Dr. Holmes' report and found it "most likely quite precise and to the point."

In April 1985 Dr. Campagna performed a closing examination. Claimant continued to experience increasing back pain whenever he twisted or turned. Prescribed medication and an occasional use of a "jacuzzi" gave him some relief. Claimant's neck and back motions were limited to 50 percent of normal, but Dr. Campagna detected no weakness, atrophy, fasciculations, or sensory loss. Recommending vocational rehabilitation, Dr. Campagna concluded that claimant's neck and back impairment was minimal.

Claimant testified that he experienced constant back pain which extended from between his shoulder blades into his neck. The pain increased whenever he moved his neck. His low back also bothers him, particularly when he bends over. He is able to sit for approximately 15 minutes before he must change position. In addition, any prolonged sitting or standing evokes numbness in both of his legs. To ease his pain claimant takes prescribed medication and receives chiropractic adjustments approximately twice a month. Since his compensable injury claimant has curtailed, if not eliminated, most of his recreational activities. These activities include swimming, fishing, hunting, basketball, and football. Claimant felt that his physical limitations prevented him from returning to any of his past work activities.

The Referee found that the Determination Order's award "more than adequately compensated claimant for his back injury." Accordingly, the award of 35 percent unscheduled permanent disability was affirmed. We agree that claimant's compensable back injury and related physical limitations have resulted in a permanent loss of earning capacity. ORS 656.214(5). However, we consider a 35 percent award to be excessive.

In rating the extent of claimant's permanent disability, we consider his physical impairment and all of the relevant social and vocational factors set forth in OAR 436-30-380 et seq. We do not apply these rules as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that a 20 percent unscheduled permanent disability award adequately compensates claimant for his compensable back injury.

ORDER

The Referee's order dated November 13, 1985 is affirmed in part and modified in part. In lieu of all prior unscheduled permanent disability awards, claimant is awarded 20 percent (64 degrees) unscheduled permanent disability for his compensable back injury. The remainder of the Referee's order is affirmed.

BETTY L. JUNEAU, Claimant
Michael B. Dye, Claimant's Attorney
Foss, et al., Defense Attorneys

WCB 82-10456
May 22, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of that portion of Referee Mongrain's order which set aside its partial denial of claimant's right knee condition. On review, the employer contends that claimant's right knee condition is not compensable. Claimant cross-requests review, contending that the Referee erred: (1) in upholding denials of claimant's back, extremities, and fibrositis conditions; and (2) in declining to award interim compensation, penalties, and accompanying attorney fees for allegedly improper claims processing.

We affirm those portions of the Referee's order which found that claimant's back, extremities, and fibrositis conditions were not compensable. Furthermore, we agree with those portions of the Referee's order which concluded that claimant was not entitled to interim compensation, penalties, and accompanying attorney fees. However, we reverse that portion of the Referee's order which found claimant's right knee condition compensable.

Claimant was 50 years of age at the time of hearing. In December 1975 she sustained a compensable left knee injury. This injury resulted in a May 1976 lateral meniscectomy and an October 1978 patellectomy. Her condition has been diagnosed as chondromalacia of the left patella.

In January 1980 a Determination Order issued, awarding claimant 45 percent scheduled permanent disability for loss of use of her left leg. This award was subsequently increased to 90 percent by virtue of a May 1982 Referee's order.

Prior to her compensable left knee injury, claimant had experienced right knee complaints. In 1968 she underwent a lateral meniscectomy of the right knee. Following a six month recuperative period, she experienced no significant right knee symptoms. In March 1976, following her compensable left knee injury, claimant underwent a right knee arthroscopy. The post-operative diagnosis revealed Grade I chondromalacia of the patella, early fringe degeneration of the lateral meniscus, and Grade I chondromalacic changes of the medial femoral condyle.

Claimant testified that her right knee symptoms have progressively increased since her compensable left knee injury. She attributed these right knee symptoms to her attempts to compensate for her left knee limitations. References to claimant's right knee complaints began to periodically arise beginning in June 1980 when she was examined by Dr. Smith, orthopedist. Although claimant related her right knee complaints to her left knee injury, Dr. Smith concluded that her painful right knee was probably due to an abnormality at the lateral side of the patellofemoral joints. Thereafter, in April 1982 Dr. Jones stated in a chart note that claimant's right knee symptoms were probably due to an alteration in weight bearing from her left leg.

In September 1982 claimant was referred to the Callahan Center. Along with her left knee problems, claimant complained of pain and grinding in the right knee where she had undergone her previous surgery. She believed these symptoms were caused by her attempts to favor her left side. Claimant testified that the uphill walking at the Center prompted increased symptoms in her right knee, forcing her to terminate the program.

In November 1982 Dr. Freudenberg stated that claimant probably had "mild early chondromalacia of the lateral femoral condyle and/or tibial plateau" of the right knee. Dr. Freudenberg attributed this condition to the loss of claimant's lateral meniscus. Dr. Freudenberg did not recommend another arthroscopy.

In February 1983 claimant was walking through a restaurant parking lot when her left knee gave way. She shifted her weight to her right leg, which slipped on the pavement. She did not fall, but experienced a "sharp, twisting pain" in her right knee.

In March 1983 Dr. Smith reported that he did not know whether claimant's increasing right knee complaints were related to a progressive degenerative change or due to a functional problem. It was for this reason that Dr. Smith recommended a diagnostic arthroscopy.

In July 1983 claimant was referred to Dr. Baldwin, orthopedist. Dr. Baldwin diagnosed claimant's condition as "status postop lateral meniscectomy of the right knee." Concluding that claimant's symptoms were suggestive of a medial meniscus tear, Dr. Baldwin performed an arthroscopy and an arthroscopic debridement of the right knee. The post-surgery diagnosis was status post lateral meniscectomy with mild degenerative changes, mild patellar chondromalacia, and adhesions of the right knee.

In August 1983 Dr. Baldwin opined that claimant's current right knee disability and residual impairment were a

direct result of her preexisting 1968 injury. Accordingly, Dr. Baldwin concluded that claimant's medical expenses were directly related to her 1968 incident.

In November 1983 Dr. Baldwin reported that claimant felt that her left knee injury had significantly affected the symptoms in her right knee. Dr. Baldwin acknowledged that had claimant not had a preexisting right knee condition, she probably would not have experienced right knee complaints following her left knee injury. However, Dr. Baldwin agreed with claimant that her left knee impairment had overstressed her right knee, resulting in her current symptoms. Dr. Baldwin could not clinically determine how much worsening, if any, had occurred in claimant's right leg.

In December 1983 Dr. Baldwin stated that claimant's subjective right knee complaints had increased as a result of her left knee injury. It was impossible for Dr. Baldwin to determine whether material worsening had recurred. Dr. Baldwin opined that increased stress on a previously diseased knee would increase symptoms and, if the stress was significant, would accelerate the knee's degenerative process.

The Referee found claimant's current right knee condition compensable. Although he considered claimant's demeanor "lacking in forthrightness and directness," the Referee noted that the medical reports consistently reflected right knee symptoms since 1980. Furthermore, the Referee considered it plausible that a severely impaired leg could cause additional stress and symptoms in the other previously injured leg. Finally, the Referee found that Dr. Baldwin had persuasively explained why he had initially attributed claimant's condition to her 1968 injury. Accordingly, the Referee concluded that claimant's compensable left knee injury was a material contributing cause of her current right knee complaints.

Claimant is entitled to medical services for conditions which are a direct and natural consequence of the original injury. Eber v. Royal Globe Insurance Co., 54 Or App 940, 943 (1981). To establish compensability, claimant must prove that her compensable left knee injury materially contributed to her current right knee symptomatology. Florence v. SAIF, 55 Or App 467, 470 (1981).

We find that claimant has failed to establish the compensability of her current right knee condition. In reaching this decision, we are not persuaded by the opinion of Dr. Baldwin.

As claimant's attending physician, Dr. Baldwin is generally accorded great weight, absent persuasive reasons to the contrary. See Weiland v. SAIF, 64 Or App 810 (1983); Taylor v. SAIF, 75 Or App 583, 585 (1985). Our review of the record has revealed several reasons to discount the opinion of Dr. Baldwin. To begin, Dr. Baldwin did not examine claimant until July 1983, long after claimant's right knee complaints had begun. Prior to Dr. Baldwin's association in the case there had been speculation that claimant's right knee symptoms might be related to an "altered gait syndrome" brought on by her left leg condition. Yet, there was an equally reasonable body of opinions suggesting that her right knee condition was related to degenerative changes which were attributable to her 1968 surgery.

Furthermore, although Dr. Baldwin ultimately concluded that the right knee problems were causally related to the

compensable left knee, he initially related claimant's right knee condition to the 1968 noncompensable event. Contrary to the Referee's finding, we conclude that Dr. Baldwin failed to adequately explain the reasoning behind his change of position. Moreover, Dr. Baldwin apparently based this change of opinion on other similar cases or on claimant's causation theory. We do not find Dr. Baldwin's findings concerning other cases to be of particular significance to the present issue. In addition, considering claimant's lack of forthrightness and directness, we do not find her causation theory an adequate foundation upon which to base a persuasive opinion, especially when that opinion directly contradicts the physician's prior opinion.

Lacking a persuasive medical opinion, we are left with claimant's questionable testimony and the Referee's "lay person" opinion that a severely disabled left leg could cause additional problems in a previously injured right leg. We agree with the Referee that this causal relationship theory seems plausible. However, considering the extent of claimant's prior right knee problems, her history of degenerative changes in the right knee, and the complexity of the interrelationship between her knee problems, we conclude that a persuasive medical opinion is necessary to resolve this complicated medical issue. Uris v. Compensation Department, 247 Or 420, 424 (1967); Kassahn v. Publishers Paper Co., 76 Or App 105, 109 (1985). Without a persuasive medical opinion and in view of the Referee's adverse credibility finding, we find the preponderance of the evidence insufficient to establish the compensability of claimant's current right knee condition.

Subsequent to the completion of the briefing schedule, the employer submitted a "Supplemental Brief," contending that the Referee erred in awarding claimant interim compensation, penalties, and accompanying attorney fees. Citing the recent case of Miller v. SAIF, 78 Or App 158 (1986), the employer argued that pending the subsequent denial of her claim, claimant had been out of the work force and had in effect, "retired." Consequently, the employer asserted that claimant was not entitled to interim compensation.

Although the employer did not specifically raise this issue in its appellant's brief, we may dispose of it as we determine appropriate. Miller, supra, 78 Or App at 161; Russell v. A & D Terminal, 50 Or App 27, 31 (1981). However, the Board's administrative rules contain no provision concerning the filing of briefs outside of the briefing schedule. See OAR 438-11-010(3), (Renumbered OAR 438-11-011(3), May 6, 1986). Inasmuch as we have concluded that strict enforcement of the aforementioned rule is both necessary and desirable, Vanessa Dortch, 37 Van Natta 1207, 1208 (1985), to be consistent with this policy we will not consider briefs submitted outside of the briefing schedule. Our conclusion does not prevent parties from bringing to our attention recent decisions issued after completion of the briefing schedule, but it does terminate supplemental argument on the subject.

After conducting our review of the record, we note that the testimony concerning this "interim compensation" issue was ruled inadmissible at the hearing. Even assuming that this testimony was admissible, we are not persuaded that claimant had voluntarily left work and was not seeking work. See Cutright v. Weyerhaeuser, 299 Or 290, 301 (1985). Accordingly, we find that claimant was entitled to the interim compensation, penalty, and accompanying attorney's fee as awarded by the Referee.

ORDER

The Referee's order dated September 4, 1985 is affirmed in part and reversed in part. The self-insured employer's partial denial of claimant's right knee condition is reinstated and upheld. Claimant's attorney fee award for overturning the denial is reversed. The remainder of the Referee's order is affirmed.

ELMIRA K. SATCHER, Claimant
Patrick K. Mackin, Claimant's Attorney
Kay E. Kinsley, Defense Attorney

WCB 85-07300
May 22, 1986
Order Denying Motion to Dismiss

Claimant has moved the Board for an order dismissing the insurer's request for review on the ground that the insurer did not file a brief within the time allowed by the briefing schedule. Briefing is not jurisdictional. OAR 438-11-011(3). The motion is denied.

IT IS SO ORDERED.

LARRY D. BARNHART, Claimant
D. Keith Swanson, Claimant's Attorney
Garrett, et al., Defense Attorneys

WCB 85-15160
May 27, 1986
Order of Dismissal

The self-insured employer has moved the Board for an order dismissing claimant's request for Board review of Referee Danner's order on reconsideration. In his order, the Referee adhered to his earlier holding that denied claimant's request for temporary disability compensation on the ground that the condition giving rise to the right to such compensation had been denied. The employer asserts that the Referee's order is not a final order for the purposes of review and, therefore, the Board is without jurisdiction.

In Lindamood v. SAIF, 78 Or App 15 (1986), the court held that a Referee's order setting aside a disputed claim settlement was not final for the purposes of review because the issue of the compensability of the claim remained to be litigated. In this case, the issue regarding claimant's entitlement to temporary disability compensation will necessarily be resolved when it is determined whether the claim is compensable. The Referee's order denying temporary disability compensation pending the hearing on compensability was an interim order and, as such, is not currently reviewable. Lindamood v. SAIF, supra, 78 Or App at 18.

The motion to dismiss is allowed. The request for review is dismissed.

IT IS SO ORDERED.

THOMAS D. CRAFT, Claimant
Kenneth D. Peterson, Claimant's Attorney
Marshall C. Cheney, Defense Attorney

WCB 82-01461
May 27, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Craft v. Industrial Indemnity Co., 78 Or App 68 (1986). The court has ordered that claimant's extent of disability be determined. In his order dated June 30, 1983, the Referee found that claimant was entitled to an award for permanent total disability effective January 13, 1982. Because our decision

was previously based upon a procedural point, we did not reach the extent of disability issue. Based upon our previous order, the Evaluation Division issued a Determination Order dated March 21, 1986 that granted claimant an award for permanent total disability effective January 14, 1982.

We conclude that the effect of the court's judgment that claimant's claim was not effectively reopened on May 25, 1983 is to render the most recent Determination Order moot. Upon de novo review of the entire record, we agree with the Referee's finding on the merits that claimant is permanently and totally disabled and has been so since January 13, 1982. We, therefore, reinstate and affirm the Referee's order dated June 30, 1983.

Claimant's attorney is entitled to a reasonable attorney fee for his services. This case is somewhat unique, in that had the procedural issue not been raised by the insurer, the Board would have addressed the merits of the claim in December 1984 and affirmed the Referee's award of permanent total disability. Under those circumstances, claimant's attorney fee would have been paid by the insurer pursuant to ORS 656.382(2) (claimant's compensation not disallowed or reduced on insurer or employer appeal). By setting aside our order, that held that the claim was open and that determination of extent of disability was premature, the court has restored the status quo ante. Thus, we again have before us an insurer initiated request for review of the Referee's order. We conclude that claimant's attorney is entitled to a fee under the provisions of ORS 656.382(2) and that a reasonable attorney fee under the unique facts of this case is $1,000.

ORDER

The Referee's order dated June 30, 1983 is reinstated and affirmed. Claimant's attorney is awarded a reasonable attorney fee of $1,000 for services on Board review, to be paid by the insurer in addition to compensation. This attorney fee is in addition to the attorney fee allowed by the Referee to be paid out cliamant's compensation.

DAVID M. LINDAMOOD, Claimant
Malagon & Moore, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-04069
May 27, 1986
Order on Remand (Remanding)

This matter is before the Board on remand from the Court of Appeals. Lindamood v. SAIF, 78 Or App 15 (1986). The court determined that the Referee's order was not a final order for the purposes of Board and judicial review and has ordered further proceedings. The current posture of this case is that a disputed claim settlement has been set aside on an interim basis by the Referee and the matter of compensability is ripe for litigation. The court's mandate does not foreclose further consideration of the validity of the disputed claim settlement.

ORDER

This matter is remanded to the Hearings Division for further proceedings in accordance with the mandate of the Court of Appeals.

JEPHTHA ORRIGGIO, Claimant
William H. Skalak, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-04706
May 27, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Orriggio v. SAIF, 77 Or App 450 (1986). The court has ordered that claimant be awarded compensation for permanent total disability. The mandate does not specify the date the award is to be made effective.

The standard for determining the effective date of a retroactive award for permanent total disability is "the earliest date that claimant's permanent total disability is proved to have existed." Morris v. Denny's, 53 Or App 863, 867 (1981). That date may or may not coincide with the date claimant was medically stationary. See Deborah L. Jones, 36 Van Natta 1573, 1575 (1985). We find that all of the relevant medical, social and vocational factors to be considered in rating claimant's disability were established as of Dr. Lezak's consultation, July 29, 1983. The award of permanent total disability shall be effective that date. The SAIF Corporation is entitled to offset any permanent partial disability compensation paid after July 29, 1983 as prepayment of permanent total disability compensation. Pacific Motor Trucking Co. v. Yeager, 64 Or App 28 (1983).

IT IS SO ORDERED.

RONALD R. RUST, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-11893 & 84-03839
May 27, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of those portions of Referee Brown's order that set aside its denial of claimant's industrial injury claim for his left shoulder and, in connection with a subsequent low back injury, set aside the Determination Order of October 16, 1984 as premature. The issue with regard to claimant's shoulder injury is whether an employment relationship existed between claimant and SAIF's insured at the time of the injury. The issues with regard to claimant's low back injury are premature closure, aggravation and extent of disability.

The Board affirms that portion of the Referee's order that set aside SAIF's denial of claimant's industrial injury claim for his left shoulder. The Board reverses that portion of the Referee's order that set aside the Determination Order of October 16, 1984 as premature.

Claimant injured his low back on August 4, 1983 in the course of his employment at a shake mill when he attempted to lift a large piece of wood over his head. Claimant complained of low back pain radiating into his lower extremities, especially the left, and received conservative treatment from a chiropractor, Dr. Clark. Claimant made very slow progress, due primarily to anxiety-induced muscle tension associated with personal problems. Late in 1983 claimant was examined by two neurologists, Dr. Golden and Dr. Randle. They found no evidence of a disc lesion and recommended continued conservative treatment. Dr. Clark released claimant for light work on December 23, 1983.

In February 1984 SAIF referred claimant to the "Injured Workers' Program" at Sacred Heart Hospital for vocational assessment. Claimant was enrolled in an exercise and physical

rehabilitation program and his low back condition improved significantly. At the time of his discharge from the program in late April 1984, claimant's symptoms were described as a constant, dull aching in the low back with occasional radiation down the left leg. Dr. Golden declared claimant medically stationary in late June and the claim was closed by Determination Order dated July 23, 1984 with an award of 20 percent (64 degrees) unscheduled permanent partial disability.

On October 16, 1984 the Evaluation Division issued another order stating that it had received additional information not available at the time of its previous order which caused it to conclude that claimant's award for permanent partial disability was inadequate. The order increased claimant's award to 40 percent (128 degrees) but stated that in all other respects the July 23, 1984 Determination Order remained in effect.

Also on October 16, 1984 claimant was examined by Dr. Tsai, a neurologist, on referral from claimant's attorney. Dr. Tsai noted signs of left L5 nerve root irritation and recommended a myelogram. An independent medical evalutation was performed by an orthopedist, Dr. Schachner, on December 18, 1984. Dr. Schachner found no evidence of a disc herniation and recommended against a myelogram. He noted that claimant was very tense about personal matters and thought that this tension was temporarily exacerbating claimant's condition. He indicated that claimant remained medically stationary and rated his impairment as mild. After reviewing Dr. Schachner's report, Dr. Tsai withdrew his recommendation for a myelogram and instead recommended physical therapy and vocational rehabilitation.

Claimant subsequently participated in a direct employment program of vocational rehabilitation and began working as a security guard in May 1985. Claimant quit this job within a few days telling his rehabilitation counselor that it was beyond his physical limitations. In her closing report, the counselor opined that the job was within claimant's limitations and stated that claimant had told his employer he was quitting because he did not like the job.

On July 23, 1985 claimant filed a claim for aggravation. The following day claimant was examined by another neurologist, Dr. Lafrance, on referral from claimant's attorney. Claimant complained of low back pain which occasionally radiated down his left leg. Dr. Lafrance performed a neurological examination which was essentially negative. Given claimant's complaints of left leg pain, however, he recommended further diagnostic tests. SAIF denied claimant's aggravation claim on August 14, 1985.

After receiving reports of an EMG and CT scan, Dr. Lafrance reported in September 1985 that the EMG revealed no clearcut pattern of denervation but was suggestive of multiple areas of neural foraminal narrowing. The CT scan was negative for disc herniations. Dr. Lafrance concluded that claimant's ongoing complaints of low back and leg pain were due to "chronic degenerative disease with superimposed musculoligamentous injury."

The hearing in this case was held on September 10, 1985. Claimant testified that he experienced relatively constant low back pain which occasionally radiated into his left leg. Claimant stated that this pain had worsened since claim closure in July of 1984 and indicated that his physical capabilities were extemely

limited. He testified, for example, that he could not sit or stand comfortably for more than five or ten minutes. In his Opinion and Order, the Referee noted that claimant's testimony was inconsistent with his behavior at the hearing. Given these observations along with evidence that claimant drew unemployment while working in 1983 and failed to report some of his income during 1983 to the Internal Revenue Service, the Referee stated that he had "reason to question both [claimant's] reliability as a witness and his veracity."

The Referee set aside the Determination Order of October 16, 1984 as premature because he concluded from the evidence that claimant was not medically stationary at that time. SAIF argues that the Referee erred in setting aside the order as premature because that order was merely a reconsideration of the extent of disability awarded under the Determination Order of July 23, 1984 and did not effect the date of claim closure. We do not find it necessary to address SAIF's argument because we conclude that claimant's low back condition remained medically stationary during the entire period from the issuance of the Determination Order in July 1984 through the time of the hearing in September 1985. The evidence indicates that claimant's symptoms have waxed and waned during this period, but otherwise they have remained the same. We conclude that the claim was not prematurely closed and, in light of the same evidence, also conclude that claimant has failed to prove a compensable aggravation.

With regard to the issue of the extent of claimant's low back disability, we conclude that the record is sufficiently developed that we may decide the question. On our de novo review of the record, considering claimant's impairment together with the pertinent social and vocational factors, see ORS 656.214 (5); OAR 436-30-380 et seq., we find that claimant is adequately and appropriately compensated for the permanent loss of earning capacity due to his compensable injury by an award of 128 degrees for 40 percent unscheduled permanent partial disability.

ORDER

The Referee's order dated October 1, 1985 is reversed in part. Those portions of the order that set aside "the Determination Order of November [sic] 16, 1984" as premature, reinstituted time loss benefits and awarded attorney fees on the premature closure issue are reversed. The Determination Order of July 23, 1984 as amended by the order of October 16, 1984 is affirmed. The remainder of the order is affirmed.

WESLEY E. CROOKE, Claimant
Francesconi & Cash, Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 83-11486
May 28, 1986
Order on Review

Reviewed by the Board en banc.

The insurer requests review of those portions of Referee Mulder's order, as amended on reconsideration, that: (1) found claimant's globus hystericus and psychological conditions to be compensable; and (2) found claimant entitled to temporary total disability compensation beginning April 26, 1984 and continuing through the date of the next claim closure. The issues on review are compensability and claimant's entitlement to temporary total disability.

On the issue of compensability, we affirm.

The remaining issue is claimant's entitlement to interim compensation. The Referee found that claimant's asserted entitlement to compensation for his globus and psychological conditions constituted a claim for aggravation, and the parties apparently agree. In an aggravation claim, claimant's entitlement to interim compensation is controlled by ORS 656.273(6), which provides:

> "A claim submitted in accordance with this section shall be processed by the insurer or self-insured employer in accordance with the provisions of ORS 656.262, except that the first instalment of compensation due under ORS 656.262(4) shall be paid no later than the 14th day after the subject employer has notice or knowledge of medically verified inability to work resulting from the worsened condition."

At hearing, claimant argued that an April 26, 1984 letter, in which his treating psychologist stated that he was not capable of employment until his psychological problems resolved, provided the "medical verification" of inability to work required by the statute. The Referee agreed.

On review, the insurer argues that a psychologist cannot provide "medical verification" because a psychologist is not a "doctor" or "physician" as those terms are defined in ORS 656.005(13). The insurer offers an alternative argument that, even if claimant's psychologist can verify his inability to work, the psychologist's April 26th letter does not provide verification. The insurer argues that the April 26th letter, when read in conjunction with a prior letter from the psychologist, suggests that reemployment is the ultimate treatment of choice for claimant, thereby indicating that claimant can and should work.

Taking the insurer's last argument first, the psychologist's April 10 and April 26th letters do indicate that reemployment would best serve claimant. However, the April 26th letter also clearly states that until claimant's psychological conditions are successfully treated, reemployment is not feasible. This letter verifies claimant's inability to work as of the date the letter was written.

The remaining question is whether the April 26th letter provides "medical verification." The letter is signed by two psychologists. One is a psychology "resident" who may or may not be licensed to practice psychology in Oregon. The record is not clear in that regard. The other is Dr. Colistro, who is, in fact, a licensed psychologist. The insurer argues that neither psychologist can provide "medical verification" because neither is a "doctor" or "physician" as the phrase is used in ORS 656.005(13). That statute provides:

> "'Doctor' or 'physician' means a person duly licensed to practice one or more of the healing arts in this state within the limits of the license of the licentiate . . ."

We interpret the insurer's argument to be that medical

verification can come only from an individual licensed to practice "medicine." Psychologists do not practice "medicine." By referring to "doctors" and "physicians" as persons licensed to practice one or more of the "healing arts," however, ORS 656.005(13) at least suggests that individuals licensed in disciplines other than medicine may be included within the statutory definition.

The ultimate question is whether psychologists are among those licensed to practice the "healing arts" so as to fall within the statutory definition of "doctor" or "physician." We hold that they are not. The term "healing arts" is not defined in the Workers' Compensation Law. Until it was amended in 1983, however, ORS 676.110 utilized the term and directed professionals practicing the "healing arts" to designate their specialties when promoting their services. The statute referred to eight "healing arts" professions. Psychology was not among them. ORS Chapter 676 no longer uses the term "healing arts;" it now governs the "health care professions." Again, Psychology is not among those professions listed.

We further note that when the Legislature first defined the terms "doctor" and "physician" in the Workers' Compensation Act, Oregon Laws 1957 Ch. 718, Reg. Sess., Psychology was not a licensed profession in this state. Although the profession is now recognized and regulated under Oregon law, the Compensation Act's definitions of "doctor" and "physician" remain unchanged from their original form. ORS 656.005(13).

Finally, we note that a bill specifically designating psychologists as members of the "healing arts" profession was introduced during the 1985 session of the Legislative Assembly. Senate Bill 425 was sponsored by the Joint Committee on Sunset Review at the request of the Oregon Psychological Association. Among the bill's purposes was the creation of certain new provisions of ORS Chapter 675, which governs the practice of Psychology. One proposal was the designation of licensed psychologists as "members of the healing arts profession." Senate Bill 425 was not enacted by the Legislature.

We wish to make clear that by finding psychologists not to be among those who may provide medical verification of inability to work, we do not hold that psychological therapy cannot be a compensable medical service. Indeed, the Court of Appeals has held that psychological therapy provided upon a direct referral from claimant's treating physician is a compensable service under ORS 656.245(1). Kemery v. SAIF, 51 Or App 813 (1981). We simply find that psychologists are not "doctors" or "physicians" as those terms are used in ORS 656.005(13), and that they are therefore unable to provide "medical verification" of a claimant's inability to work under ORS 656.273(6). In the present case, no doctor or physician provided medical verification, and without it, claimant was not entitled to temporary total disability compensation for the period claimed.

We find that, on the issues of the compensability of claimant's conditions, this was a case of ordinary difficulty and usual probably of success. A reasonable attorney fee is awarded accordingly.

ORDER

The Referee's orders dated October 24, 1984 and November 24, 1984 are affirmed in part and reversed in part. That

portion of the amended order that found claimant's globus hystericus and psychological conditions compensable is affirmed. That portion of the order that found claimant entitled to temporary total disability compensation beginning April 26, 1984 and continuing through the date of the next claim closure is reversed. For successfully defending the compensability of claimant's conditions before the Board, claimant's attorney is awarded a fee of $550, to be paid by the insurer.

BOARD MEMBER LEWIS DISSENTING:

I respectfully dissent from that portion of the majority's decision which finds that claimant is not entitled to temporary total disability. I disagree with the majority's conclusion that a psychologist cannot provide "medical verification" of an inability to work for purposes of ORS 656.273(6).

Dr. Colistro would qualify as a "doctor" or "physician" as defined in ORS 656.005(13). The majority acknowledges that the profession of psychology is recognized and regulated under Oregon law. Therefore, as a duly licensed psychologist, Dr. Colistro was authorized to practice his profession within the limits of his license. In my opinion, activities such as authorizing releases from work and temporary total disability compensation would necessarily be included within the parameters of his license.

The basis of the majority's decision is that psychology is not included within the term "healing arts", as used in ORS 656.005(13). To buttress their decision, the majority reaches outside the Workers' Compensation Law to determine what professions come within the term "healing arts." Such a practice is of limited value when construing terminology within another statutory chapter, particularly when defining phrases within the context of the Workers' Compensation Law. See ORS 656.003. Moreover, the failure to designate psychology within the "healing arts" professions under a former or current provision of ORS Chapter 676 does not mean that psychology is not encompassed within the term "healing arts" under ORS 656.005(13).

My interpretation of the relevant statutes leads me to conclude that psychology is included within the term "healing arts" as used in ORS 656.005(13). One of the purposes of the Workers' Compensation Law is to provide an injured worker with reasonable and necessary medical treatment for a compensable injury. See ORS 656.245(1). In addition, the range of compensable services which can be provided and the practitioners to provide those services can be quite expansive. For example, compensation can be provided when treatment is by means of prayer or other spiritual means if the treatment is performed by a duly accredited practitioner of a well-recognized church. ORS 656.010. The aforementioned statutes, in conjunction with the general purpose of the Workers' Compensation Law, persuade me that as long as the psychologist or other medical professional providing the services is duly accredited and licensed, he or she is a practitioner of the "healing arts."

Among others, an objective of the Workers' Compensation Law is to provide sure, prompt, and complete medical treatment and fair, adequate, and reasonable income benefits to injured workers. See ORS 656.012(2)(a). Considering this objective and my interpretation of the statutes as discussed above, I can find no statutory hurdle which would prevent a duly licensed

psychologist from providing "medical verification" of a claimant's inability to work due to a compensable psychological condition. Therefore, since Dr. Colistro is a duly licensed psychologist, I conclude that he can provide medical verification of an inability to work pursuant to ORS 656.273(6).

Accordingly, for the reasons expressed above, I would find that claimant was entitled to temporary total disability compensation. Consequently, I would affirm the Referee's order in its entirety.

RAY C. HARRISON, Claimant
Brown & Tarlow, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-03189
May 28, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of those portions of Referee Michael Johnson's order, as amended, that: (1) found claimant's claim properly closed by the Determination Order dated February 23, 1984; (2) awarded 19.2 degrees for 10 percent scheduled permanent partial disability for claimant's right arm; (3) awarded 16 degrees for 5 percent unscheduled permanent partial disability for the right shoulder in addition to the 32 degrees for 10 percent previously awarded by the Determination Order; (4) refused to award penalties and attorney fees for the SAIF Corporation's alleged unreasonable failure to pay claimant temporary total disability compensation subsequent to his leaving work; and (5) refused to award penalties and attorney fees for SAIF's untimely payment of a compensable medical billing. SAIF cross-requests review of that portion of the Referee's order that set aside what the Referee deemed to be a de facto denial of claimant's aggravation claim. The issues on review are premature closure, extent of scheduled and unscheduled permanent disability, penalties and attorney fees and aggravation.

We affirm those portions of the Referee's order pertaining to premature closure, extent of scheduled and unscheduled disability and penalties and attorney fees regarding the payment of temporary disability compensation. On the issues of aggravation and penalties and attorney fees for failure to pay for medical services, we reverse.

Claimant suffered a compensable right arm and shoulder injury in May 1983. He was diagnosed as having suffered a shoulder strain with a possible cervical disc lesion. A June 1983 cervical myelogram, however, proved negative for the cervical lesion. All treatment has been conservative. Claimant's symptoms slowly improved throughout the remainder of 1983 until he was found to be stationary on December 6, 1983. A February 23, 1984 Determination Order awarded temporary total disability compensation and a 10 percent unscheduled award.

Approximately two months after the issuance of the Determination Order, claimant was examined by Dr. Brooks, a neurologist. Claimant complained of constant pain, headaches, dizzy spells and numbness in the arms. Dr. Brooks found a decreased range of cervical motion and diagnosed a "chronic pain syndrome." He found no evidence of severe nerve root compromise, no reflex assymetries, no wasting and no definite signs of weakness. Claimant returned to Dr. Brooks one week later

reporting great improvement after a few days of rest. The cervical range of motion was 90 percent of normal in all directions. Electromyelography and nerve conduction studies were normal, as was claimant's neurological evaluation. Dr. Brooks noted that "the weakness and sensory changes noted [on April 26] are not present today [May 3] and I suspect that when this is present, that it is entirely secondary to the pain."

Two weeks later Dr. Pasquesi, an orthopedist, also noted claimant's full range of cervical motion. In August 1984 Dr. Collada, a neurologist, reported some restriction in claimant's cervical spine motion, but suspected the presence of a functional component. When claimant returned for a second visit, Dr. Collada saw no physical barriers to a return to normal activity. Despite claimant's continuing subjective complaints, his objective test results remained normal throughout the remainder of 1984. Claimant ultimately sought treatment from a psychiatrist, who attributed his functional behavior to nonindustrial causes.

The Referee found that claimant's restricted range of motion, headaches and other complaints arising upon the April 1984 visit to Dr. Brooks constituted a compensable worsening. SAIF offers alternative arguments on review: (1) that claimant failed to perfect an aggravation claim in the first instance; and (2) that even if a claim had been perfected, claimant failed to establish a compensable worsening of his condition.

With regard to SAIF's first argument, a physician's report indicating a need for further medical services or additional compensation is a claim for aggravation. ORS 656.273(3). A physician's report need not adduce facts sufficient to establish an aggravation; it need only suggest the need for further treatment for the injury. Smith v. SAIF, 78 Or App 443 (1986); Haret v. SAIF, 72 Or App 668 (1985). In the present case, Dr. Brooks' April 26, 1984 report chronicles alleged changes in claimant's condition. Using the interpretations set forth in Smith and Haret, supra, we find Dr. Brooks' report to be a claim for aggravation under ORS 656.273(3).

Although we find that claimant perfected his aggravation claim, we hold that he failed to establish its compensability. Under ORS 656.273(1) claimant is entitled to additional compensation for worsened conditions resulting from the compensable injury. Under the proper facts, a symptomatic worsening may constitute a compensable aggravation. Foushee v. Consolidated Freightways, 78 Or App 509 (1986). In addition, claimant's testimony may or may not establish a compensable aggravation, depending on the balance of the evidence. Garbutt v. SAIF, 297 Or 148 (1984). The Referee found that any one of the several changes in claimant's condition noted by Dr. Brooks in April 1984 constituted a compensable worsening. He did not address claimant's apparent recovery from those changes noted by Dr. Brooks a week after the April examination.

After reviewing the record, we find that claimant's worsening was largely functional and not compensable. Although he demonstrated a severe restriction in cervical range of motion on April 26, by May 3 he was nearly normal. All other objective signs were also normal. Marked functional overlay was noted, and it was attributed to non-work causes by claimant's psychiatrist. We are essentially left with claimant's testimony that his

conditon worsened. When compared with the medical evidence, however, the testimony is not persuasive. Garbutt, supra. We find that claimant's condition did not worsen, other than from noncompensable causes, after the last arrangement of compensation.

The remaining issue is whether SAIF should be penalized for its failure to timely pay a compensable medical bill. The bill was generated from a diagnostic test ordered by Dr. Raaf on October 11, 1984. The medical center conducting the test submitted the billing to claimant, who, in turn, submitted it to SAIF. When SAIF did not pay the billing, the medical center submitted it to claimant once again on March 20, 1985. Claimant then turned the matter over to his attorney, who requested a hearing. SAIF had paid the bill at the time of the hearing.

The Referee found SAIF's failure to timely pay claimant's billing to be unreasonable. He held, however, that because SAIF had paid the bill at the time of the hearing, there were no amounts due upon which to calculate a penalty. On review claimant argues, and we agree, that the Referee incorrectly viewed the hearing date as the time upon which to determine whether there were amounts due. In Harold A. Lester, 37 Van Natta 745 (1985), we held that when unreasonable conduct involves a delay in payment rather than an outright failure to pay, the time for determining amounts due is the time that the delay occurs. In the present case, SAIF delayed payment of a medical bill in the amount of $880. The $880 was an "amount due" at the time the delay occurred. It is upon this amount that a penalty shall be assessed.

ORDER

The Referee's amended order dated October 4, 1985 is reversed in part and affirmed in part. Those portions of the order that found claimant to have established a compensable aggravation claim and that failed to assess a penalty for the SAIF Corporation's failure to timely pay claimant's medical bill are reversed. SAIF is assessed a penalty in the amount of 25 percent of the cost of claimant's diagnostic test. For prevailing on the penalty issue, claimant's attorney is awarded $250, to be paid by the SAIF Corporation. The remainder of the Referee's amended order is affirmed.

ROBERT E. LEE, Claimant
Pozzi, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 82-08616
May 28, 1986
Order on Review

This matter is before the Board on remand from the Court of Appeals. Lee v. Freightliner Corp., 77 Or App 238 (1986). The court has mandated that the Referee's order be reinstated and that we determine a reasonable allowance of attorney fees.

Pursuant to ORS 656.388(1), claimant's attorney is entitled to a reasonable attorney fee for services both before the Board and the Court of Appeals, to be allowed on remand. A petition for attorney fees was filed with the court and, under the provisions of the court's orders, made part of the scope of our review on remand. We have considered the petition and find that the requested fee is reasonable. Accordingly, the petition is allowed.

ORDER

The Referee's order dated November 21, 1983 is reinstated and affirmed, including the provision for attorney fees of 25 percent of claimant's compensation to a maximum of $2,000 for services at hearing. Claimant's attorney is allowed a reasonable attorney fee of 25 percent of claimant's compensation to a maximum of $1,687.50 for services on Board review and before the Court of Appeals, in addition to the Referee's allowance of attorney fees.

ROY D. LYTSELL, Claimant
Bischoff & Strooband, Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

WCB 85-05973
May 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Foster's order which: (1) increased claimant's scheduled permanent disability award for loss of use or function of his right foot from 15 percent (20.25 degrees), as awarded by a May 6, 1985 Determination Order, to 30 percent (40.5 degrees); (2) increased claimant's scheduled permanent disability award for loss of use or function of his left foot from 10 percent (13.5 degrees), as awarded by the aforementioned Determination Order, to 20 percent (27 degrees); and (3) increased claimant's unscheduled permanent disability award for a low back injury from 15 percent (48 degrees), as awarded by the aforementioned Determination Order, to 40 percent (128 degrees). On review, the insurer contends that claimant's unscheduled and scheduled permanent disability awards should be reduced.

We affirm those portions of the Referee's order which awarded claimant 30 percent scheduled permanent disability for his right foot injury and 20 percent scheduled permanent disability for his left foot injury. However, we modify the Referee's award of unscheduled disability.

Claimant was 29 years of age at the time of hearing. In July 1984, while working as a welder for a lumber company, he sustained a compensable injury when he fell "at least 20 feet" from a crane. Both feet were fractured and casted. Soon after the incident, claimant began experiencing low back discomfort which radiated into his right and left thigh. Dr. Woolpert, his initial treating orthopedist, diagnosed claimant's condition as a back strain. Treatment has been conservative, primarily consisting of physical therapy, medication, and exercise.

In November 1984 vocational assistance efforts were initiated. Claimant had a high school education and had completed a one-year welding course at a junior college. His past work experiences had involved physical labor, mostly involving welding activities. Claimant had managed his own welding "job shop" for approximately five years. The vocational consultant concluded that if claimant was physically unable to return to welding his vocational skills were questionable.

In March 1985 the Orthopaedic Consultants performed an independent medical examination. In addition to continuing discomfort in both of his feet, claimant's complaints included lumbosacral pain. These complaints fluctuated depending on the extent of his physical activities. X-rays of the lumbar spine

were normal. A minimal degree of wedging was detected at T11, but there was no evidence of a compression fracture. The Consultants diagnosed bilateral foot fractures with residuals and traumatic lumbar strain. Light duty activities were recommended, consisting of a 25 pound carrying limitation and the avoidance of activities which involved climbing, balancing, or walking on uneven ground. These latter restrictions primarily pertained to claimant's lower extremity problems. Stating that welding activities were inconsistent with claimant's physical capabilities, the Consultants opined that his impairment was significant. However, they did not apportion claimant's impairment between his foot residuals and his back complaints.

Dr. Thompson, claimant's current treating orthopedist, agreed with the Orthopaedic Consultants' opinion concerning claimant's future work restrictions. Dr. Thompson anticipated that claimant would require further medication and injection therapy to relieve his chronic lumbosacral strain. In Dr. Thompson's opinion claimant had sustained permanent impairment in the moderate to moderately severe range. As with the Consultants, Dr. Thompson did not differentiate between claimant's foot residuals and his back impairment.

In July 1985 claimant's vocational counselor reported that, based on their eight month association, claimant's participation had been "less than enthusiastic." The counselor based this opinion on claimant's virtual inaccessibility, several reschedulings of remedial testing procedures, and his failure to take placement tests. The counselor identified several "bench work" occupations, which apparently complied with claimant's physical limitations. However, due to claimant's refusal to relocate, further evaluations were recommended in the hope of identifying a vocational goal where he could secure retraining without relocating. Claimant acknowledged that he had rejected a nine month "prosthetics" retraining course in Minnesota, but he had done so because there were no assurances that he would be reimbursed for expenses incurred in returning to Oregon once he completed the course.

In September 1985 claimant was administratively discharged from the Southern Oregon Pain Center. The basis for the discharge was claimant's absence from the program for three consecutive days without a valid reason. Claimant explained that he left the Center because he felt he was not receiving any benefit from the program.

Claimant credibly testified that he experiences low back discomfort "all the time." He describes the discomfort as a "stabbing" pain, primarily on the right side, extending from his tailbone up "maybe six inches." The pain has recently begun radiating into his legs and further increases whenever he is physically active. Prolonged sitting exacerbates his low back symptoms and standing worsens his constant foot pain. To relieve his low back complaints, claimant takes anti-inflammatory medication and "Extra Strength Tylenol." As a result of his compensable injury, he has curtailed, if not eliminated, most of his recreational activities. These activities include football, basketball, baseball, and wrestling.

Claimant felt that his physical limitations prevented him from returning to any of his past work activities. He has attempted to drive a dump truck, paint a van, and cut firewood.

However, his back soon becomes "locked up", forcing him to terminate these duties. Recently, claimant has been erecting a one-man "firewood mill", which he hopes to operate himself. He designed this mill, as well as a firewood yarder and waste oil burner.

The Referee found that the combination of claimant's problems had undoubtedly placed considerable restrictions on his activities. Apportioning claimant's significant impairment between his feet and back, the Referee concluded that claimant had sustained a 40 percent loss of earning capacity as a result of his low back injury.

We agree that the Determination Order's award of 15 percent is insufficient. However, we find the Referee's award of 40 percent excessive.

In rating the extent of claimant's permanent disability, we consider his physical impairment attributable to the compensable low back injury, which includes his credible testimony concerning his disabling pain and physical limitations, and all of the relevant social and vocational factors set forth in OAR 436-30-380 et seq. We do not apply these rules as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or 260 (1982). Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that a 25 percent unscheduled permanent disability award adequately compensates claimant for his compensable low back injury.

Finally, we find that this is a case of ordinary difficulty and usual probability of success for claimant. Accordingly, a reasonable attorney fee is awarded for claimant's attorney's services concerning the scheduled permanent disability issues.

ORDER

The Referee's order dated October 31, 1985 is affirmed in part and modified in part. In lieu of the Referee's award, and in addition to the Determination Order's award of 15 percent (48 degrees) unscheduled permanent disability, claimant is awarded 10 percent (32 degrees), which gives him a total award to date of 25 percent (80 degrees) unscheduled permanent disability for his compensable low back injury. Claimant's attorney's fee shall be adjusted accordingly. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $300 concerning the scheduled permanent disability issues on Board review, to be paid by the insurer.

ROBERT H. ROWELL, Claimant
Charles Maier, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 85-01385 & 85-01384
May 28, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

St. Paul Insurance Company requests review of Referee Seifert's Corrected Order, as adhered to on reconsideration, that set aside its denial of claimant's claim for a new injury and affirmed CIGNA/INA's denial of claimant's aggravation claim. CIGNA/INA has raised an issue on review regarding the attorney fee awarded by the Referee at hearing. CIGNA/INA argues that because

compensability was not an issue at hearing, no attorney fee should have been awarded. The issues on review are responsibility and attorney fees.

On the issue of responsibility, we affirm. We also affirm the Referee's attorney fee award with the following comment. Although we agree with CIGNA/INA that the issue of compensability was effectively conceded by counsel for both insurers at the time of the hearing, it appears that the issue remained in a contested status up to that time. The denial issued by St. Paul Insurance Company is somewhat ambiguous and can be interpreted as denying compensability as well as responsibility. At the time of the hearing no order had been issued pursuant to ORS 656.307. Under these circumstances, it was necessary for claimant's attorney to prepare for the issue of compensability, as well as responsibility, prior to the hearing. An attorney fee for services prior to the hearing was, therefore, appropriate. There shall be no attorney fee awarded for services on Board review, however, for compensability was clearly not an issue in this forum. Petshow v. Farm Bureau Insurance Co., 76 Or App 563 (1985); Stanley C. Phipps, 38 Van Natta 13 (1986).

ORDER

The Referee's orders dated August 17, 1985 and October 8, 1985 are affirmed.

CARL A. ANFORA, Claimant
Bischoff & Strooband, Claimant's Attorneys
Mitchell, et al., Defense Attorneys
Lindsay, et al., Defense Attorneys

WCB 85-03807, 85-03808, 85-06955 & 85-06956
May 30, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Argonaut Insurance Company requests review of Referee Seifert's order which set aside its denial of claimant's "new injury" claim for a back condition and upheld Fireman's Fund Insurance Company's denial of claimant's aggravation claim. On review, Argonaut contends that Fireman's is responsible for claimant's current condition. We agree and reverse.

Claimant was 39 years of age at the time of hearing. In January 1982, while working as an engineering technician for Fireman's insured, he compensably injured his low back while helping move video tape equipment weighing approximately 400 pounds. Claimant immediately experienced a "stabbing pain" which radiated from his mid-back to his buttocks. His condition was diagnosed as a low back strain. Claimant continued to work, despite recurring pain. Fireman's accepted the claim as a nondisabling injury.

Approximately one week later, claimant sustained another compensable injury when he fell backwards while attempting to sit down. He experienced discomfort in the same areas as before, except he also felt muscle pain to the right side above the belt level. X-rays revealed a compression deformity of the L1 vertebrae, which was probably due to an old injury. The diagnosis was contusion and low back strain. Fireman's accepted this claim as a disabling injury.

In March 1982 claimant was examined by Dr. Phifer, orthopedist. Claimant complained of a recurrent low back and tailbone ache after prolonged sitting, car rides, or stooping. He also occasionally experienced thoracic back pain. X-rays were indicative of an old healed vertebral epiphysitis in the lumbar area. Dr. Phifer diagnosed thoracic and lumbar strains and a probable contusion of the coccyx. Considering claimant's preexisting deformities and degenerated lower thoracic and upper lumbar intervertebral discs, Dr. Phifer anticipated a prolonged period of convalescence. Claimant was encouraged to lose weight, exercise, and avoid strenuous activity. Thereafter, he returned to work, but avoided heavy lifting whenever possible.

A September 1982 Determination Order issued, closing his disabling injury claim. Claimant received approximately two months of temporary disability and no permanent disability. By a November 1983 stipulation claimant was eventually awarded 10 percent permanent disability resulting from his two compensable injuries. In February 1984 Dr. Roberts, his treating chiropractor, agreed that claimant had suffered mild residual disability of 10 percent which would preclude him from performing heavy lifting, bending, or prolonged stooping activities.

Claimant continued to work and to receive monthly chiropractic treatments. He avoided heavy lifting, particularly when coworkers were not present to assist him. Whenever claimant attempted to perform lifting activities he would experience a "burning sensation down the lower back area." Generally, this pain would subside overnight.

On September 11, 1984, while Argonaut was on the risk, claimant attempted to lift and carry a 50 pound videotape machine. The machine was approximately one foot in heighth and two feet by two feet in diameter. Claimant carried the machine approximately 30 feet from one room to another. Along the way he had to open two doors while holding the machine in one arm. He did not recall any sudden twist, turn, or slipping motion. However, by the time he reached the first door he "started feeling it." The discomfort was similar in type and location to the pain he had previously experienced, except this time the pain did not subside overnight. Claimant has not missed any time from work as a result of this incident. Since the incident his back has been "sore a lot more often" and he now refrains from lifting anything by himself.

Claimant returned to Dr. Roberts, who treated him approximately 19 times from September 13, 1984 through November 9, 1984. Inasmuch as claimant had injured the same lumbar/sacroiliac area before and had reported a similar lifting incident a month before the September 1984 incident, Dr. Roberts opined that claimant had suffered an aggravation of his previous problem. Dr. Roberts considered claimant's back "relatively unstable" since the January 1982 injury. The September 1984 incident had involved dramatic body mechanics and had contributed to claimant's condition in the sense that claimant's low back problem was more acute. However, Dr. Roberts concluded that any incident which increased claimant's pain and required additional medical treatment could be termed a contribution to claimant's problem.

The Referee found that the September 1984 incident independently contributed to claimant's need for medical treatment. Accordingly, applying the "last injury rule", the

Referee held that Argonaut was responsible, as the insurer on the risk at the time of the September 1984 incident. In reaching his decision, the Referee cited Industrial Indemnity v. Kearns, 70 Or App 583 (1984), for the proposition that a rebuttable presumption exists that a claimant's last injury contributed independently to the worsened condition, and that the last insurer is responsible.

We disagree with the Referee's reliance on Kearns. The Kearns presumption applies in cases involving multiple accepted injuries involving the same body part. See Stanley C. Phipps, 38 Van Natta 13 (1986). It does not apply when the issue is whether a claim is compensable as an aggravation of an old injury or as a new contributory incident.

In an aggravation/new injury context, allocation of responsibility is dependent on whether claimant's current condition is a continuation of his original injury or the result of a subsequent incident that independently contributed to his condition in a material way. Ceco Corp. v. Bailey, 71 Or App 782, 785 (1985). If the second incident merely aggravates the effects of the first and results in a second period of disability without independently contributing to claimant's condition, the first insurer remains responsible. Smith v. Ed's Pancake House, 27 Or App 361 (1976).

We conclude that Fireman's, the insurer on the risk for claimant's January 1982 injury, is responsible. We recognize that claimant's pain increased after the September 1984 incident and resulted in a need for additional medical treatments. However, as Dr. Roberts persuasively reasoned, any incident which resulted in increased pain and a need for further medical treatments could be described as contributing to claimant's low back problems. Furthermore, the facts lend themselves more readily to an aggravation rather than a new injury. Claimant had experienced recurring complaints in the same area since his January 1982 injury, particularly whenever he engaged in lifting activities. The September 1984 incident represents merely another in a continuing series of exacerbations of claimant's symptoms, not an independent contribution to the causation of his chronic back condition. See SAIF v. Brewer, 62 Or App 124, 129 (1983). Accordingly, we conclude that Fireman's, as the first insurer, remains responsible for claimant's low back condition.

ORDER

The Referee's order dated October 29, 1985 is reversed. Argonaut Insurance Company's denial is reinstated and upheld. Fireman's Fund Insurance Company's denial is set aside and the claim is remanded to Fireman's for processing according to the Workers' Compensation Law. Fireman's shall reimburse Argonaut for its claim's costs incurred to date.

BERNIECE FOWLER, Claimant
Malagon & Moore, Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

WCB 85-06091
May 30, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Foster's order that upheld the insurer's denial of claimant's aggravation claim for the neck and left knee. Claimant also asks that we remand this case to the Referee for the taking of

additional evidence submitted after the hearing record was closed. The issues are compensability and the propriety of remand.

We find remand inappropriate in this case; the evidence now sought to be introduced could have been produced with due diligence before or at the time of the hearing. See Michael Mulcahy, 38 Van Natta 266 (1986).

On the merits we affirm the order of the Referee.

ORDER

The Referee's order dated November 19, 1985 is affirmed.

PEGGY L. FRY, Claimant
Olson Law Firm, Claimant's Attorney
Edward C. Olson, Defense Attorney

WCB 84-03858
May 30, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Seymour's order that awarded claimant 32 degrees for 10 percent unscheduled permanent partial disability for the cervical spine in lieu of a Determination Order that awarded no permanent disability. The issue is extent of unscheduled disability. We modify the Referee's order.

Claimant is a former cook/baker who compensably injured her cervical spine after slipping and falling on the job. The evidence is that claimant is unable to return to her former employment as a result of her cervical injuries. She was 56 years of age at the time of the hearing and had completed high school. Claimant's work was in the medium range at the time of her injury; she is capable of light work now.

The Evaluation Division found claimant entitled to temporary disability only, concluding that she suffered no physical impairment as a result of her injury. The medical record, however, demonstrates mild physical impairment, as the Referee correctly noted. After considering this impairment and claimant's social and vocational factors, the Referee awarded claimant 10 percent unscheduled disability.

Our de novo review persuades us that claimant's disability exceeds the Referee's award. After considering claimant's impairment, age, education, transferable skills and the labor market findings, we find claimant entitled to an award of 64 degrees for 20 percent unscheduled permanent partial disability. This award shall be in lieu of all prior awards.

ORDER

The Referee's order dated September 27, 1985 is modified. In lieu of the Referee's award and all prior awards, claimant is awarded 64 degrees for 20 percent unscheduled permanent partial disability. Claimant's attorney is allowed a fee of 25 percent of the increased compensation awarded by this order, not to exceed $3,000.

LEONOR S. MARTINEZ, Claimant
Vick & Associates, Claimant's Attorneys
Miller, et al., Defense Attorneys

WCB 85-05863
May 30, 1986
Order Striking Brief

The self-insured employer moved the Board for an order striking claimant's opening brief on the grounds that it was untimely and that a purported extension of time within which to file the brief was invalid. We initially denied the motion by a letter-order. The employer has requested that we reconsider our decision. We have done so, and we now conclude that the motion must be allowed.

At the time relevant in this case, filing of briefs was governed by OAR 438-11-010(3) of our rules of practice and procedure. In relevant part, OAR 438-11-010(3)(b) provided: "Extensions of time for filing briefs will be granted only on written motion filed not later than the date the brief is due." (OAR 438-11-010 has since been superceded by OAR 438-11-011, Temporary rule, effective May 7, 1986. The quoted language remains a part of the rule; however, additional language now makes it even clearer that late requests for extensions will not be considered.)

Claimant's brief was due February 19, 1986. Due to a calendaring omission, the brief was not timely filed. The error was discovered February 28, 1986. Claimant's attorney telephoned the Board, inquiring as to what procedure could be followed to cure the default. Evidently, someone on our clerical staff told claimant's attorney that a written request for an extension should be filed. Such a request was filed, requesting an extension of time to March 7, 1986. The extension request also represented that the employer's attorneys had been contacted and "would have no objection to a brief extension of time . . . ." Based upon the representations and counter-representations of counsel since, we conclude that the employer's counsel actually expressed that the employer "would take no position . . ." regarding the requested extension. We conclude that claimant's erroneous representation was unintentional. Nevertheless, a member of our clerical staff evidently relied upon the representation and issued a computer generated letter that allowed an extension through March 7, 1986. A brief was filed March 7, 1986, and it is this brief the employer moves to strike.

When we initially denied the employer's motion to strike claimant's brief, we did so in an attempt to acheive a degree of fairness. Although the extension that was granted to claimant was clearly not permitted by the letter of our rule, it was, nonetheless granted. Claimant proceeded to prepare and file a brief either in reliance upon the extension or a reasonable belief, based upon verbal communication with our clerical staff, that such an extension would be allowed. On the other hand, the employer's attorney also communicated with our staff and was told, in response to a question based upon the facts of this case, that a late request for an extension probably would not be granted under the rule. Based upon this information, the employer decided not to call to our attention the erroneous representation of its position as to the requested extension. The attorneys for both parties attempted to proceed informally, based upon good faith, but ex parte, contact with Board staff. As the protracted nature of this motion proceeding now demonstrates, and as our rules

require, requests and counter-requests for Board action must be in writing.

The adoption of OAR 438-11-010(3) as a temporary rule in November 1985 was prompted by a history of uncertainty and vague procedures, often abused, relating to briefing cases pending review by this Board. See Vanessa Dortch, 37 Van Natta 1207 (1985). We adopted the rule after consultation with representatives of both the claimant and employer/insurer bars. In some respects, the prior rule was liberalized, but, as the above-quoted language from OAR 438-11-010(3)(b) demonstrates, it was clearly contemplated that extensions of time under the rule be requested before the expiration of the allowed time. We also specifically eliminated prior language that allowed the parties to agree to a modified briefing schedule.

The rule in question is stated in mandatory terms. Although failure to timely file a brief is not "jurisdictional" in the sense that it affords a basis to dismiss a pending request for review, see current OAR 438-11-011(3); former OAR 438-11-010(3), we have, by adopting the rule, mandated that late requests for time extensions will not be allowed. We are bound to follow our own rules. See Bratt v. SIAC, 114 Or 644 (1925). We conclude that the granting of the untimely requested extension in this case amounts to an ultra vires act. We, therefore, allow the employer's motion to strike the claimant's opening brief.

ORDER

Claimant's appellant's brief is stricken and will not be considered on Board review. The employer shall be allowed 21 days from the date of this order to file a respondent's brief. If a respondent's brief is filed, claimant shall be allowed 14 days from the mailing date thereof to file a reply brief, which shall be confined to matters of reply.

RONALD SANTOS, Claimant
Cash Perrine, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-12974
May 30, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Seifert's order, as amended on reconsideration, that: (1) upheld the insurer's denial of claimant's aggravation claim for the low back; (2) found claimant's claim to have been properly closed by the September 4, 1984 Determination Order; (3) denied claimant's request for penalties and attorney fees for the insurer's alleged unreasonable failure to pay temporary total disability benefits; (4) denied claimant's request for penalties and attorney fees for the insurer's alleged untimely denial; and (5) denied claimant's request for penalties and attorney fees for the insurer's failure to timely provide medical reports. The issues are the compensability of claimant's aggravation claim, premature closure and penalties and attorney fees.

We affirm those portions of the Referee's order pertaining to premature closure and penalties and attorney fees for an alleged untimely denial and the failure to pay temporary total disability. On the remaining issues, we reverse.

Claimant is a former laborer who suffered a compensable back strain on March 15, 1984 while operating an air drill. He

sought medical attention at a hospital emergency room the next morning. Medication and bed rest were prescribed. Claimant was found medically stationary on April 2, 1984 and was released to his regular work by Dr. Knapp. A subsequent Determination Order awarded temporary total disability only. The order issued September 4, 1984; it is the last arrangement of compensation.

Claimant returned to work in April 1984 and continued to work in his heavy job until October 17, 1984. On that date he left work and returned to Dr. Knapp because of increasing back pain. Claimant indicated on his time card that he was "sick," but he apparently made no mention of back pain or a work-related disability. Dr. Knapp diagnosed probable chronic lumbosacral strain and he took claimant off work pending a consultation by Dr. Mann, an osteopath. Dr. Mann examined claimant on October 25, 1984 and he released claimant to light work only with no heavy lifting, bending or twisting. Apparently believing that his employer had no light duty work available, claimant resigned. He soon approached his employer again, however, and requested a new job with differing responsibilities. Claimant testified that he informed his employer of a need for lighter employment and that he showed the employer his light duty work release. The employer testified that claimant asked for a carpentry job, which is not light work, and that claimant neither presented the work release nor attributed his resignation to a work-related disability.

On November 1, 1984 claimant's attorney wrote to the insurer requesting medical reports and other claim information. On December 6, 1984 claimant renewed his request for information and sent a copy of his request for hearing to the insurer. He renewed his request a second time one week later and enclosed an insurance form from a medical center that had treated claimant's back with a week of bed rest. On January 31, 1985 claimant again requested claims information and complained that no temporary disability benefits had been paid. The insurer denied claimant's aggravation claim the same day.

The Referee's orders do not address the issue of penalties and attorney fees for an alleged untimely denial. The issue was not raised at hearing. Neither do the Referee's orders address the penalty and attorney fee issue regarding failure to pay temporary total disability, even though that issue was before the Referee. On de novo review, we find that penalties and attorney fees are not due on either issue. We are unpersuaded that claimant's employer or its insurer had knowledge of claimant's medically verified inability to work. ORS 656.273(4). The insurer's failure to commence temporary total disability benefits, therefore, was not unreasonable. We further find that the insurer first became apprised of claimant's aggravation claim on December 6, 1984. Its January 31, 1985 denial, therefore, was timely.

The Referee found that claimant had suffered a "new injury" rather than an aggravation in October 1984. He, therefore, remanded the case to the insurer for processing as a new injury claim. The insurer requested reconsideration of the Referee's order, asserting that the issue of a "new injury" was not before the Referee at hearing. On reconsideration the Referee vacated that portion of his Opinion and Order remanding the case to the insurer. He did not further discuss the aggravation claim, and the effect of his order was to affirm the insurer's denial on that issue.

Claimant argues on review that the medical record establishes his claim. He points to the opinion of Dr. Knapp that claimant was worse in October 1984 than he was in April of that year. He also notes the opinion of Dr. Mann that claimant should not return to heavy work after the second injurious event. The insurer argues that, at most, claimant experienced a return of symptoms in October 1984 and that a symptomatic worsening alone is insufficient to sustain an aggravation claim.

In Foushee v. Consolidated Freightways, 78 Or App 509 1986), the court held that a symptomatic worsening is sufficient to establish an aggravation claim if the increased symptoms result in increased disability. We are convinced that the present claimant's disability was increased as a result of his post-closure increased symptoms. Before the September 1984 Determination Order, claimant was released to return his regular heavy work by Dr. Knapp. He actually performed that work for several months. A month after the last arrangement of compensation, however, claimant's increased symptoms resulted in his physician's releasing him for light duty only. We interpret this decrease in claimant's residual capacity as an increase in his disability subsequent to the September 1984 Determination Order. Under Foushee, supra, claimant has established a compensable aggravation.

The remaining issue is whether the insurer should be assessed a penalty and an associated attorney fee for its failure to timely provide claimant with medical reports pertinent to the claim. OAR 437-07-015(2) requires insurers to forward copies of claims documents to claimant within 15 days of demand. Failure to comply with the rule may be considered unreasonable delay or refusal under ORS 656.262(10). Although the Referee acknowledged the pertinent rule he did not assess a penalty or attorney fee because he found no "amounts due" upon which to calculate a penalty. EBI Companies v. Thomas, 66 Or App 105 (1983).

We find the insurer's delay in providing claims information to claimant to have been unreasonable. A penalty and attorney fee are, therefore, appropriate. Because we have found claimant's aggravation claim to be compensable there are now amounts due from which to calculate the penalty.

For prevailing on the issues of aggravation and penalties and attorney fees for the insurer's failure to time provide medical reports, claimant's attorney is entitled to reasonable fees at the hearing and Board levels. After de novo review we find that this is a case of ordinary difficulty and usual probability of success for claimant. A reasonable attorney fee is awarded accordingly.

ORDER

The Referee's orders dated June 4, 1985 and October 16, 1985 are reversed in part and affirmed in part. The insurer's denial of claimant's aggravation claim is set aside and the claim is remanded to the insurer for processing according to law. The insurer is assessed a penalty equal to 25 percent of the temporary total disability compensation due as result of this order. Claimant's attorney is awarded a fee of $300 for prevailing on the penalty issue. For overturning the aggravation denial, claimant's attorney is awarded a fee of $1,300 for services at hearing and

$600 for services on Board review. Both fees shall be paid by the insurer. On the issue of premature closure, the Referee's order is affirmed.

MYRON E. BLAKE, Claimant
Pozzi, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-05348, 85-08114 & 85-0260M
June 5, 1986
Order Denying Motion to Dismiss

EBI Companies requested Board review of Referee Neal's order that held it, rather than the SAIF Corporation, responsible for claimant's compensation. Claimant has moved the Board for an order dismissing the request for review on the ground that it was untimely. We deny the motion.

The Referee's order was mailed April 10, 1986. To be timely, a request for Board review must be made within 30 days of the Referee's order. ORS 656.289(3). ORS 656.295(2) provides that a request for Board review be mailed to the Board and the parties. In Roy L. Morris, 38 Van Natta 99, 100 (1986), we discussed the methods of perfecting a request for Board review in view of OAR 438-05-040(4) of our rules of practice and procedure. We concluded that under OAR 438-05-040(4)(b), when a request for review was allegedly mailed, but not received by the Board, acceptable proof of mailing was a receipt stamped by the postal service showing date of mailing by registered or certified mail. That subsection of the rule does not apply in this case, however.

OAR 438-05-040(4)(a) provides that a document may be filed with the Board by physically delivering it to the Board "at any office of the Board." EBI filed its request for review by physically delivering it to our Portland office. The request bears a date received stamp of May 12, 1986, a Monday. Because the thirtieth day after the Referee's order was a Saturday, filing the request on the following Monday was timely. OAR 438-05-040(4)(c).

In the alternative, claimant moves for dismissal on the ground that EBI did not serve the request for review by mail on all "parties." We are satisfied that EBI served its request for review by mail on the attorneys for all other parties. Such service is sufficient to grant jurisdiction. Argonaut Insurance v. King, 63 Or App 847, 850-51 (1983); Nollen v. SAIF, 23 Or App 420 (1975), rev den (1976).

Claimant's motion to dismiss the request for review is denied.

ROBERT ROSE, Claimant
Evohl F. Malagon, Claimant's Attorney
Lindsay, et al., Defense Attorneys

WCB 84-10894
June 5, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of Referee Howell's order that: (1) assessed penalties and an associated attorney fee for the insurer's alleged unreasonable refusal to pay interim compensation for the period of June 5, 1984 through September 15, 1984; and (2) assessed penalties and an associated attorney fee for the insurer's alleged unreasonable delay in payment of a penalty assessed by a prior Opinion and Order. The issue is penalties and attorney fees for the insurer's alleged unreasonable conduct. We draw from the Referee's recitation of the facts.

Claimant filed a workers' compensation claim for an injury suffered during a softball game on May 20, 1983. He was off work for a short period but returned to his regular job in June 1983. He continued to work until leaving his employment in September 1983. The insurer denied claimant's claim and claimant requested a hearing.

Hearing was held before Referee Baker on May 15, 1984. In his May 31, 1984 Opinion and Order, Referee Baker found claimant's claim not compensable. He further found, however, that claimant was entitled to interim compensation for the period of June 5, 1983 through January 9, 1984, during a portion of which claimant was working full time. The Referee also imposed a penalty as a percentage of interim compensation due from December 9, 1983 through January 9, 1984. The Referee's compensability ruling was later affirmed by the Board.

Following Referee Baker's ruling, the insurer paid the interim compensation ordered, but at an incorrect rate. When contacted by claimant's attorney in that regard, the insurer admitted its error. It further asserted, however, that claimant was due interim compensation only during those periods in which he was off work, i.e., September 16, 1983 through January 9, 1984. The insurer then paid claimant for that period at the corrected rate and paid the penalty assessed in Referee Baker's order. Claimant requested a hearing, which was held before Referee Howell on April 5, 1985.

Referee Howell found that at the time of Referee Baker's order, the Court of Appeals decision in Bono v. SAIF, 66 Or App 138 (1983), provided entitlement to interim compensation between the date an employer is apprised of a claimant's claim and the date of the insurer's denial, including those periods during which claimant was employed. The Referee found that although the Bono decision was ultimately reversed [Bono v. SAIF, 298 Or 405 (1984)], the Court of Appeals' decision represented the most recent interpretation of the law at the time of the prior Referee's order. He held, therefore, that it was unreasonable for the insurer to fail to comply with then-current law, and he imposed a 25 percent penalty.

The insurer offers two arguments on review: First, the Court of Appeals Bono decision did not have binding effect because a mandate was never issued in that case. Second, the insurer argues that the interim compensation ordered by Referee Baker was in effect a "penalty," which the insurer argues it had no duty to pay pending appeal to the Board. On both issues, our recent decision of Terry L. Hunter, 38 Van Natta 134 (1986), is dispositive. Hunter was decided subsequent to the present Referee's order.

In Hunter, the claimant filed an occupational disease claim. Between the date the claim was filed and the date of the denial, the claimant worked full-time at his regular salary. The insurer did not pay compensation during that period. The claimant requested a hearing and, based on the Court of Appeals Bono decision, the Referee ordered payment of "interim compensation" for a portion of the period during which claimant was working. Both parties requested Board review and, pending review, the insurer did not pay the interim compensation ordered by the

Referee. The claimant requested a second hearing based on the insurer's failure to pay.

Subsequent to the Referee's order in Hunter, the Supreme Court reversed the Court of Appeals' decision in Bono. On Board review of the Referee's order, the insurer argued that the Court of Appeals decision had never been the law because no mandate had ever issued. We rejected that argument, holding:

> "While the insurer is technically correct that the judgment of the Court of Appeals was never enforceable as to the litigants in the Bono case [citations omitted], the court's opinion was . . . the most current, published interpretation of the law by a superior tribunal. The Board was, therefore, bound to follow it." Hunter, 38 Van Natta at 135.

Our holding in Hunter is directly applicable to the present case.

Hunter also controls the issue of whether interim compensation is "compensation" that must be paid on appeal. In Hunter, we held that it is not when the claimant was working full-time at his regular salary during the period for which the claimant sought compensation:

> "We conclude that the 'interim compensation' ordered paid in [Hunter] was payable solely by virtue of the Court of Appeals' interpretation of ORS 656.262(4) regardless of claimant's work status, and was not temporary total disability compensation due under ORS 656.210. Such compensation . . . is not the type of compensation that must be paid under ORS 656.313(4) pending further review. The insurer, therefore, was within its rights to stay payment of that compensation pending review of the Referee's decision." 38 Van Natta 136. (Compare Howard E. Hughes, 38 Van Natta 434 (1986), in which we held that interim compensation awarded for a period during which the claimant was not working as a result of an alleged occupational disease was "compensation" within the meaning of ORS 656.313(4), and must be paid pending appeal.)

The facts of Hunter are nearly identical to those of the current case. As in Hunter, the current insurer had no duty to pay interim compensation pending review by the Board. The Referee's order of penalties and attorney fees must, therefore, be reversed.

ORDER

The Referee's order dated April 24, 1985 is reversed.

JOHN A. SHOULDERS, JR., Claimant
Malagon & Moore, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 80-06247
June 5, 1986
Order on Remand

This matter is before the Board on remand from the Supreme Court. Shoulders v. SAIF, 300 Or 606 (1986). The court has mandated that claimant's attorney be awarded an insurer-paid attorney fee for services performed in connection with the Board's review of this case. ORS 656.382(2). On Board review, claimant prevailed against the SAIF Corporation's request for Board review on the issues of the compensability of claimant's right arm phlebitis and right leg thrombophlebitis. In the review, SAIF prevailed on the issues of the compensability of claimant's tinnitus and vertigo conditions and on claimant's cross-request for review of that portion of the Referee's order that upheld closure of the claim by Determination Order.

All of our holdings on the merits of the substantive issues were affirmed by the Court of Appeals. Shoulders v. SAIF, 73 Or App 811 (1985). The only issue before the Supreme Court was under which statute, ORS 656.382(2) or 656.386(1), claimant's attorney fee for partially prevailing on Board review should have been awarded. Claimant's attorney has been awarded attorney fees by the Supreme Court for services before the appellate courts.

We find that this was a case of ordinary difficulty and probability of success for claimant on the issues upon which claimant prevailed. We accordingly award a reasonable attorney fee of $400 for services on Board review, to be paid by the SAIF Corporation, in addition to and not out of claimant's compensation.

IT IS SO ORDERED.

DONALD R. VOELKER, Claimant
Welch, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 86-0209M
June 5, 1986
Own Motion Order

SAIF Corporation has submitted to the Board claimant's claim for an alleged worsening of his February 7, 1977 industrial injury. Claimant's aggravation rights have expired. SAIF has authorized the proposed back surgery, but opposes reopening claimant's claim as they feel he has removed himself from the labor market.

Claimant has not worked for many years and is, in fact, drawing Social Security disability benefits. He has received awards totalling 85 percent in this claim. It is evident that he is significantly disabled. However, the record is replete with indications of claimant's lack of motivation to return to work. Most of his treating physicians and all of his psychiatrists feel claimant could do some type of light work. We are persuaded on this record that claimant has voluntarily removed himself from the labor market and is not entitled to claim reopening for the payment of temporary total disability compensation. Cutright v. Weyerhaeuser Company, 299 Or 290 (1985). The request for own motion relief is hereby denied.

IT IS SO ORDERED.

CHARLES M. KEPFORD, Claimant
Malagon & Moore, Claimant's Attorneys
Foss, et al., Defense Attorneys

WCB 82-10296
June 10, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Kepford v. Weyerhaeuser Co., 77 Or App 363, rev den, 300 Or 722 (1986). The effect of the court's judgment is to order acceptance of claimant's claim for compensation for his low back condition as an occupational disease. The claim was denied by the employer on April 28, 1983.

Therefore, the employer's denial dated April 28, 1983 is set aside and this matter is remanded to the employer for acceptance, payment of compensation according to law and processing to closure under the provisions of ORS 656.268.

IT IS SO ORDERED.

DONALD T. QUANT, Claimant
Osborne & Spencer, Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

WCB 85-05304
June 10, 1986
Order on Review (Remanding)

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Brown's order that set aside its denial of responsibility for claimant's right wrist condition. In his response brief claimant requests remand to develop the evidence whether claimant's workers' compensation claim in California has been accepted or finally rejected. Claimant submitted a motion to supplement the record with a subsequently received official notification form regarding a disability claim. The issues are responsibility and remand.

Included among the documentary evidence submitted to the Referee is a letter from claimant's employer in California which appears to be a denial of a claim for workers' compensation benefits and directing claimant to contact the employer's insurer. At the time of the hearing, there was no response from the insurer. Subsequent to the hearing, a form response was received by claimant from the State of California, Employment Development Department, Disability Insurance Program. Because of a discrepancy on his initial filing, the claim form was being returned to claimant with instructions.

Since the hearing, the law regarding subsequent out-of-state contribution to a disabling condition has been clarified by the opinion of the Court of Appeals in Miville v. SAIF, 76 Or App 603 (1985). The Court remanded for a determination whether claimant had filed a claim in another state and whether that claim, if made, had been finally determined as to compensability.

Following the rule of Miville, the ultimate conclusion in California will determine whether this claimant is entitled to compensation under Oregon's Workers' Compensation Law. Consistent with that opinion, we think that the evidence in this case is unclear whether claimant has made a claim in California for his right wrist condition and whether there has been a final determination of compensability under California law. Alberto v. Monaco, 38 Van Natta 32 (1986). Consequently, we find that the

case has been insufficiently developed and remand the case to the Referee for the purpose of determining whether claimant has made a claim in California for his right wrist condition and whether that claim, if made, has been finally determined as to compensability under that state's laws.

ORDER

The Referee's order dated August 6, 1985 is vacated. This matter is remanded to the Referee for further proceedings consistent with this order.

LINDA E. WOOD (BARON), Claimant
Victor Calzaretta, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-00794
June 10, 1986
Order Dismissing Motion for Attorney Fees

Claimant has moved for an order awarding attorney fees for prevailing against the SAIF Corporation's contention on Board review, as raised in its respondent's brief, that her unscheduled permanent disability award should be reduced. We treat this motion as one for reconsideration.

Our Order on Review issued April 22, 1986. Claimant's motion was filed with the Board on May 29, 1986, more than 30 days after the date of our order.

The motion is not timely filed. ORS 656.295(8). Therefore, since our Order on Review has become final by operation of law, we lack jurisdiction to consider the matter raised by claimant.

THIS MATTER IS DISMISSED.

WILLIAM R. GILL, Claimant
Evohl F. Malagon, Claimant's Attorney
Foss, et al., Defense Attorneys

WCB 85-09759
June 12, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

The self-insured employer requests review of that portion of Referee Myers' order which set aside its denial of claimant's aggravation claim for a low back condition. On review, the employer contends that a subsequent employer is responsible for claimant's condition.

Following our de novo review of the medical and lay evidence, we are not persuaded that claimant's subsequent employment contributed to the causation of his chronic back condition. Rather, the evidence establishes that claimant's subsequent work activities aggravated his continuing back problem, which resulted in a second period of disability. See Crowe v. Jeld-Wen, 77 Or App 81, 87 (1985); SAIF v. Brewer, 62 Or App 124, 129 (1983). Accordingly, we affirm the Referee's order which found that claimant had sustained an aggravation, for which the employer remains responsible.

Furthermore, we find that this case is of ordinary difficulty and usual probability of success for claimant. Therefore, a reasonable attorney fee is awarded.

ORDER

The Referee's order dated January 29, 1986 is affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by the self-insured employer.

PAUL O. LUNSFORD, Claimant
Hayner, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-03923 & 85-03924
June 12, 1986
Order of Dismissal

The Board has received SAIF Corporation's request for Board review of the Referee's Order on Reconsideration dated April 23, 1986. The 30 days for filing a request for review expired May 23, 1986. Although SAIF's request was dated May 22, 1986, it was not received in the Board's offices until May 27, 1986. Therefore, SAIF's request for review is hereby dismissed as being untimely filed, and the order of the Referee is final by operation of law.

IT IS SO ORDERED.

CYNTHIA L. MALM, Claimant
Malagon & Moore, Claimant's Attorneys
Lindsay, et al., Defense Attorneys
Fishleder, et al., Defense Attorneys

WCB 85-01960, 85-01961, 85-07509 & 85-07510
June 12, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Tenenbaum's order which set aside United Pacific Insurance's denial of her "new injury" claim for a low back condition. On review, claimant contends that: (1) she suffered an aggravation of a low back injury for which Fireman's Fund Insurance is responsible; and (2) she is entitled to a reasonable attorney's fee at the hearing level and on Board review.

We affirm the order of the Referee with the following comment concerning claimant's contention that she is entitled to a reasonable attorney's fee.

Inasmuch as responsibility was the sole issue at the hearing level and on Board review, claimant is considered a nominal party. Petshow v. Farm Bureau Ins. Co., 76 Or App 563, 571 (1985); Stanley C. Phipps, 38 Van Natta 13, 16 (1986). Furthermore, although she took a position and actively litigated a point bearing upon her entitlement to receive temporary disability compensation in a particular amount, her position has not prevailed. Accordingly, we conclude that she has not "actively and meaningfully participate[d]" as that phrase is used in OAR 438-47-090(1), and thus, is not entitled to an attorney's fee. Phipps, supra.

ORDER

The Referee's orders dated November 5, 1985 and November 29, 1985 are affirmed.

MALCOLM V. NEIL, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-06830
June 12, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of those portions of Referee Wasley's order which: (1) upheld the SAIF Corporation's partial denial of his low back condition; (2) upheld SAIF's denial of his aggravation claim for a neck, right arm, and low back condition; and (3) affirmed a September 14, 1984 Determination Order that had awarded 10 percent (19.2 degrees) scheduled permanent disability for loss of use or function of the right arm and 25 percent (48 degrees) unscheduled permanent disability for a neck injury. On review, claimant contends that: (1) his low back condition is compensable; (2) his compensable condition has worsened since the last award of compensation; or alternatively, (3) his permanent disability awards should be increased.

We affirm the order of the Referee with the following comments.

Following our de novo review of the medical and lay evidence, we are not persuaded that claimant's compensable injury was a material contributing cause of his current low back condition. Furthermore, the preponderance of the evidence fails to establish that the symptomatology of claimant's condition has worsened so that he is more disabled than at the time of the last award of compensation. See Johnson v. Argonaut Insurance Co., 79 Or App 203 (May 14, 1986); Consolidated Freightways v. Foushee, 78 Or App 509, 512 (1986). Finally, we find that the Determination Order's awards of permanent disability have adequately compensated claimant for his compensable injury and residuals.

ORDER

The Referee's order dated December 4, 1985 is affirmed.

TOMMY A. SUNDIN, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-12393
June 12, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Peterson's order that: (1) awarded claimant interim compensation for the period of January 23, 1982 through December 12, 1984; (2) assessed a penalty in the amount of ten percent of the interim compensation held to be due for SAIF's alleged unreasonable failure to pay that compensation; (3) assessed a penalty in the amount of five percent of the interim compensation due for SAIF's alleged failure to timely accept or deny claimant's claim; (4) set aside SAIF's denial of claimant's low back injury claim; (5) assessed a penalty in the amount of 15 percent of the temporary total disability held to be due for SAIF's allegedly unreasonable denial of claimant's claim; and (6) awarded claimant's attorney a fee totalling $3,500 for services at hearing. The issues on review are whether claimant's claim was timely filed and, if so, whether the claim is compensable. If the claim is compensable, the issues include compensability, interim compensation, temporary total disability compensation, penalties and whether the Referee's award of attorney fees was excessive.

Claimant is a former janitorial worker who alleges that over a two-week period beginning in December 1981, he developed low back, left hip and left leg pain as a result of stripping and waxing floors. He visited an orthopedic surgeon, Dr. Cherry, on January 23, 1982. Dr. Cherry had performed surgery on claimant's lumbar spine in May 1976. Claimant filed a claim with his then-employer, Union Carbide, asserting that his 1976 lumbar condition was related to that employment. The claim was denied and the denial was ultimately sustained by a hearing Referee's Opinion and Order.

On January 23, 1982 Dr. Cherry gave claimant a release from heavy duty. He did not actually treat claimant, but merely diagnosed his condition and released him to return to lighter work. Dr. Cherry made no arrangements for a follow-up visit and he submitted no report to the employer or SAIF. Claimant did not visit Dr. Cherry again until April 1985, or more than three years after the alleged incident at work.

Claimant returned to his employer's premises after his appointment with Dr. Cherry and presented his release to an agent of the employer. When asked at hearing whether he had told the agent that his condition was work-related, he responded, "Yes, I believe so." The employer's agent (who did not testify but who offered her statement through an insurer's claims representative) indicated that she had no recollection that claimant presented information regarding a claim. Claimant, in fact, made no express oral claim and he did not request a claim form from the employer's agent. The employer's records indicate that claimant left work voluntarily because of his belief that he could no longer do janitorial work. The records do not mention a work-related disability.

SAIF was not apprised of claimant's claim until it received a copy of his request for hearing filed on November 23, 1984. On December 12, 1984 SAIF issued a denial of claimant's injury claim, asserting that claimant had incurred no medical services as a result of his employment. Later a SAIF investigator contacted several of claimant's former fellow employes for information regarding whether claimant had exhibited back problems on the job. Some co-workers remembered claimant having problems; others did not. A SAIF claims representative testified that some of the co-workers' representations differed from those of claimant.

Among SAIF's arguments before the Referee was its assertion that claimant's claim was barred for having been untimely filed. ORS 656.265(1) provides that a claim for compensation shall be filed within 30 days after the worker's accident. Failure to give timely notice bars a claim unless the employer had notice of the injury or the insurer has not been prejudiced by failure to receive notice. ORS 656.265(4)(a); Gerald L. Sneed, 38 Van Natta 17 (1986). The Referee accepted claimant's testimony that he informed the employer of a work-related need to leave work. The Referee found, therefore, that the employer had "knowledge" of the injury and he found the claim to have been timely "filed" under ORS 656.265(4)(a).

Unlike the Referee, we are not persuaded by claimant's testimony. Claimant's statement that he "believed" he informed the employer's agent of his injury clearly indicates that he was uncertain. His memory also appears to be poor, as evidenced by his inability to recall when he incurred injuries in a 1981 auto

accident. Claimant recalled the accident occurring in December 1981; the record reflects it occurred ten months earlier. In addition to claimant's questionable recall is the inability of the employer's agent to recall claimant's alleged representation of an injury-related disability. We note parenthetically that because of his 1976 worker's compensation claim, claimant was aware of the compensation system and what was required to assert a claim for benefits. Therefore, if he failed to inform his employer of the work-relatedness of his leaving work, it was not out of ignorance of the procedural aspects of the worker's compensation system. We also note that at the time the employer's agent stated that she had no recollection of claimant's informing her of the work-related nature of his condition, she was no longer employed by the employer. She, therefore, had little if any motivation for misrepresenting her discussion with claimant.

We do not find it surprising in this case that the parties' memories have faded, considering that claimant's alleged injurious event occurred more than three years before the hearing. Without more definitive evidence that claimant informed his employer of a work-related disability, we cannot find that the representation occurred. We find, therefore, that claimant's employer had no knowledge of a work-related injury at the time claimant left work. Having no knowledge of a potentially compensable claim, neither the employer nor its insurer were required to pay interim compensation. See ORS 656.262(4).

Although we find that the employer did not have knowledge of the claim, the claim will not be barred if the insurer was not prejudiced by the failure to receive notice. It is the insurer's burden to prove that it has been prejudiced. Satterfield v. Comp. Dept., 1 OR App 524 (1970). After considering the present facts we find that the insurer has sustained its burden. An insurer can be prejudiced by the mere passage of time. Vandre v. Weyerhaeuser, 42 Or App 702 (1979). The present claimant's failure to file his claim within a reasonable time after the alleged injury precluded SAIF from conducting a meaningful and timely investigation. The memories of all pertinent parties had clearly faded by the time the claim was filed, and SAIF's ability to acquire reliable information was hampered thereby.

Our finding that claimant's claim was untimely filed moots the remaining issues raised on review. As noted above, interim compensation was not due because neither the employer nor the insurer had knowledge of claimant's potentially compensable claim. In addition, the untimely filing of the claim bars its compensability and the temporary disability compensation that may or may not have been payable had the claim been timely filed. There can be no penalties or associated attorney fees because of our holding on the issue of compensability; there are no amounts due from which penalties can be calculated. Kosanke v. SAIF, 41 Or App 17 (1979).

ORDER

The Referee's order dated September 26, 1985 is reversed and the SAIF Corporation's denial is reinstated.

HAROLD D. WARD, Claimant
Malagon & Moore, Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

WCB 84-12808
June 12, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of those portions of Referee Foster's order that set aside its denial of claimant's aggravation claim and set aside the Determination Order of July 31, 1985 as premature. The issues are aggravation and premature closure.

The Board affirms the order of the Referee with the following comment and modification. The final paragraph of the Referee's order reads:

> "Industrial Indemnity is hereby Ordered to pay claimant's attorney the sum of $1,500 as a reasonable attorney fee for their apparent denial of the claimant's psychiatric treatment."

The insurer's denial had expressly stated that medical services would continue to be paid for claimant's psychiatric condition and that only claimant's aggravation claim was being denied. We conclude that the Referee's apparent reference to the medical services associated with claimant's psychological condition was inadvertent. We modify the portion of the Referee's order quoted above to read:

> "Industrial Indemnity is hereby Ordered to pay claimant's attorney the sum of $1,500 as a reasonable attorney fee for his services at the hearing in overturning the insurer's July 25, 1985 denial of claimant's aggravation claim and in setting aside the Determination Order of July 31, 1985 as premature."

ORDER

The Referee's order dated December 6, 1985, as modified above, is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the insurer.

LOUIS K. AUSTIN, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-10564
June 17, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Galton's order which awarded 15 percent (48 degrees) unscheduled permanent disability for a tinnitus condition, whereas a May 25, 1984 Determination Order had awarded no permanent disability for this condition. On review, SAIF contends that claimant failed to establish that he suffered a permanent loss of earning capacity as a result of his tinnitus condition. We agree and reverse the Referee's award of unscheduled permanent disability.

Claimant is a 54-year-old safety compliance officer with the Accident Prevention Division of the Workers' Compensation

Department. His work activities over an approximately 17 year career have exposed him to noisy environments, particularly when conducting inspections at construction sites. As a result, he has difficulty detecting high-pitched voices or understanding a conversation involving several participants. These deficiencies make any type of communication, either at a work site, the office, or on the telephone, more challenging. Claimant also experiences a constant pressure and tone, of varying intensities, in his ears, the left more so than the right. These recurring complaints affect his concentration while reading and performing office work. In addition, his sleep habits have been disturbed. He wears ear muffs, which help to filter the noise, but the ringing in his ears persists.

Claimant is at the top of his pay scale and "[tries] very hard" to perform all the functions of his job. However, he believes his tinnitus has affected his job performance in that he finds it increasingly difficult to communicate, especially in mediation sessions between management and workers. Claimant "honestly [doesn't] know" what portion of his problem in following conversations is attributable to his hearing loss and what portion is the result of his tinnitus.

In April 1983 Dr. Schleuning, otolaryngologist, conducted an examination. Claimant reported a progressive high frequency hearing loss over the past few years which resulted in difficulties understanding conversations involving noisy environments and certain voices. The examination was negative with the exception of a high frequency neurosensory hearing loss. Claimant continued to wear ear protection, but chose not to pursue amplification.

In April 1984 an audiologic assessment was performed. Testing was consistent with a bilateral sensorineural hearing loss affecting predominately the higher frequencies. Hearing loss in the right ear was mild to moderate, while the left was moderate. Speech discrimination was good in both ears. The degree of impairment was calculated to be 0 percent for the right ear, 5.25 percent for the left ear, and .66 percent binaural.

In April 1985 claimant was examined by Dr. Bergeron, an ear, nose, and throat specialist. Claimant described a progressive hearing loss with annoying tinnitus. He reported trouble understanding conversational speech in a crowded room or with background noise, but found the tinnitus particularly noticeable when working in windy conditions in high noise levels or when involved in a stressful situation. Claimant's discrimination scores were excellent. Audiometric testing revealed a mid and high frequency sensory neural threshold loss in both ears. Dr. Bergeron calculated the right ear loss as 0 percent, the left ear loss as 1.5 percent, and binaural loss as .25 percent. Dr. Bergeron concluded that there was no way of rating claimant's "quite annoying" tinnitus.

A Determination Order awarded 5.25 percent scheduled permanent disability for loss of hearing in the left ear. Claimant requested a hearing, contending that he was entitled to an unscheduled permanent disability award for his tinnitus condition. SAIF did not contest the compensability of the tinnitus condition, but asserted that claimant had not sustained a loss of earning capacity as a result of the condition.

The Referee found that claimant had credibly described accommodations he had made in his job as a result of his tinnitus condition. Reasoning that these accommodations would adversely impact upon claimant's ability to obtain other employment in a hypothetically normal job market, the Referee concluded that he had suffered a loss of earning capacity. Accordingly, claimant was awarded 15 percent unscheduled permanent disability.

To establish entitlement to an award of unscheduled permanent disability, claimant must prove a permanent loss of earning capacity attributable to his tinnitus condition. See ORS 656.214(5). Depending upon the circumstances of an individual case, post-injury earnings may be of great, little, or no importance in determining loss of earning capacity. Jacobs v. Louisiana-Pacific, 59 Or App 1, 3 (1982); Ford v. SAIF, 7 Or App 549, 552 (1972). In order to entitle claimant to an award of permanent disability, his tinnitus condition must result in permanent impairment, rather than be merely annoying. John J. O'Halloran, 36 Van Natta 611, 612 (1984), aff'd mem., 73 Or App 526 (1985).

Following our de novo review of the medical and lay evidence, which includes claimant's credible testimony, we conclude that the preponderance of the evidence fails to establish that claimant has sustained either a permanent impairment or a permanent loss of earning capacity as a result of his tinnitus condition. Consequently, he is not entitled to an award of unscheduled permanent disability.

We conclude that claimant's tinnitus condition has not resulted in permanent impairment. Claimant contended that he has made accommodations for his problem by wearing ear muffs and by increasing his level of concentration during conversations. However, he acknowledged that the ear muffs have had no effect on the ringing in his ears because the muffs are designed to filter out background noise. Moreover, he conceded that he was unable to differentiate what portion of his communication deficiencies was attributable to his hearing loss and what portion was the result of the tinnitus.

There is apparently no way to measure claimant's "quite annoying" tinnitus. Although his tinnitus has been discussed by the medical experts, the consensus appears to primarily relate his communication difficulties to his high frequency hearing loss. Furthermore, the significance of these difficulties are appreciably lessened by speech discrimination tests, which have variously described claimant's discrimination abilities as "good" and "excellent." Claimant has already been awarded permanent disability for limitations stemming from his measurable hearing loss. He should not receive an additional permanent disability award for an indeterminable tinnitus condition which would be based on the same limitations.

Finally, we are not persuaded that claimant's ability to obtain other employment has been impaired by his tinnitus condition. In reaching our decision, we find guidance from the Court of Appeals' opinion in Hughes v. Pacific Northwest Bell, 61 Or App 566 (1983). In Hughes, a 54-year-old cable splicer credibly described a hearing loss and a tinnitus condition which caused irritability, sleeplessness, and fatigue. The tinnitus was extremely annoying and made it difficult for the claimant to

communicate in noisy environments. However, the claimant continued to perform his work activities with no limitations and with no impairment of earnings. The Hughes court affirmed the Board's order which had declined to award unscheduled permanent disability. The court found that the claimant had made no showing that his ability to obtain other employment, given his skills, intelligence, training, experience, and age, was impaired by the tinnitus condition. Hughes v. Pacific Northwest Bell, supra., 61 Or App 422.

Here, as in Hughes, claimant's tinnitus condition is extremely annoying. Yet, claimant has continued to engage in his regular work activities without limitation and with no impairment of earnings. Although his post-injury earnings are not dispositive, there is also no persuasive evidence to suggest that his tinnitus has had an adverse effect on his ability to secure other employment. Therefore, we find that claimant has not sustained a permanent loss of earning capacity resulting from his tinnitus condition.

ORDER

The Referee's order dated December 19, 1985 is reversed. The May 25, 1984 Determination Order is reinstated.

DAVID A. BERKEY, Claimant
Vick & Associates, Claimant's Attorneys
Roberts, et al., Defense Attorneys
Beers, et al., Defense Attorneys

WCB 83-05108 & 83-10234
June 17, 1986
Order on Reconsideration

The self-insured employer requested reconsideration of our Order on Review dated February 20, 1986. We abated our order to fully consider the request.

The employer's argument in support of reconsideration was that our having affirmed the Referee's finding that the self-insured employer was responsible for claimant's compensation should be reconsidered in light of subsequent developments in the law relating to "back-up" denials of employer or insurer responsibility. See Johnson v. Spectra Physics, 77 Or App 1 (1985); Fred Shearer & Sons v. Stern, 77 Or App 607 (1986). The request for reconsideration is allowed.

After careful consideration of the employer's arguments and the insurer's response, we adhere to our previous order. We conclude that the cases relied upon by the employer are consistent with our discussion and holding in Mary G. Mischke, 37 Van Natta 1155, 1158 (1985). We applied the Mischke analysis to this case in affirming the relevant portion of the Referee's order.

ORDER

Our Order on Review dated February 20, 1986 is republished effective this date.

RICHARD L. BOOTH, Claimant
Velure & Bruce, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-05142
June 17, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of those portions of Referee Daron's order that: (1) set aside its retroactive denial of claimant's occupational disease claim based on the principle of Bauman v. SAIF, 295 Or 788 (1983); (2) awarded claimant 64 degrees for 20 percent unscheduled permanent partial disability in addition to the 48 degrees for 15 percent disability awarded by Determination Order; and (3) granted claimant temporary total disability for the period of December 2, 1984 through December 30, 1984. The issues are whether the insurer's retroactive denial was permissible, the extent of unscheduled disability and temporary total disability.

We agree with the Referee that the employer's retroactive denial was impermissible. Claimant's occupational disease claim is compensable, therefore, by operation of law. With regard to the issues of temporary and permanent disability, we modify the Referee's order.

Claimant is a sawmill employe who began noticing a shortness of breath in 1977, primarily while on the job. He had worked for three years for the employer in an area in which he was exposed to dust from freshly cut lumber. His condition was eventually diagnosed as bronchial asthma and emphysema. He did not lose time from work for this condition until 1983.

On November 27, 1983 claimant was hospitalized for gastroenteritis. The hospital chart notes that claimant's respiratory status was "good" during the hospitalization and that his asthma medication had been discontinued. Upon his discharge on December 2, 1983, claimant's asthma was characterized as "no problem." Subsequent to the discharge claimant did not return to work until December 19, 1984. After his return, claimant worked for just one day before being forced to leave again because of returning respiratory symptoms.

The Referee granted claimant temporary disability compensation for the period of December 2, 1983, the date claimant left the hospital following his gastroenteritis problems, through December 30, 1983. There is no evidence, however, that after leaving the hospital claimant was precluded from returning to work because of his compensable asthma condition. Without proof of a work-related disability, claimant is not entitled to temporary disability compensation. Claimant has failed to prove that he suffered a work-related disability between December 2, 1983 and December 20, 1983. The compensation awarded by the Referee shall be adjusted accordingly.

The remaining issue is whether the Referee properly granted claimant an increased award of permanent disability. A September 28, 1984 Determination Order awarded claimant 48 degrees for 15 percent unscheduled disability. The Referee raised that award by 20 percent, bringing claimant's total award to 35 percent (112 degrees).

Claimant was 50 years of age at the time of the hearing. He holds a high school diploma. His asthma precludes him from working in sawmills and other dusty environments. He is able, however, to work in all other lumber-related occupations, as well as in jobs he held prior to beginning work for this employer. Considering claimant's age, education, physical impairment, prior work experience and other labor market findings, ORS 656.214(5), we find that claimant was adequately compensated by the 15 percent disability award provided by the September 1984 Determination Order. The Referee's award of increased permanent disability shall be reversed.

For successfully defending against the employer's request for Board review on the issue of the employer's denial, claimant's attorney is entitled to a reasonable fee. After de novo review we find that this is a case of ordinary difficulty and usual probability of success for claimant. A reasonable attorney fee is awarded accordingly.

ORDER

The Referee's order dated October 25, 1985 is reversed in part, modified in part and affirmed in part. That portion of the Referee's order that awarded claimant 64 degrees for 20 percent unscheduled permanent partial disability in addition to the Determination Order award is reversed and the Determination Order is reinstated. That portion of the Referee's order that granted claimant temporary total disability compensation for the period of December 2 through December 30, 1983 is modified. In lieu of the Referee's award, claimant is granted temporary total disability compensation for the period of December 20, 1983 through December 30, 1983. The remainder of the Referee's order is affirmed. For successfully defending against the employer's request for review on the issue of the employer's denial, claimant's attorney is awarded a fee of $500, to be paid by the self-insured employer.

TIMOTHY R. DELP, Claimant
Francesconi & Cash, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-04840
June 17, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Holtan's order that upheld the SAIF Corporation's denial of claimant's occupational disease claim for mental stress. The issue is compensability. We reverse.

Claimant is a former custodial employe of the Oregon State Hospital. In March 1985 his primary duty was to pick up soiled patient laundry and to deliver it to the Hospital's housekeeping area. In mid-March 1985 the Hospital admitted a patient suffering from Acquired Immune Deficiency Syndrome (AIDS). Claimant's duties included picking up the AIDS patient's laundry. He had attended an AIDS seminar sponsored by the Hospital and was aware that extraordinary safety precautions were being instituted to prevent the spread of disease. Despite this awareness, claimant remained fearful of contracting AIDS. He asked for, and was refused, a written guarantee from the Hospital that he would not be infected. He informally arranged to trade

duties with another Hospital employe who had no fear of contracting the disease. The job trade was unsatisfactory to the Hospital administration, however, and claimant was directed to perform his regular duties.

On March 11 through 14, 1985 claimant refused to perform his duties. On March 13, 1985 he was suspended without pay for insubordination. He notified his employer of his intent to file a workers' compensation claim the same day. He filed a Form 801 on March 15, 1985. He was terminated from his employment effective March 29, 1985, following an internal investigation.

On March 27, 1985 claimant visited Dr. Lee. The record is silent regarding Dr. Lee's area of specialty, if any. Claimant related that he had experienced an "acute stress anxiety," nervousness, appetite disturbance, tremors and crying episodes due to incidents occurring at work over the prior three weeks. Dr. Lee's impression was "acute anxiety and stress reaction with depressive component. This appears to be definitely related to recent incident at [Oregon State Hospital] . . . I feel that the pt., because of his overwhelming fear and anxiety, cannot presently handle job duties that involve any contact with the AIDS pt. . . ." Claimant returned to Dr. Lee in a somewhat improved condition subsequent to his termination.

On April 11, 1985 claimant visited Dr. Mead, a psychiatrist. Dr. Mead, who became claimant's treating psychiatrist, noted that claimant presented with symptoms of a "Dysthemic Disorder," which Dr. Mead characterized as situational and reactive depression. He also noted that claimant apparently sought counseling for the purpose of adjusting to his termination. In Dr. Mead's opinion, claimant's "Dysthemic" Disorder was precipitated by the termination.

In February 1985 claimant was examined on behalf of the insurer by Dr. Klein, who is also a psychiatrist. Dr. Klein found that she "could not put a psychiatric label on [claimant's] worries," but found them understandable and "not phobic." Dr. Klein felt that claimant suffered from an abnormally acute fear of AIDS but that he had no psychiatric disorder. She did note, however, that claimant exhibited anxiety symptoms as a result of having been ordered to handle the AIDS patient's laundry.

In a June 14, 1985 report, Dr. Mead opined that claimant's employer failed to provide adequate information to allay claimant's fears about contracting AIDS. Dr. Mead found that this failure to inform exacerbated claimant's fear beyond what someone else handling the patient's laundry would have experienced, and he concluded that claimant's "valid fear caused the job related stress." A review of the record reveals that Dr. Mead was misinformed about the steps taken by the Oregon State Hospital to prevent the spread of disease. Dr. Mead's assessment of claimant's anxiety reaction, however, was accurate.

At hearing claimant characterized his claim as one for occupational disease. In order to establish the compensability of his claim, therefore, claimant must establish that he suffered a mental disorder as a result of real events and conditions of his employment, that those events and conditions were capable of producing stress, and that they were the major contributing cause of his mental disorder. McGarrah v. SAIF, 296 Or 145 (1983).

The Referee found that claimant suffered a mental disorder in the form of a dysthmic reaction, manifest primarily as anxiety and depression. He further found that claimant's disorder was caused by real events and conditions of his employment, i.e., the existence of AIDS-infected laundry and claimant's duty to handle it. The Referee then found that claimant's duties, coupled with his fear of contracting AIDS, were capable of producing claimant's stress reaction. We agree with the Referee's foregoing findings. Finally, however, the Referee found the claim not compensable, holding that the conditions of claimant's employment were not the major contributing cause of his mental disorder. With this finding, we disagree.

In analyzing the case, the Referee found that claimant suffered from four primary stressors. Based on Dr. Mead's reports, he found the first and most important stressor to be claimant's depressive reaction to being terminated from his employment. The Referee found that termination, or the fear thereof, is not in itself a compensable on-the-job stressor. While the Referee's finding may be applicable in some cases, we find that it does not apply to the present case. In Elwood v. SAIF, 298 Or 429 (1984), the Court agreed with the insurer's argument that the occupational disease law does not make illness from losing a job a compensable risk of employment. The Court went farther, however, by delineating those cases in which job termination can be factored into the compensability analysis. The Court held:

> "The line, we think, runs between illness resulting from the stress of actual or anticipated unemployment, which is not compensable, and illness resulting from the circumstances and manner of discharge, which can be regarded as events still intrinsic to the employment relationship before termination and can lead to compensation . . . [S]tressful events accompanying the discharge can make the resulting illness compensable; illness resulting from the mere act of discharge and loss of the job is not." 298 Or at 433.

Thus, had this claimant's stress reaction resulted simply from being terminated from a job, his disorder would not be compensable. We find from the record, however, that claimant's stress was a direct result of the circumstances leading to his discharge, i.e., his being ordered to handle a contagious patient's laundry. The events leading to claimant's discharge were "intrinsic to the employment relationship before termination," id. at 433, and must be considered when determining the compensability of claimant's claim.

The Referee found claimant's second primary stressor to be his fear of contracting AIDS. He found this to be a significant and legitimate on-the-job stressor. We agree.

The Referee found the third primary stressor to be claimant's notoriety resulting from the substantial media attention to which he was subjected following his discharge. The Referee found this stressor to be beyond the responsibility of the employer and he refused to consider it in determining

compensability. The Referee was in error. The media attention to which claimant was subjected was a direct result of his discharge, which we have found to be intrinsic to the conditions of claimant's employment. To the extent, therefore, that claimant experienced stress resulting from the presence of the media, the stress is compensable.

The Referee found the last primary stressor to be claimant's filing for bankruptcy, which the Referee correctly identified as an off-the-job stressor. After reviewing the record, however, we find that although claimant's bankruptcy was a stress-producing event, it was relatively minor when compared with the conditions of his employment.

In summary, we find that claimant suffered an occupational disease arising out of his employment. We find that he suffered a mental disorder as a result of real employment conditions capable of producing stress. These conditions, when compared with off-the-job factors, were the major contributing cause of claimant's mental disorder. The Referee's order shall be reversed.

ORDER

The Referee's order dated July 19, 1985 is reversed. Claimant's attorney is awarded $1,300 for services at hearing and $600 for services on Board review, both fees to be paid by the SAIF Corporation.

CAROL J. KNAPP, Claimant
Hayner, et al., Claimant's Attorneys
Foss, et al., Defense Attorneys

WCB 85-10909
June 17, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of Referee Brown's order which found that claimant was entitled to temporary disability while her aggravation claim was in open status. On review, the employer contends that claimant was not entitled to temporary disability because she failed to prove that: (1) she would have experienced "lost wages" as a result of her compensable surgery; or that (2) she would have remained eligible for unemployment benefits had she not had surgery.

Subsequent to the completion of the briefing schedule, the employer submitted a "Supplemental Brief," reasserting its prior contentions and citing the recent case of Miller v. SAIF, 78 Or App 158 (1986). There is no provision concerning the filing of briefs outside of the briefing schedule. See OAR 438-11-010(3) (superceded OAR 438-11-011(3) (Temp.), May 6, 1986). Since we have concluded that strict enforcement of the aforementioned rule is both necessary and desirable, Vanessa Dortch, 37 Van Natta 1207, 1208 (1985), to be consistent with this policy we will not consider supplemental arguments submitted outside of the briefing schedule. Betty L. Juneau, 38 Van Natta 553 (May 22, 1986). However, the Board will continue to entertain citations to recent decisions, issued after completion of the briefing schedule, which affect the issue presently on appeal. Id.

Following our de novo review of the record, we agree with the Referee that claimant was entitled to temporary

disability benefits, less any unemployment benefits received while her aggravation claim was in open status. Consequently, we affirm the Referee's order.

Furthermore, we find that this is a case of ordinary difficulty and usual probability of success for claimant. Accordingly, a reasonable attorney fee is awarded.

ORDER

The Referee's orders dated October 11, 1985 and November 8, 1985 are affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by the self-insured employer.

MELVIN L. LARSON, Claimant
Van Valkenburgh, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 84-0364M
June 17, 1986
Order Denying Attorney Fees

Claimant's attorney, Mr. Paul Hoffman, has requested that he be allowed an attorney fee from the increased compensation for permanent partial disability granted by the Board's March 21, 1986 order. At the time claimant's claim was initially closed in February 1986, we had no knowledge of Mr. Hoffman's representation of claimant. The request for reconsideration of the February order, which resulted in the increased permanent disability award in March 1986, was submitted by SAIF Corporation. Because we had no evidence of the efforts expended by Mr. Hoffman on claimant's behalf, we wrote to both Mr. Hoffman and SAIF Corporation for further explanation. SAIF responded with the position that it was responsible for obtaining evidence and requesting the increased disability award. Mr. Hoffman has not responded to our letter. As we have no evidence of efforts expended on claimant's behalf by Mr. Hoffman, the request for attorney fees is hereby denied.

IT IS SO ORDERED.

JOHN M. LENNINGER, Claimant
Quintin B. Estell, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-04605
June 17, 1986
Order on Reconsideration

Claimant requested reconsideration of the Board's Order on Review dated May 7, 1986. We abated our order on May 22, 1986 in order to allow the SAIF Corporation sufficient time to file a response.

Claimant contends that we erred in authorizing SAIF to offset temporary disability compensation paid pending appeal from the Referee's order "against any future award of temporary or permanent disability relative to this claim." We agree. See Hutchinson v. Louisiana Pacific, 67 Or App 577, 581, rev den 297 Or 339 (1984); Carol J. Levesque, 38 Van Natta 230, 231 (1986). The sentence which contains the above-quoted language is deleted from our order. We adhere to the remainder of our order.

IT IS SO ORDERED.

ADELA LERMA, Claimant
Burt, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-04399
June 17, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee McCullough's order which increased claimant's unscheduled permanent disability award for a low back injury from 15 percent (48 degrees), as awarded by a March 25, 1985 Determination Order, to 60 percent (192 degrees). On review, SAIF contends that claimant's award should be reduced. We agree and modify.

Claimant was 39 years of age at the time of hearing. In November 1983, while working as a sanitation worker for a frozen food plant, she injured her low back jumping approximately five feet off a platform. X-rays and a CT scan of the lumbar spine were negative. Her condition was diagnosed as low back strain with secondary muscle contraction and spasm. All treatment has been conservative, consisting primarily of medication, bedrest, and physical therapy.

In February 1984 claimant attempted to return to work, subject to a light duty restriction. However, her back pain soon returned, forcing her to discontinue her work activities. Dr. Morgan, claimant's then attending physician, opined that her persistent pain complaints and muscle spasms were caused by a "tremendous emotional overlay." Because of this anxiety, Dr. Morgan recommended treatment at a pain clinic. Dr. Van Olst, orthopedist, examined claimant and opined that she was suffering from a psychogenic neuro-muscular syndrome. Concluding that claimant demonstrated neither a neurologic problem nor an orthopedic syndrome, Dr. Van Olst agreed with Dr. Morgan's pain clinic recommendation.

In June 1984 claimant attended the Northwest Pain Center. She described low back pain, which extended to her neck, right arm and right leg. The pain was aggravated by physical activity. Claimant had a ninth grade education and had previously worked as a lumber grader, custodian, and day care supervisor. Following her "enthusiastic" participation in the program, claimant's motivation for returning to work and her prognosis for vocational rehabilitation were considered excellent.

Dr. Denker, staff physician at the Center, diagnosed chronic mechanical low back pain, without evidence of nerve root dysfunction, but with a psychological over-emphasis on her physical symptoms. A psychological evaluation revealed a self-demanding personality with a mild level of reactive depression. Concluding that claimant was capable of performing sedentary to modified light labor, Dr. Denker stated that she could lift 25 pounds on a limited basis and 15 pounds frequently. Dr. Denker further suggested that claimant maintain an active exercise program and return to work with her former employer at a lighter job as soon as possible.

In September 1984 Dr. Grube, claimant's current treating physician, referred her to Dr. Garfunkel, pyschologist. Claimant saw Dr. Garfunkel periodically between September 1984 and May 1985. In addition to emotional support, claimant's treatment

included relaxation and pain control procedures. Dr. Garfunkel diagnosed adjustment disorder secondary to a chronic pain syndrome. Due to this pain, Dr. Garfunkel felt that claimant's concentration and attention levels were limited.

In October 1984 claimant returned to part-time work with her employer, subject to light duty restrictions. However, her back pain became increasingly debilitating, eventually forcing her to again discontinue her work duties in January 1985. Dr. Grube suggested vocational rehabilitation.

In February 1985 Dr. Grube concluded that claimant had reached medically stationary status. Her condition was diagnosed as "typical significant lumbosacral strain." Surgery was not indicated. Dr. Grube suggested that claimant fluctuate her body position and avoid repetitive lifting, bending, or standing. Restricting claimant to light duty, Dr. Grube recommended a 10 to 20 pound lifting restriction. Dr. Grube ultimately concluded that claimant's permanent residual was one of "significant chronic pain", which was "somewhat more than moderate, but certainly not severe."

In March 1985 vocational assistance was initiated. Claimant reported working at a lumber mill in various positions for approximately eight years and as a day care worker for about 11 years. In addition to her duties on the sanitation crew, she had also worked as a custodian. Considering claimant's physical limitations and few transferable skills, her counselor concluded that her current employment opportunities were limited. Consequently, an authorized training program was recommended.

Thereafter, a vocational evaluation was performed. Claimant's aptitude test scores were low, except for clerical, manual, and fingering skills. Her reading level was gauged at between the second to sixth grade level and her overall math scores were determined to be at a fourth grade level. These scores were compatible with occupations such as a cashier, a receptionist, or an electronic assembly worker. However, before further investigating claimant's vocational goals, her counselor recommended a course in basic education skills. At the time of the hearing, claimant had obtained some materials, but had not begun preparations for taking a GED examination.

Claimant credibly described her disabling pain and physical limitations. The pain is always present, but increases whenever she engages in physical activity. Prolonged sitting or standing evokes a numbness and burning pain across her low back, which radiates into her right leg. Consequently, she must constantly alternate her body positions. Her pain makes her tense, which generally results in muscle spasms. To relieve her persistent pain, she has worn a back brace, used a TNS unit, and taken prescribed medication. She also continues to see Dr. Grube, who has reinstituted a physical therapy program. Because of her pain and limitations, claimant believes that she can no longer perform the lifting, twisting, and bending requirements of her previous employments. Since her injury, she has curtailed, if not eliminated, most of her household and recreational activities.

Claimant received treatment for upper back complaints on several occasions prior to her compensable low back injury. For instance, in 1979 she injured her upper back while pulling lumber on the green chain. In addition, she received chiropractic

treatments immediately before she began working for SAIF's insured in September 1983. At that time, her then treating chiropractor had recommended that she avoid heavy lifting and the use of her upper body. These activities had been required in her prior work duties as a custodian.

The Referee found that claimant's physical limitations resulting from her compensable injury had prevented her from returning to the various types of manual labor that she had once performed. Furthermore, her limited formal education and low vocational aptitudes left her with few transferable skills. Based on these medical and non-medical factors, the Referee concluded that claimant had "very little residual earning capacity." Accordingly, the Determination Order's award of 15 percent unscheduled permanent disability was increased to 60 percent.

We agree that claimant's compensable low back injury has resulted in significant physical limitations, which have presented her with difficult emotional adjustments. When her limited education and minimal transferable skills are also considered, her loss of earning capacity exceeds the 15 percent unscheduled permanent disability awarded by the Determination Order. However, we find that the Referee's award is excessive.

In rating the extent of claimant's permanent disability, we consider the physical impairment attributable to her compensable injury, which includes her credible testimony concerning her disabling pain and physical limitations, and all of the relevant social and vocational factors set forth in OAR 436-30-380 et seq. We do not apply these rules as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that a 35 percent unscheduled permanent disability award adequately compensates claimant for her compensable low back injury.

ORDER

The Referee's order dated November 21, 1985 is modified. In lieu of the Referee's award and in addition to the Determination Order's award of 15 percent (48 degrees) unscheduled permanent disability, claimant is awarded 20 percent (64 degrees), which gives her a total award to date of 35 percent (112 degrees) unscheduled permanent disability for her compensable low back injury.

SHARON L. NOVAK, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-10931
June 17, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Mulder's order that set aside its denial of claimant's industrial injury claim for an inguinal hernia. The sole issue on review is compensability.

We agree with the Referee that claimant's claim is compensable. Because we wish to clarify the limits of SAIF's liability on the claim, however, we offer the following comments. Claimant's hernia preexisted her industrial injury. The medical

evidence suggests that the injury resulted in an increase in claimant's symptoms, which required medical services. There is no persuasive evidence that claimant's underlying hernia condition was worsened by the injury.

On review, SAIF offers an alternative argument to its primary contention that there is no causal link between claimant's work and her hernia condition. It argues that even if causation is established, it should be held responsible only for claimant's temporary symptomatic worsening, rather than for the underlying condition itself, for claimant's work resulted in a symptomatic worsening only. We agree. David F. Brainerd, 37 Van Natta 276 (1985); Roy L. Bier, 35 Van Natta 1825 (1983). We interpret the Referee's order as limiting SAIF's liability on the claim to the temporary symptomatic worsening experienced by the claimant. On that basis we affirm the order.

ORDER

The Referee's order dated February 22, 1985 is affirmed. Claimant's claim is remanded to SAIF for processing according to this order. For successfully defending the compensability of the claim, claimant's attorney is awarded a reasonable fee of $550, to be paid by the SAIF Corporation.

JIMMIE PARKERSON, Claimant
Gatti, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 85-01896
June 17, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

EBI Companies requests review of Referee Foster's order that found the Workers' Compensation Board did not have jurisdiction to authorize reimbursement by the Inmate Injury Fund (Fund) for claims costs paid by EBI beyond the amounts the Fund is authorized by statute to expend. Claimant's right to compensation and the amount thereof are not at issue in this proceeding. Claimant did not appear and is solely a nominal party. The Referee's order was published after hearing argument for specific enforcement of the Board's Order on Review published at 36 Van Natta 1240 and 36 Van Natta 1263 (1984). The issue on review is jurisdiction.

At the outset the Board notes that EBI has presented its claim to the Compliance Division and the Director of the Workers' Compensation Department and they have declined to consider the request because of the opinion of the Department of Justice that the Workers' Compensation Department has no jurisdiction over the Inmate Injury Fund to order it to comply with the Board's order. On review, the Fund argues that the holding of Renolds-Croft v. Bill Morrison Co., 55 Or App 487 (1982) precludes the Board from reviewing the Referee's order.

The Board agrees with the Fund that the Board does not have jurisdiction to review the Referee's order for the reasons stated in Renolds-Croft, supra, and because appeal of a final order of the Director on an issue which is not a matter concerning a claim is taken directly to the Court of Appeals. ORS 656.704; 183.482. The request for review is dismissed.

IT IS SO ORDERED.

PETER R. RIOS, Claimant
Pozzi, et al., Claimant's Attorneys
Brian L. Pocock, Defense Attorney

WCB 85-07944 & 84-08085
Order on Review
June 17, 1986

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of those portions of Referee T. Lavere Johnson's order which: (1) awarded a penalty of 25 percent of the unpaid balance of the compensation for unscheduled permanent partial disability awarded by Determination Order dated October 10, 1984; and (2) awarded attorney fees of $750 associated with the penalty. Claimant cross-requests review of those portions of the Referee's order which: (1) awarded 80 degrees for 25 percent unscheduled permanent partial disability in lieu of the Determination Order dated October 10, 1984 which awarded 192 degrees for 60 percent unscheduled permanent partial disability for injury to claimant's right shoulder; (2) affirmed the Determination Order dated June 24, 1985 which awarded 15 degrees for 10 percent scheduled permanent partial disability for injury to claimant's right hand; (3) modified the Determination Order dated June 24, 1985 to terminate authorization for temporary disability compensation on August 14, 1984 rather than April 22, 1985; and (4) denied penalties and attorney fees for non-payment of temporary disability compensation awarded by Determination Order dated June 24, 1985. The issues on review are: (1) penalty for suspension of payments on unscheduled permanent partial disability awarded by Determination Order; (2) attorney fees on the penalty issue for unreasonable delay of payments; (3) extent of unscheduled permanent partial disability for injury to the right shoulder; (4) extent of scheduled permanent partial disability for injury to the right hand; (5) temporary disability compensation; and (6) penalties and attorney fees for unreasonable delay of payment of temporary disability compensation awarded by Determination Order.

On the issues of extent of scheduled permanent partial disability and unscheduled permanent partial disability, the Board affirms the order of the Referee.

Claimant first reported having symptoms of carpal tunnel syndrome in his right wrist on March 29, 1983. He continued to work as a log truck second loader until he injured his right shoulder on May 23, 1983. He ruptured a biceps tendon and tore the rotator cuff. The rotator cuff was surgically repaired on September 22, 1983.

While claimant was recovering from the shoulder surgery, his doctor requested authorization to perform carpal tunnel release in June 1984. The employer denied the claim. The doctor performed the carpal tunnel release in July 1984.

The doctor reported that claimant was medically stationary with permanent residual impairment in the right shoulder in September 1984, and reported that claimant could not return to his regular work. The shoulder claim was closed by an award of 192 degrees for 60 percent unscheduled permanent partial disability on October 10, 1984. The employer commenced monthly payments on the permanent disability award.

Vocational rehabilitation efforts centered on encouraging claimant to retire. Claimant wanted to return to his regular work and undertook a self-directed program of physical rehabilitation. By March 1985 the employer had obtained other medical opinions regarding the compensability of claimant's carpal tunnel symptoms and had accepted the claim, but apparently had not paid the medical bills and accrued temporary disability compensation. The treating doctor released claimant to return to regular work effective March 11, 1985. The employer refused to allow claimant to return to work because of concerns about claimant's ability to do the work and the relatively unexplained nature of the doctor's change of opinion.

Claimant was referred to the Callahan Center for vocational assessment. Dr. Corrigan at the Callahan Center reported that claimant had an excellent result from the rotator cuff surgery and good rehabilitation of the right shoulder. He opined that claimant could return to heavy work including that of a second loader. On April 22, 1985 the treating doctor repeated his release to return to regular work and claimant was reinstated at his regular work the next day.

In May 1985 the treating doctor performed a closing examination for the right wrist claim and reported a mild loss of grip strength. His examination findings were very similar to those obtained at the Callahan Center in April 1985. The doctor reported that claimant was medically stationary at the time of the examination. The wrist claim was closed by Determination Order dated June 24, 1985 which awarded temporary partial disability compensation from May 26, 1983 through June 4, 1984 and temporary total disability from June 5, 1984 through April 22, 1985 less amounts paid on the right shoulder claim, plus 15 degrees for 10 percent scheduled permanent partial disability. In August 1985 the June 1985 Determination Order which closed the right wrist claim was reconsidered and affirmed in all respects.

The employer made payments through July 1985 on the October 1984 unscheduled permanent disability award, but then made no further payments. The employer contended that claimant's award by Determination Order was excessive. The employer sought a hearing on the issue of the extent of claimant's unscheduled permanent partial disability.

The employer relied on Leokadia W. Piwowar, 37 Van Natta 21 (WCB Case No. 82-09391; January 9, 1985), as authority to unilaterally terminate payments on a Determination Order award for permanent partial disability. Piwowar was abated for reconsideration January 17, 1985. 37 Van Natta 297. On November 25, 1985 the Board published its Order on Reconsideration which reversed the result in the case. 37 Van Natta 1591. The Board unanimously agreed that there is no authority by which an insurer or employer can unilaterally terminate payment of an award by Determination Order or by litigation order except the publication of an order by a subsequent tribunal which authorizes suspension of payment of an award. Id. In Leokadia W. Piwowar, 37 Van Natta 1597 (WCB Case No. 83-07720; November 29, 1985), the Board affirmed the order of a Referee which required the employer to pay the disability compensation awarded by the Referee in the previous case and the Board awarded penalties and attorney fees.

In this case the employer unilaterally terminated

payment of benefits awarded by a Determination Order, without authorization. The Board finds that termination of the payments on claimant's permanent disability award was unreasonable resistance or delay of compensation which merits a penalty.

At the time of the hearing, two monthly payments were overdue and unpaid. By the time of publication of the Referee's order, two more payments were due. In Harold A. Lester, 37 Van Natta 745 (1985), the Board found that penalties should be assessed on amounts due at the time of the action being penalized. The Referee awarded a penalty based upon the entire unpaid portions of the Determination Order award. The Board finds that the penalty should be based on the amounts due and not paid at the time of the publication of the Referee's order. Any amount of money that would have become due after the publication of the Referee's order was not an amount then due for purposes of determining the amount of a penalty and should not be included in the calculation of the penalty.

Penalty associated attorney fee awards are based on several factors, only one of which is the amount of time which may have been reasonably invested on a particular issue. Skill and standing of claimant's attorney are also considered among the factors as well as the result obtained for the injured worker. Penalty associated attorney fees are not awarded as a measure of the unreasonableness of the insurer's or employer's actions. Charlene K. Brotherton, 38 Van Natta 256 (1986); Barbara A. Wheeler, 37 Van Natta 122 (1985). The Board finds that a reasonable attorney fee in association with the penalty issue would be $500.

On the issue of the reduction of claimant's temporary total disability awarded by Determination Order from termination on April 22, 1985 to termination on August 14, 1984 the Referee relied on a chart note by the treating doctor entered in response to a question posed by the employer. While the first report that claimant was medically stationary was dated in May 1985, the chart note entered on July 31, 1985 indicated that the treating doctor thought claimant would have been medically stationary with regard to the right wrist surgery by the middle of August 1984 if not for the shoulder condition. This report was not received until August 1985 and was not available to the Evaluation Division at the time of the June 1985 Determination Order. It should have been available to the Evaluation Division for the redetermination which resulted in complete affirmation of the original right wrist Determination Order in August 1985. While it may be true that claimant might have been medically stationary at the time the doctor states, merely being medically stationary would not necessarily authorize termination of temporary disability compensation as of that date. The claim may not be closed and disability compensation may not be terminated until claimant has been released to return to regular work, returned to work, or had the claim closed by Notice of Closure or Determination Order. Jackson v. SAIF, 7 Or App 109 (1971); Richard L. Hoffee, 37 Van Natta 248 (1985). While the date on which the employer actually accepted the right wrist claim cannot be determined from the record, it appears to have accepted the claim by at least March 1985 and made no attempt to obtain a closing examination until it obtained the May 1985 report. The Board finds that claimant was entitled to temporary disability compensation until he returned to full time work on April 23, 1985 less amounts paid on the right shoulder claim. Fischer v. SAIF, 76 Or App 656 (1985).

Claimant was not paid the temporary disability compensation awarded by both Determination Orders by the date of the hearing which was more than fourteen days after the last Determination Order. OAR 436-60-150(3) requires full payment of temporary disability compensation awarded by Determination Order within fourteen days of the order. No reason for non-payment was given. Claimant is, therefore, awarded a penalty of 25 percent of the temporary disability compensation awarded and affirmed by Determination Orders dated June 24 and August 23, 1985 which was unpaid by the date of the Referee's order. Claimant is awarded $500 penalty associated attorney fees for this issue.

ORDER

The Referee's order dated November 25, 1985 is reversed in part, modified in part, and affirmed in part. That portion of the order which modified the Determination Order dated June 24, 1985 by terminating the award for temporary total disability on August 14, 1984 is reversed and the Determination Order is reinstated as affirmed and republished on August 23, 1985. The employer shall pay claimant a penalty of 25 percent of the amount of the unscheduled permanent partial disability compensation awarded by the Determination Order dated October 10, 1984 which was due but unpaid by the date of the Referee's order. The employer shall pay claimant reasonable attorney fees of $500 for services associated with the penalty for unreasonable delay of payment of the unscheduled permanent partial disability award. The employer shall pay claimant a penalty of 25 percent of the amount of the temporary disability compensation awarded by Determination Order dated June 24, 1985 and affirmed and republished on August 23, 1985 which was unpaid by the date of the Referee's order plus associated attorney fees of $500. Claimant's attorney is allowed attorney fees of 25 percent of the increased temporary disability compensation awarded by this order to a maximum of $3,000. The remainder of the order is affirmed.

OMER ROBY, Claimant
Peter O. Hansen, Claimant's Attorney
G. Howard Cliff, Defense Attorney

WCB 81-07998
June 17, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of those portions of Referee Mulder's order which: (1) set aside its partial denial of psychological treatment as not related to claimant's low back injury; and (2) set aside its partial denial of treatment related to a suicide attempt. The insurer also requests review of the Referee's evidentiary rulings which: (1) denied admission to xerographic copies of court documents relating to an out of state criminal conviction; and (2) allowed admission of medical opinion letters which had not been provided in timely fashion by claimant to the insurer under OAR 438-07-015(3) and which denied cross examination of the author of the reports. The issues on review are compensability of psychological treatment related to claimant's low back injury, compensability of medical services related to a suicide attempt, and admission of exhibits.

On the issues of the evidentiary rulings, the Board affirms the Referee with the following comment. On the denial of admission of the criminal records from Washington, the information was provided by the testimony of claimant who did not deny the

conviction. The criminal records did not controvert claimant's testimony in any relevant part; therefore, the criminal record was not impeaching and was not admissible. On the admission of certain medical opinion letters of claimant's treating psychologist, the Board finds that the letters admitted were merely cumulative of letters submitted to the insurer and to the Referee in timely fashion. The Referee's failure to allow cross examination of the author of the letters would have been reversible error if there had been surprise or prejudice to the insurer by the contents of the letters, but the insurer had notice of the treating psychologist's opinion sufficiently soon in the processing of the claim to seek cross examination if it wanted it. The insurer did obtain an independent medical examination and report which are in the record. The ruling on the admission of the undiscovered letter opinions of the treating psychologist was harmless error in the context of this case.

On the issue of the compensability of psychological treatment related to claimant's low back injury, the Board affirms the Referee's order.

On the issue of the compensability of psychological and hospitalization services related to a suicide attempt or "suicide gesture," the Board reverses the Referee's order. Claimant suffered a long recovery period from his compensable back injury. He participated in a vocational rehabilitation program of dubious value and suffered from depression related to his recovery and prospects of reemployment. In April 1984 the company which trained and employed claimant ceased operations and claimant lost his job, claimant's dog, which had been with him for thirteen years, died, his girlfriend suddenly left him, and claimant received a demand to repay overpaid temporary disability compensation. On the day claimant received the demand to repay overpaid compensation, claimant deliberately ingested all of his pain medications and two bottles of wine with the express purpose of ending his life. He called his girlfriend and told her what he had done. Someone obtained emergency medical services for claimant and he was transported to a hospital for treatment.

Although the suicide attempt was caused in part by claimant's physical condition related to the industrial injury and by the depression related to that injury, the issue of compensability of services related to an intent to produce injury is not resolved by determination under the standard used to determine compensability otherwise. When medical services result from actions intended to produce injury or death, claimant must prove that he did not know the consequences of his actions. Lawrence M. Sullivan, 37 Van Natta 1552 (1985); Clinton S. McGill, 36 Van Natta 1692 (1984). The Board finds that claimant acted intentionally to produce injury and end his life and that claimant knew the consequences of his actions at the time he acted. Therefore, claimant has not proven that he is entitled to compensation for services related to the suicide attempt and the relevant portion of the Referee's order is reversed.

ORDER

The Referee's order is reversed in part and affirmed in part. That portion of the order which set aside the insurer's denial of services related to the suicide attempt is reversed and the portion of the denial letter dated August 3, 1984 which denied

services related to the suicide attempt is reinstated. The remainder of the order is affirmed. Claimant's attorney is awarded $500 for services on Board review related to the compensability of psychological services related to claimant's low back injury, to be paid by the insurer.

LARRY D. BARNHART, Claimant
Brian R. Whitehead, Claimant's Attorney
Garrett, et al., Defense Attorneys

WCB 85-15160
June 19, 1986
Order on Reconsideration

Claimant requested reconsideration of our Order of Dismissal dated May 27, 1986. We withdrew the order to allow time to consider the points raised by claimant and the employer's response. In our earlier order, we concluded that the Referee's order denying temporary total disability compensation was an interim order and not subject to review at this time, relying upon Lindamood v. SAIF, 78 Or App 15, 18 (1986).

Claimant initiated this proceeding under the provisions of OAR 438-06-075 of our Rules of Practice and Procedure. That rule provides for an expedited resolution of nonpayment of temporary disability benefits if it appears that an insurer or employer "has terminated temporary disability compensation without: the attending physician's approval of the worker's return to his regular employment; or the injured worker's actual return to work; or the issuance of a denial, determination order or notice of closure; or authorization of the Board or Department . . . ." In this case, the employer had issued a denial of a lung condition, and based its failure to pay temporary disability benefits upon the denial.

The Referee decided that temporary disability benefits were not due because the claim was denied. However, he necessarily also decided that claimant's inability to work was not due to the accepted portion of the claim. Without deciding the merits of either party's contentions at this point, we conclude that there was and is a question of fact presented whether claimant was released to or did return to his regular work prior to the onset of the denied condition. To the extent that the Referee's decision was that temporary disability benefits were not due on the accepted, open portion of the claim, the Referee's order is a final order subject to review under the provisions of ORS 656.295.

The request for reconsideration is allowed. On reconsideration, we withdraw our Order of Dismissal and allow the request for Board review. The transcript of proceedings and call for briefs will issue in the ordinary course of business.

IT IS SO ORDERED.

DAVID F. BARRETT, Claimant
Merrill Schneider, Claimant's Attorney
Meyers & Terrall, Defense Attorney

WCB 81-02757
June 19, 1986
Order on Remand

This matter is before us on remand from the Supreme Court. Barrett v. D & H Drywall, 300 Or 325 (1985), adhered to on reconsideration, 300 Or 553 (1986). We initially called for further briefing from the parties. Claimant responded with a formal motion to remand the matter to the Hearings Division for further development of the record. The insurer opposed the

motion. We conclude that, because the Supreme Court's mandate remanded this case to the Board, rather than to the Referee, we are left with discretion as to whether the case should be further remanded. ORS 656.295(5). We have reviewed this case in connection with the motion to remand and have concluded: (1) that the motion to remand will be denied; (2) that the record is adequately developed to permit us to decide the matter in accordance with the court's mandate; and (3) that no good purpose would be served any party to this case or the Board to further delay final decision of this case pending additional briefs.

Claimant's motion to remand is made upon the ground that, although claimant was represented by counsel at the hearing, no reasonable attorney could have adequately prepared claimant's case to anticipate how disability was to be determined under the standard finally enunciated by the Supreme Court. We do not accept claimant's reasoning. All of the facts relied upon by the Supreme Court are contained in the record before us. The court did no more than mandate how those facts should be considered and evaluated.

In its opinion on reconsideration, the court stated: "If . . . the accident . . . caused [the] disease to produce symptoms where none existed immediately prior to the accident, and those symptoms produced loss of earning capacity, then that loss of earning capacity is 'due to' the compensable injury, and the statute requires an award of compensation therefor." 300 Or at 555-56. We read this statement as consistent with prior law that disabling pain caused by an industrial injury is a part of the calculus in rating extent of permanent disability. See e.g. Harwell v. Argonaut Insurance Co., 296 Or 505, 510-11 (1984).

The issue in this case revolved around the source, not the existence, of the disabling pain, and further involved the question whether claimant had an occupational disease, which the court concluded he did not. We view the court's mandate as directing us to determine whether claimant has disabling pain which is "due to" the industrial injury, and is permanent. We do so on the record compiled by the Referee at the hearing. See Gettman v. SAIF, 289 Or 609, 614 (1980); Jeffrey Barnett, 36 Van Natta 1636, 1638 (1984).

We summarize the material facts as found by the Court of Appeals and adopted by the Supreme Court. On June 5, 1980, claimant, a drywall taper, fell about four feet from a ladder, landing on his feet and falling against a brick wall injuring his low back. Claimant sought medical attention and received workers' compensation benefits until his claim was closed by a Determination Order on March 4, 1981. The order awarded compensation for temporary disability and 25 percent unscheduled permanent partial disability for injury to the low back. Claimant requested a hearing on the Determination Order and later amended his request for hearing to allege that his underlying osteoarthritic condition was connected with his compensable injury. The insurer denied compensability of the osteoarthritis. The Referee upheld the partial denial and increased claimant's permanent disability award to 35 percent. In so doing, the Referee refused to consider "conditions not medically connected to the industrial injury . . . ."

We affirmed the Referee's order with a memorandum order,

which we adhered to on reconsideration. Claimant requested judicial review. Discussion of this case's path through the appellate courts would not be helpful. As we read it, the ultimate decision by the Supreme Court was that symptoms of claimant's osteoarthritis must be considered by the finder of fact in rating claimant's permanent disability if: (1) they would not exist but for the industrial injury; (2) they are disabling; and (3) they are permanent.

We have reviewed the evidence with those criteria in mind. We conclude that the medical evidence does not differentiate between claimant's low back symptoms on the basis of which are due to osteoartritis and which are due to the industrial injury. The preponderance of the persuasive medical evidence is that claimant's industrial injury resulted in mild permanent impairment, which is a result primarily of chronic low back pain radiating into the groin. Because we are bound by the court's finding that claimant's pre-existing osteoarthritis was not worsened by the industrial injury, we find that all of claimant's low back symptoms are due to the industrial injury.

Considering claimant's mild impairment and the relevant social and vocational factors, ORS 656.214(5), we conclude that the Referee correctly arrived at a total award of 112 degrees for 35 percent unscheduled permanent partial disability for injury to the low back.

ORDER

The Referee's order dated January 14, 1983 is affirmed.

SANDRA G. BATY, Claimant
David C. Force, Claimant's Attorney
Allan Coons, Attorney
Noreen K. Saltveit, Defense Attorney

WCB 85-06022
June 19, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of those portions of Referee Mongrain's order which: (1) set aside the Determination Order dated April 26, 1985 as premature; (2) set aside the partial denial dated May 17, 1985 which denied services of an out-of-state dental surgeon; and (3) set aside the partial denial dated August 20, 1985 which denied compensability of claimant's neck condition. The insurer requests that the Board affirm the Determination Order dated April 26, 1985 which found claimant was medically stationary as of April 1, 1985 and which awarded no compensation for permanent disability.

The insurer presented three motions for the Board's consideration: (1) requesting an indefinite stay of briefing pending the publication of an order in WCB Case No. 83-09462; (2) requesting an order to compel publication of an order in WCB Case No. 83-09462; and (3) requesting remand to the Referee to rate the extent of permanent disability. Claimant presented two motions for the Board's consideration: (1) requesting dismissal of the insurer's request for review for failure to file an opening brief on review by the due date of claimant's response brief; and (2) to strike the insurer's opening brief, which was filed twenty days late without prior authorization by the Board.

The issues on review are premature closure, compensability of out-of-state dental surgeon's services, compensability of a neck injury claim, extent of permanent disability, whether to dismiss a request for review, whether to strike a brief, whether to allow a stay of briefing issues on review pending publication of an order in another case between the parties, whether to compel publication of an order by a Referee, and whether to remand the case to the Referee if the Board finds the Determination Order was not prematurely published.

The Board will consider the procedural motions first. The insurer in its first correspondence with the Board after the transcript was mailed requested a stay of briefing until the publication of an Opinion and Order in another case pending between the parties. Claimant opposed the motion but was willing to acquiesce in allowing the insurer an additional twenty days to file the opening brief on review. Subsequently, in her response brief, claimant requested that the Board strike the insurer's opening brief due to late filing without prior authorization by the Board. The insurer filed its brief on the twentieth day after the originally assigned due date. In the context of the development of this issue, the Board allows the insurer's request to the extent of claimant's acquiescence and has considered the insurer's opening brief on review.

On the issue of compelling the Referee to publish an Opinion and Order in WCB Case No. 83-09462, the Board finds that the record was closed December 24, 1985 and the order was published on January 22, 1986. No request for review was submitted; therefore, the issue is moot.

Claimant's motion to dismiss the request for review is denied. Thomas E. Harlow, 37 Van Natta 1209 (1985). Claimant's motion to strike the insurer's opening brief on review is denied for the reasons previously stated.

Turning now to the issues before the Referee, the Board affirms the order of the Referee with the following comments. The claim was prematurely closed without closing reports being submitted regarding the neck injury, which had been reported with the initial injury report and subsequent medical reports. See Rogers v. Tri-Met, 75 Or App 470 (1985). The opinions of Drs. Carter and Potter do not specifically relate to the successful dental treatment described and provided by Dr. Thomasson. See Linn Care Center v. Cannon, 74 Or App 707 (1985). The insurer's motion to remand to the Referee to rate the extent of disability is moot because the claim continues in open status until closure is appropriate. ORS 656.268.

Claimant's attorney is awarded fees for prevailing on the insurer's requests for review concerning three claims for compensation which were not reduced on Board review: (1) the entitlement to temporary disability due claimant since the setting aside of the Determination Order dated April 26, 1985; (2) denial of the neck injury claim; and (3) denial of services of a dental surgeon. While in combination the issues are unique, each of the issues by itself is not unique. The Board finds that each issue was of ordinary difficulty and there was a usual probability of success for claimant on each issue. Reasonable attorney fees for each issue are awarded accordingly. Shoulders v. SAIF, 300 Or 606 (1986); Deborah M. Cook, 37 Van Natta 542 (1985).

ORDER

The Referee's order dated October 21, 1985, as amended October 25, 1985, is affirmed. Claimant's attorney is awarded $400 for services related to the premature closure claim, $300 for services related to the neck injury claim, and $300 for services related to the medical services claim for services on Board review, to be paid by the insurer.

ARTHUR L. CHATT, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-01782
June 19, 1986
Order on Reconsideration

The SAIF Corporation has requested reconsideration of the Board's Order on Review dated May 27, 1986 which affirmed a Referee's order that granted claimant permanent total disability pursuant to the so-called "odd lot" doctrine. Specifically, SAIF requests that we consider its motion to remand for the taking of additional evidence concerning claimant's potential employment opportunities which have allegedly arisen post-hearing.

We may remand for further evidence if we determine that a case has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). Because of the numerous mechanisms for keeping the record open and in the interest of administrative economy, we have a restrictive policy regarding the granting of requests to remand. See Casimer Witkowski, 35 Van Natta 1661 (1983). See also Kienow's Food Stores v. Lyster, 79 Or App 416, 420 (1986).

SAIF's request for remand is denied. Following our de novo review of the medical and lay evidence, and after considering SAIF's request, we are not persuaded that this case has been "improperly, incompletely or otherwise insufficiently developed." The record includes numerous reports from claimant's vocational counselors concerning his potential for securing gainful and suitable employment. Moreover, we note that the record was specifically held open to obtain the deposition of claimant's current vocational consultant.

Whether claimant is permanently totally disabled must be decided upon conditions existing at the time of the decision. Gettman v. SAIF, 289 Or 609, 614 (1980). However, claimant's entitlement to permanent total disability is subject to periodic reexamination to determine whether he is currently permanently incapacitated from regularly performing work at a gainful and suitable occupation. ORS 656.206(5); 656.325(3). If claimant is no longer permanently incapacitated from regularly performing work at a gainful and suitable occupation, his award can be adjusted. Gettman, supra, 289 Or 615.

Based on the conditions existing at the time of the Referee's decision, we continue to agree with the conclusion that claimant was entitled to permanent total disability.

SAIF's request for reconsideration is granted. On reconsideration, the Board adheres to and republishes its former order, as supplemented herein, effective this date.

IT IS SO ORDERED.

MYRON W. RENCEHAUSEN, SR., Claimant
Hayner, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 84-12397, 85-04595 & 85-13561
June 19, 1986
Order Denying Motion to Stay Compensation

The self-insured employer has moved the Board for an interim order authorizing a stay in payment of a lump sum of temporary disability compensation ordered by Referee Myers, pending our review of the Referee's order. We conclude that we must deny the motion.

We understand the employer's frustration in this case in having to either pay the compensation under ORS 656.313(1) pending review or risk a substantial penalty if it elects not to pay. We are, however, bound by legislative constraints. The matter of whether the compensation ordered paid by the Referee must be paid pending our review is beyond the scope of that review. We may only affirm, reverse, modify or supplement a Referee's order based upon the record compiled by the Referee. ORS 656.295(3), (5) and (6). The question raised on the motion we are asked to allow was neither a subject of the Referee's order nor is there evidence regarding it included within the record.

The case relied upon by the employer, Terry L. Hunter, 38 Van Natta 134 (1986), reached us by means of an "enforcement hearing" before the Hearings Division. See also Howard E. Hughes, 38 Van Natta 434 (1986). Because of the limitations placed upon the scope of our review by ORS 656.295, we conclude that we could consider the issue raised by the employer in this case only through such a proceeding. The motion to stay is, therefore, denied.

IT IS SO ORDERED.

JOHN P. CHRISTENSEN (Deceased), Claimant
Pippin & Bocci, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB TP-86002
June 20, 1986
Third Party Distribution Order

This matter is before the Board on a petition for an allowance of an extraordinary attorney fee to be apportioned from the proceeds of a settlement of a civil action against third persons allegedly responsible for claimant's death. The deceased claimant, a police officer, was killed in the line of duty on February 7, 1976. Claimant's beneficiaries elected to commence a civil action against third persons whose negligence allegedly caused claimant's death. ORS 656.154; 656.578. The action was commenced June 4, 1976. In a ten-year history of litigation, the third party case was twice before the Oregon Supreme Court. The facts and procedural history of the case are extensively discussed in that court's opinions. See Christensen v. Epley, 287 Or 539 (1979); Christensen v. Murphy, 296 Or 610 (1984).

The case was finally tried in February 1985, resulting in a mistrial when the jury was unable to reach a verdict. The case was rescheduled for trial in April 1986. On the eve of the second trial, the case was settled for $87,500. The attorneys for the beneficiaries have requested that the Board allow a distribution of the proceeds of the settlement that will result in 50 percent of the proceeds being allowed as attorney fees. The beneficiaries have joined in the request, agreeing to take

approximately $5,000 less than their statutory share. The paying agent, SAIF Corporation, responded to our request for a statement of its position by stating that it took no position. The proposed distribution would reduce SAIF's share of the proceeds by about $9,000.

Pursuant to ORS 656.593(1)(a), attorney fees in third party cases under the Workers' Compensation Law may not exceed the advisory schedule of fees established by Board rules. See ORS 656.388(4); OAR 438-47-000 to 438-47-095. See also Shipley v. SAIF, 79 Or App 149, 152-53 (1986).

In Shipley v. SAIF, supra, the court held:

> "The Board established a fee schedule, effective February 1, 1979, that placed a maximum limit on attorney fees, in third-party claims, of 33 1/3 percent of the gross recovery. OAR 438-47-095. Plaintiff's attorney received the maximum allowable award of attorney fees under the rule in effect at the time of recovery. [Footnote omitted.] The Board correctly applied the statute [ORS 656.593(1)(a)] in distributing the proceeds."

OAR 438-47-095 provides: "In third party claims, as outlined in ORS 656.593, the attorney's fees shall in no event exceed 33 1/3 percent of the gross recovery obtained by the claimant."

In Shipley, the court appears to affirm our third party order for the reason that we concluded that we could not allow a fee in excess of 33 1/3 percent of the gross recovery to the claimant, by virtue of OAR 438-47-095. Examination of our underlying order in Jim D. Shipley, 37 Van Natta 116, 117-18 (1985), shows that we made no such conclusion. We stated:

> "Claimant's attorney also argues that he is entitled to attorney's fees of 40 [percent] of the recovery in the original action against the third party. Because that judgment is not before us, we take no position as to how it might be distributed were it before us. SAIF takes the position that claimant's attorney is entitled to 33 1/3 [percent] of the judgment against the liability insurer. We agree with SAIF that an attorney's fee of 33 1/3 [percent] of the judgment against the liability insurer is appropriate. . . ." (Emphasis added.)

Our holding in Jim D. Shipley, supra, was that, under the facts presented, an extraordinary attorney fee was not appropriate. The court affirmed our holding. We did not discuss whether we have the authority to award an extraordinary fee nor did the parties brief that issue, either to the Board or the court. We have long held that we do have such authority.

We discussed the issue of extraordinary attorney fees in cases under the third party law in Leonard F. Kisor (Dec'd), 35 Van Natta 282 (1983). We stated:

"OAR 438-47-010 contains general principles governing attorney fees in workers' compensation proceedings, including third party actions. Subsection (2) provides:

> "'The amount of a reasonable attorney fee when authorized under 47-000 to 47-095, including cases involving extraordinary services, shall be based on the efforts of the attorney and the results obtained, subject to any maximum fee provided by 47-000 to 47-095. A referee, the Board, or a court may allow a fee in excess of the maximum amount fixed by 47-000 to 47-095 for extraordinary services on a showing by claimant's attorney in a sworn statement the services performed by the attorney.'

"This rule specifically incorporates the rule governing attorney fees in third party proceedings, OAR 438-47-095. There is a potential conflict between the terms of this general rule and the terms of the specific rule governing attorney fees in third party actions, providing that the attorney's fee shall 'in no event' exceed one-third of the proceeds of the third party recovery; however, this apparent conflict is present as between the general principle set forth in OAR 438-47-010(2) and every other rule in Chapter 438, Division 47, providing for a maximum attorney's fee payable out of a claimant's award of compensation or in addition thereto. Attorney fees exceeding the limitations contained in the administrative rules are commonly awarded in workers' compensation proceedings where the attorney has made a satisfactory showing of extraordinary services, generally based upon favorable resolution of a claim involving unusually complicated legal, medical or other factual issues, where there has been a justified expenditure of an extraordinary amount of an attorney's time.

". . . [W]e see no reason to treat workers' compensation proceedings involving third party litigation differently from the more usual workers' compensation proceedings. In fact, civil litigation often entails a greater investment of attorney resources than does the usual proceeding in workers' compensation claims, simply by virtue of the procedural differences, including motion practice and discovery. This is particularly true in cases involving complex litigation . . . ."

35 Van Natta at 284-85. See also John Galanopoulos, 35 Van Natta 548, 554 (1983).

Although we did not specifically so state in our order, we applied these principles in arriving at our conclusion in Jim D. Shipley, supra, that an extraordinary attorney fee was not appropriate in that case. See John B. Bruce, 37 Van Natta 135, aff'd mem., 76 Or App 732 (1985). Applying the same principles, we conclude that this is a case where "success [was] sufficiently in doubt and the risk that the [attorneys'] services [would] go uncompensated [was] so high" that an extraordinary attorney fee is certainly appropriate. See Wattenbarger v. Boise Cascade Corp., 301 Or 12, 16 (1986).

The proposed distribution calls for payment of the extraordinary portion of the attorney fee by reducing the proceeds paid both to the claimant/plaintiff and the paying agent. Because we are dealing with the proceeds of a settlement, rather than a judgment, the paying agent's share of the proceeds may be adjusted based upon what is "just and proper." ORS 656.593(3). See Shipley v. SAIF, supra, 79 Or App at 152; Robert B. Williams, 38 Van Natta 119 (1986). By the same token, the claimant/plaintiff's share of the proceeds must be "at least" 33-1/3 percent of the balance of proceeds remaining after payment of costs and attorney fees. ORS 656.593(1)(b); 656.593(3). The claimant/plaintiff has agreed to the higher attorney fee and the SAIF Corporation, after receiving notice of the proposed distribution, has not objected. We, therefore, allow the petition, and allow a reasonable attorney fee of 50 percent of the gross proceeds of the third party recovery.

ORDER

The proceeds of the third party settlement shall be distributed as follows:

Attorney Fees	$ 43,750.00
Litigation Costs	7,500.00
Beneficiaries' Share	12,083.00
Paying Agent's Share	24,167.00
TOTAL PROCEEDS	$ 87,500.00.

CAROLYN K. BARR, Claimant
Corey, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-04731 & 85-05501
June 23, 1986
Order on Reconsideration

EBI Companies has requested reconsideration of the Board's Order on Review dated May 27, 1986 in which we affirmed a Referee's order that found that claimant's initial hearing request from EBI's denial was premature and that a subsequent hearing request was untimely filed without good cause. EBI requests that we reconsider that portion of our order which declined to address EBI's cross-request that its denial should be interpreted to include a denial of medical services under ORS 656.245.

The request is granted. On reconsideration, we continue to conclude that since we lack jurisdiction to consider either the "substance" or the "scope" of EBI's denial, we cannot address

EBI's contention. Accordingly, we adhere to and republish our former order, effective this date.

IT IS SO ORDERED.

HARRY J. BATTILEGA, Claimant
Peterson & Peterson, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-10299
June 23, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Fink's order that found claimant entitled to an award of permanent total disability. The issue on review is whether claimant is entitled to that award.

Claimant is a former sheet metal worker who compensably injured his low back in November 1983. Although claimant testified to significant and ongoing symptoms, all medical treatment has been conservative. Claimant is 60 years of age and is a high school graduate. Prior to his injury, claimant worked for the same employer for approximately 35 years. He has received an award of 25 percent (80 degrees) unscheduled disability for the low back.

Claimant's treating doctor is Dr. Howard Cherry, an orthopedist, who, a few weeks after the compensable injury, stated that claimant could not return to his regular work. Throughout 1984, however, Dr. Cherry expressed at least some optimism that claimant would be able to return to light and modified work. A consulting physician, Dr. Duff, agreed, as did Dr. Storino of the Callahan Center.

Claimant was vocationally evaluated in early 1985 and Mr. Malone, a vocational counselor, noted that claimant has an excellent work history, above average computational skills and reading ability placing him in the top range for the test administered. It was Mr. Malone's opinion that claimant possessed the skill and physical capacity to be employed as a sheet metal layout worker.

Dr. Cherry authored a brief report in early 1985, and for reasons that are not fully explained in the record, opined that claimant is permanently and totally disabled. The Referee relied on this report, along with claimant's testimony, in making the permanent total disability award. We disagree and modify the Referee's award.

Although claimant is 60 years of age, we find that he has the physical capacity and transferable skills to engage in regular and suitable, albeit part-time, employment. Claimant has undergone no surgeries, and although we accept that he suffers from pain that is disabling, we do not find his disability to be permanent and total.

We also find that claimant is entitled to an increased award of unscheduled permanent partial disability over the 25 percent awarded by Determination Order. After considering claimant's age, education, residual functional capacity, his transferable skills, the labor market findings, and claimant's physical impairment, we find claimant entitled to 45 percent (144 degrees) unscheduled partial disability, which shall be in lieu of all prior awards.

ORDER

The Referee's order dated July 16, 1985 is reversed. In lieu of the Referee's award and all prior awards, claimant is awarded 144 degrees for 45 percent unscheduled permanent partial disability. Claimant's attorney's fee shall be adjusted consistent with this order.

EMMA J. FENTON, Claimant
Pozzi, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 84-02176
June 23, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of those portions of Referee T. Lavere Johnson's order which: (1) upheld the SAIF Corporation's denial of claimant's May 1982 neck injury as not medically related to her February 1982 back injury; (2) upheld SAIF's denial of aggravation of claimant's February 1982 back injury; (3) awarded 96 degrees for 30 percent unscheduled permanent partial disability for injury to claimant's low back in addition to the Determination Order dated September 12, 1983 which awarded 64 degrees for 20 percent unscheduled permanent partial disability; and (4) denied penalties and attorney fees for unreasonable denials of the neck claim and low back aggravation claim. SAIF argues that the neck injury claim is untimely and requests authorization to offset damages claimant received in a third party settlement against compensation in the event the Board sets aside the denial of the May 1982 neck injury claim. The issues on review are compensability of the May 1982 neck injury claim, aggravation of the February 1982 back injury claim, extent of unscheduled permanent partial disability, penalties and attorney fees, and offset of third party settlement against compensation.

The Board affirms the order of the Referee with the following comment. Claimant's condition did not worsen during the pendency of the workplace modification but SAIF paid temporary disability compensation on a diagnostic basis pending the treating doctor's opinion concerning a worsening. Claimant was awarded substantial compensation for permanent disability and the symptoms claimant suffered during the winter of 1984-85 were within the range of expected permanent residual effects. Claimant's award of compensation was adequate considering her permanent impairment and relevant social and vocational factors. Robert E. Martell, 37 Van Natta 1074 (1985).

ORDER

The Referee's order dated May 22, 1985 is affirmed.

BERTHA L. HARMON, Claimant
Peter O. Hansen, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 85-03698
June 23, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests, and claimant cross-requests, review of Referee Shebley's order which awarded 50 percent (160 degrees) unscheduled permanent disability for a low back injury, whereas a July 18, 1985 Determination Order had awarded 25 percent (80 degrees). On review, the insurer contends that the award is

excessive, while claimant argues that it is insufficient. We agree with the insurer's contention and modify the Referee's order.

Claimant was 55 years of age at the time of hearing. In November 1983, while working as a bartender, she sustained a low back injury in a lifting incident. X-rays were normal. Dr. Bachhuber, claimant's then treating orthopedist, diagnosed lumbosacral strain. All treatment has been conservative, consisting primarily of bed rest, exercise, and medication.

Following two weeks of treatment, claimant returned to work. However, her low back problems became increasingly debilitating, eventually forcing her to terminate her employment in approximately October 1984.

In January 1985 the Orthopaedic Consultants performed an independent medical examination. Claimant's medical history included a 1960 hysterectomy due to uterine cancer, hepatitis in 1964, a 1976 "whiplash" injury, and lupus erythematosus since 1967. Her low back pain had improved since terminating her work activities, but would reappear whenever she began stooping, lifting, or bending. X-rays demonstrated mildly degenerative changes in the low back area. Diagnosing chronic low back strain, the Consultants concluded that claimant could return to her former occupation subject to a 20 pound lifting restriction. In the Consultants' opinion, claimant's loss of function was nil. Dr. Hanschka, claimant's family physician, essentially agreed with these findings. Dr. Grossenbacher, orthopedist, also agreed that claimant was capable of returning to her regular work, subject to the aforementioned limitations.

Thereafter claimant underwent a vocational assessment. She had an eighth grade education and had not achieved a GED. However, she had completed an equivalency test which suggested that her reading skills were at a second year college level. Claimant had also participated in an eight month program in bookkeeping where she had used a 10-key adding machine and a typewriter. Her work experience primarily consisted of some 25 years as a bartender. While engaging in these activities she had become accustomed to performing "very basic bookkeeping functions."

Claimant indicated that she could stand for two hours, walk on level ground for two hours, and sit for approximately one hour, provided she could periodically shift positions. She placed her lifting and carrying capabilities at 15 pounds, if absolutely necessary. If reemployment as a bartender was not possible, the vocational specialist opined that other suitable areas would include work as a cashier, hostess, or receptionist. Inasmuch as claimant had never completed a resume or been involved in a formal interview process, extensive training in job search skills was recommended. However, due to unrelated personal and medical problems, claimant was forced to discontinue her vocational assistance services.

In April 1985 Dr. Bachhuber reexamined claimant and reviewed the Orthopaedic Consultants' report. Claimant had no lower extremity complaints and her neurologic examination was normal. Consequently, Dr. Bachhuber concluded that there was no evidence of nerve root compression or serious back problems. In Dr. Bachhuber's opinion, claimant could return to her regular work, or other work, provided she avoid prolonged forward flexion

and lifting from below the waist. Furthermore, Dr. Bachhuber opined that claimant had suffered no permanent impairment as a result of her compensable injury.

Also in April 1985 Dr. Grossenbacher performed a closing examination. Claimant demonstrated a full range of motion, with no neurological complaints. She complained of an aching pain after heavy lifting or prolonged standing. Dr. Grossenbacher recommended that she restrict her lifting activities to 20 pounds and avoid repetitive twisting motions or excessive standing. Claimant's permanent impairment was rated as minimal.

Claimant and her roommate credibly described her disabling pain and physical limitations. She experiences back pain "about 90 percent of the time", particularly after engaging in physical activities. Generally, to relieve her pain she will take three aspirins and lie down. Claimant can sit comfortably "up to an hour, hour-and-a-half", and can stand for approximately two hours. She avoids lifting and carrying activities, but could probably lift 15 pounds. She has difficulty climbing or descending stairs and avoids bending or twisting activities. Because of her physical limitations, claimant feels that she could no longer perform her former work activities nor any full-time job. In addition, she does not think that she possesses the requisite typing skills to work as a secretary. Since her compensable injury she has curtailed, if not eliminated, many of her household and recreational activities. These activities include vacuuming, sweeping, ironing, sewing, fishing, and crabbing.

The Referee acknowledged that claimant's physicians had rated her permanent impairment as "nil" or "minimal." However, in view of claimant's and her roommate's "sincere and credible" testimony, the Referee was persuaded that her permanent impairment was considerably greater. The Referee cited Garbutt v. SAIF, 297 Or 148, 151-52 (1984). After considering claimant's age, limited education, and lack of transferable skills, the Referee increased the permanent disability award from 25 percent to 50 percent.

We agree that claimant's compensable injury, resulting physical limitations, and relevant social/vocational factors have culminated in a permanent loss of earning capacity which exceeds the Determination Order's award. See ORS 656.214(5). However, we find the Referee's award to be excessive.

In rating the extent of claimant's permanent disability, we consider her physical impairment, which includes the "sincere and credible" lay testimony concerning her disabling pain and physical limitations, and all of the relevant social and vocational factors set forth in OAR 436-30-380 et seq. We do not apply these rules as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that a 35 percent unscheduled permanent disability award adequately compensates claimant for her compensable injury.

ORDER

The Referee's order dated December 16, 1985 is

modified. In lieu of the Referee's award, and in addition to the Determination Order's award of 25 percent (80 degrees) unscheduled permanent disability, claimant is awarded 10 percent (32 degrees) unscheduled disability, which gives her a total award to date of 35 percent (112 degrees) unscheduled permanent disability for her compensable low back injury. Claimant's attorney's fee shall be adjusted accordingly.

APRIL L. MARTINEZ, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-00247 & 85-00246
June 23, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Holtan's order that upheld the SAIF Corporation's denial of claimant's claim for occupational stress. The issue is compensability.

We summarize the Referee's findings of fact, with which we concur. Claimant, a 19-year-old woman, is an employe of an administrative agency of the State of Oregon. She began working as a clerical assistant in February 1984. In July 1984 she became employed as a receptionist. Her work station as a receptionist was immediately adjacent to the office of the chairperson of the agency's board. The board's chairperson was not claimant's supervisor.

The Referee accurately summarized this case when he found: "The essense of this case is that claimant felt stress from various interactions with the chairperson of the [agency board]." These interactions involved several instances of the chairperson confronting claimant concerning the performance of her duties as receptionist, chastising claimant for wearing what the chairperson considered "unprofessional" attire and at least one instance of accusing claimant of inappropriate behavior toward a male member of the agency's board. On the other hand, unknown to claimant, the chairperson had communicated to claimant's supervisors that the supervisors should make every effort to assure that claimant succeeded in her job.

On November 7, 1984 claimant submitted a claim for mental stress. She complained of anxiety and of physical symptoms including stomach aches, neck aches and recurring low back pain. (On July 16, 1984 claimant filed an injury claim for a low back strain, which was accepted as a nondisabling industrial injury. That claim is not at issue in this proceeding.) Dr. Daly, claimant's treating psychiatrist, prescibed medication, authorized time off from work and provided counseling services over about a three week period. On the same day claimant left work, she was reassigned to clerical duties. She thereafter had no further contact with the board's chairperson. All of claimant's symptoms had resolved as of the hearing and she was successfully working at her clerical position.

The Referee concluded from his findings of fact that claimant's interaction with the agency board's chairperson was objectively capable of producing stress, did produce stress and that the on-the-job stress was the major contributing cause of claimant's symptoms. The Referee's ultimate conclusion was that the claim was not compensable because, "Claimant has not demonstrated that she is actually suffering from a true psychiatric disease, rather than just emotionalism or hurt feelings."

We find on the entire record that claimant was the youngest employe of the agency, was less mature than her coworkers believed her to be and had a passive-dependent personality which made her more susceptible to adverse reaction to criticism of the kind to which she was subjected. We believe that claimant was, in fact, embarrassed by some of the interactions with the chairperson and irritated by others. We acknowledge that this embarrassment and irritation was probably a source of stress. We find that claimant did suffer some physical symptoms -- upset stomach, neck aches and back pain -- and that she received medication for those symptoms. However, there is no evidence of record that claimant has ever had a pathological mental or physical disease attributable to embarrasment, irritation or stress.

This case raises what we see as a question of first impression in this jurisdiction: Are physical symptoms attributable to occupational stress compensable under the occupational disease law where there is no evidence that the stress caused a physical disease or mental disorder or worsened one of either that pre-existed the employment? Put more simply: Is embarrassment compensable as an occupational disease?

In McGarrah v. SAIF, 296 Or 145 (1983), the Oregon Supreme Court exhaustively analyzed the occupational disease law as it applied to the compensability of disorders and diseases caused by on-the-job stress. At one point the court stated:

> "The vast majority of workers, if not all, face and deal with job stress on a daily basis. The Oregon occupational disease statute speaks of diseases the worker is exposed to on the job, but not ordinarily exposed to off the job. On-the-job stress is not a disease. On-the-job events and conditions produce stress which in turn can cause mental disorders." Id. at 162, emphasis added..

We conclude that the fact that claimant experienced stress from events she encountered on her job is not in itself sufficient to establish that she suffers from an occupational disease. As the court clearly stated in McGarrah v. SAIF, supra, stress itself is not a disease. 296 Or at 162; see also 296 Or at 166-167, Lent, J., concurring. Stress induced by on-the-job events and conditions, on the other hand, "can cause mental disorders . . ." which may be compensable as occupational diseases if the on-the-job events and conditions were the major contributing cause of the stress. We conclude that the key in these cases is the presence or absence of a "mental disorder." (We realize that stress may also be a factor in physical disease, the most commonly encountered being heart conditions. See e.g. Clayton v. Compensation Department, 253 Or 397 (1969); Fagaly v. SAIF, 3 Or App 270 (1970). We perceive no claim in this case that claimant suffers from any diagnosed or diagnosable physical disease caused by on-the-job stress.)

There is no persuasive evidence in this case that claimant at any material time had or suffered from a mental disorder. Although reference is made to claimant's "passive-dependent" personality, there is no persuasive evidence that claimant's personality was "disordered." Even assuming for the sake of argument that claimant had an underlying personality "disorder," there is no persuasive evidence that

on-the-job events or conditions worsened any such "disorder." See Weller v. Union Carbide, 288 Or 27 (1979). At most, claimant in this case has suffered from discomfort associated with embarrassment. As we stated in Cynthia K. Bowman, 33 Van Natta 582, 583 (1981): "Not every physical discomfort of life is a disease." We hold that claimant's symptoms do not amount to an occupational disease and that SAIF's denial was correct.

ORDER

The Referee's order dated July 5, 1985 is affirmed.

CHRIS MEYERS, Claimant
Leonard Pearlman, Attorney, Dept. of Justice

WCB CV-86001
June 23, 1986
Crime Victim Compensation

Reviewed by Board Members Lewis and Ferris.

This matter is before the Board on review of the Findings of Fact, Conclusions and Proposed Order of the special hearings officer after hearing on claimant's request for review of the decision of the Department of Justice Crime Victim Compensation Fund (Fund). The Fund denied claimant's request for compensation as a victim of a crime on the ground that claimant's injury was substantially attributable to his own wrongful act.

After de novo review of the entire record, we adopt the findings and conclusions of the special hearings officer, as follows:

"FINDINGS OF FACT

"All events relevant in this matter occurred between approximately 10:30 and 11:00 p.m. on October 24, 1984 adjacent to an apartment building at 3268 S.E. Hawthorne Boulevard, Portland, Oregon. Based upon claimant's manner of testifying and his demeanor generally, I find claimant to be a sincere, candid and believeable witness and that such inconsistencies as there are in his testimony are primarily based upon his inability to recall events because of the seriousness of his injury. I also find that police officers Daniel Tuke and Michael Hefley and eyewitness Andrew Smith were totally credible and reliable witnesses.

"At approximately 10:30 p.m. claimant was driving his motorcycle with a passenger, Charles Roethle, on Hawthorne Boulevard when he saw a motorcycle parked at the curb in front of the apartment building. The mirrors on claimant's motorcycle had been stolen about two weeks previously and he had received at least two traffic citations for driving without mirrors. Claimant had a 'bad attitude' at the time and suspected that the mirrors on the parked motorcycle may have been his.

"Claimant told Roethle that he intended to steal the mirrors from the parked motorcycle and asked Roethle to stand at a bus stop and act as a lookout. Claimant parked his motorcycle and walked to the other motorcycle while Roethle took his position at the bus stop. Claimant examined the mirrors and initially determined that they were not his. Andrew Smith observed claimant from the window of his apartment during the entire time claimant was tampering with the parked motorcycle. Claimant had second thoughts about stealing the mirrors and walked away from the motorcycle. He then decided to go through with stealing the mirrors and walked back to the motorcycle. He finally decided not to steal the mirrors and again turned away from the motorcycle.

"At this point, the owner of the motorcycle, Steve Fiamengo, came out of the apartment building. Claimant heard the door open and began walking toward the bus stop, which caused him to walk parallel to the apartment building door along the sidewalk, generally in Fiamengo's direction. Claimant's action did not reasonably constitute any sort of threat to Fiamengo's person. Fiamengo was armed with a .357 Magnum pistol. Before he cleared the alcove of the doorway, Fiamengo fired one shot from the pistol, which struck claimant in the right groin, severing the right femoral artery and causing extensive nerve and muscle damage.

"CONCLUSIONS

"In rejecting claimant's claim, the Fund relied upon ORS 147.015(5), which provides that a victim of a crime may be entitled to compensation if '[t]he death or injury to the victim was not substantially attributable to the wrongful act of the victim or substantial provocation of the assailant of the victim . . . .' Compliance with ORS 147.015 is a threshhold matter of eligibility under the Act. The Fund has defined the relevant phrase. OAR 137-76-010(7) provides, '"Substantially attributable to his wrongful act" means attributable to an unlawful act voluntarily entered into from which there can be a reasonable inference that, had the act not been committed, the crime complained of would not have occurred.'

"The standard of review for cases appealed to the Board under the Compensation of Crime Victims Act is de novo on the entire record. ORS 147.155(5); Jill M. Gabriel, 35 Van Natta 1224, 1226 (1983). I conclude

from this record that when claimant stopped his motorcycle and approached Fiamengo's motorcycle, he did so with the intent to commit theft. Claimant admits that, initially, he was engaged in a wrongful act; however, he argues that, because he had made a final decision to not steal the mirrors before he was shot, he was no longer engaged in a wrongful act at the time of his injury.

"This case is similar to the first case decided by the Board under this Act. In Keith Berke, 30 Van Natta 185 (1980), the claimant was engaged as the seller in a sale of cocaine. The buyer took the cocaine and ran off without paying for it. The claimant pursued the buyer, intending to either retrieve his cocaine or get his money. The buyer fired a shot at the claimant, but missed, and the claimant continued the pursuit. The buyer fired a second time, hitting the claimant and ending the pursuit. The Board rejected the claimant's argument that his unlawful act ended when the buyer ran off with the cocaine, concluding that it was not until claimant was shot and unable to further pursue the buyer that the criminal transaction ended.

"In this case, I agree with the Fund that to accept claimant's theory would be to draw too fine a line. I conclude that the wrongful act without which this crime would not have occurred was the entire sequence of events that occurred while claimant was tampering with Fiamengo's motorcycle. Even had claimant been shot while fleeing from the scene, the shooting would not have occurred without the wrongful act of tampering with Fiamengo's motorcycle with the intent to commit theft in the first instance. It is my conclusion and recommendation that claimant's injury was substantially attributable to his own wrongful act and that he is, therefore, not entitled to compensation under the Act."

In accordance with these findings and conclusions, the Findings of Fact, Conclusions and Order on Reconsideration of the Department of Justice Crime Victim Compensation Fund dated August 29, 1985 are affirmed.

IT IS SO ORDERED.

LEROY MILLAGE, Claimant
Ivan S. Zackheim, Claimant's Attorney
Beers, Zimmerman & Rice, Defense Attorney

WCB TP-86003
June 23, 1986
Third Party Order

This matter is before the Board on claimant's petition to resolve a dispute as to the distribution of proceeds of the settlement of an action against a third party. ORS 656.154; 656.576 to 656.595.

UNDISPUTED FACTS

The following facts are stipulated. Claimant had an accepted, compensable right inguinal hernia. On April 5, 1982 claimant underwent a surgical procedure for repair of the hernia at Kaiser-Permanente. The surgeon was to have been Dr. Nolte, a general surgeon. The procedure was in fact performed by Dr. Vuksimich, a surgical resident. During the course of the surgery, the ilioinguinal nerve was partially transected. The transection of the ilioinguinal nerve resulted in two additional surgical procedures to excise neuromas that formed because of the first surgery. Temporary disability benefits and medical expenses due to these surgical procedures are agreed to have been $9,903.54. Claimant brought an action for medical malpractice against Kaiser and the doctors, which was settled with the paying agent's approval, ORS 656.587, for $37,500. Partial distribution of proceeds has been made by agreement of the parties. $16,379.18 remains in an interest bearing trust account pending the Board's decision.

NATURE OF DISPUTE

Whether the first surgery, which resulted in the partial transection of the ilioinguinal nerve, was due to the "negligence or wrong" of a third party. ORS 656.154.

CLAIMANT'S CONTENTIONS

Pursuant to John Galanopoulos, 34 Van Natta 615 (1982), 35 Van Natta 548 (1983), where a paying agent seeks recovery from proceeds of a third-party medical malpractice action, "The burden of proof is upon the [paying agent] to establish the extent of the expenditures attributable to the malpractice." 34 Van Natta at 616. Claimant submits that the paying agent can prove no more than that the nerve injury was merely a risk of the procedure. Therefore, the injury was not due to "negligence or wrong" of a third party.

PAYING AGENT'S CONTENTIONS

Claimant's allegations, contained in the complaint filed in the circuit court, were that his nerve injury was the result of negligence on the part of the defendants. These allegations are sufficient to bring the proceeds within the orbit of the third-party law. The paying agent is entitled to include within its lien "those additional expenses incurred due to the consequences of the malpractice." John Galanopoulos, 34 Van Natta 615, 615 (1982).

CONCLUSIONS

Claimant and the paying agent both rely upon John

Galanopoulos, supra. In that case, claimant received a jury verdict in his favor and recovered $139,000 from a podiatrist. Claimant's argument in this case is that there was no finding in this case that there was in fact malpractice. There is evidence in the record from Dr. Sundstrom, as follows: "I have told [claimant's lawyer] that nicking the nerve is an occurence which must occur 10 to 20 percent of the time, transecting the nerve completely 1 to 3 percent of the time and that, although it is possible to do the surgery without nicking the nerve, this certainly is not a terribly unusual occurence." Claimant appears to be arguing that this case was settled because it was not likely that claimant, as plaintiff in the civil action, would prevail, and, therefore, the paying agent cannot prove entitlement to reimbursement for any of its claim costs because it cannot prove that any of its expenditures were due in fact to the negligence of a third party.

We do not believe that anything the Board said in Galanopoulos supports claimant's argument. The question in Galanopoulos was how many dollars of the industrial insurer's claim costs were due to the malpractice, the fact of which was established by the jury verdict. The question how many dollars of claim costs are attributable to the surgeries subsequent to the transection of the nerve has been stipulated in this case to be $9,903.54. In this case, the question raised by claimant is whether, after settlement of an alleged malpractice case, the paying agent must prove malpractice in fact to share in the third party recovery. We agree with the paying agent that claimant's allegation of malpractice is sufficient to put any recovery based upon such allegation within the orbit of ORS 656.576 to 656.595.

ORS 656.583 and 656.591, provide, respectively, that the paying agent may compel the election to bring an action and, if no action is brought by the injured worker, that the paying agent may bring the action itself in the name of the injured worker. ORS 656.587 and 656.593(3) provide, respectively, that the paying agent must approve any compromise and for distribution of settlement proceeds when a case brought by the injured worker is compromised. A settlement necessarily concludes an action without a finding whether the accused third party was in fact negligent. We hold that election to seek a remedy against a third party invokes the lien provisions of ORS 656.580 and 656 593(1) and (3) as to any recovery, whether by way of judgment or settlement, from the third party. Under the standard we adopted in John Galanopoulos, supra, the discussion relating to the burden of proof applies to the amount of claim costs that can be recovered by the paying agent, not whether there is a lien at all.

ORDER

The paying agent shall be paid the sum of $9,903.54 plus its pro-rata share of accrued interest pursuant to the agreement of the parties. The remainder of the funds held in trust, together with their pro-rata share of accrued interest, shall be paid to claimant.

JAMES D. WHITNEY, Claimant
Pozzi, et al., Claimant's Attorneys
Beers, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-12562, 84-03566, 84-05467, 85-07277 & 85-07278
June 23, 1986
Order on Dismissal

EBI Companies on behalf of Astoria Plywood has requested Board review of Referee Mulder's Order dated May 30, 1986. The Referee's order denied the insurer's request to dismiss the request for hearing as to Astoria Plywood/EBI Companies.

An order of a Referee that denies a request to dismiss a request for hearing is not a reviewable order. Paul W. Bryan (Dec'd), 37 Van Natta 1431 (1985). The request for review is dismissed. This case is remanded to the Hearings Division for further proceedings.

IT IS SO ORDERED.

RAY C. HARRISON, Claimant
Brown & Tarlow, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-03189
June 26, 1986
Order on Reconsideration

The SAIF Corporation has requested that we reconsider that portion of our Order on Review dated May 28, 1986 that held that SAIF unreasonably failed to timely submit payment for a medical examination. Claimant has also requested reconsideration, asking that we review that portion of our order that affirmed without opinion the Referee's holding that although SAIF erred by not paying claimant temporary disability compensation, the failure to pay was not unreasonable. The parties' requests for reconsideration are granted.

With regard to claimant's request, we adhere to our order. We remain convinced that the Referee correctly found that SAIF's conduct was not unreasonable. Penalties and attorney fees are, therefore, not due.

In its request for reconsideration, SAIF correctly points out that the medical examination at issue was one arranged for by SAIF as an independent medical examination. There has been no contention that claimant was responsible for paying the billing generated from that examination. SAIF argues, therefore, that the examination was not a "compensable" medical service, and that the late payment of a noncompensable medical examination cannot give rise to a penalty or an associated attorney fee. On reconsideration we agree. Our order shall be modified accordingly.

Now, therefore, having granted the parties' requests for reconsideration, we adhere to and adopt that portion of our May 28, 1986 order that affirmed the Referee's denial of claimant's requests for penalties and attorney fees for SAIF's alleged unreasonable conduct in failing to pay temporary disability compensation. We set aside that portion of our order that assessed a penalty in the amount of 25 percent of the amount of the disputed medical bill and an associated attorney fee. We adhere to and hereby republish the remainder of our order.

IT IS SO ORDERED.

THOMAS D. CRAFT, Claimant
Kenneth D. Peterson, Claimant's Attorney
Marshall C. Cheney, Defense Attorney

WCB 82-01461
June 24, 1986
Order of Abatement

The insurer has requested that we reconsider and clarify our Order on Remand dated May 27, 1986. Specifically, the insurer has requested that it be permitted to offset temporary disability compensation paid pending appeal of our Order on Review against the award for permanent total disability.

We conclude that the insurer's request raises an issue similar to that considered, but not decided, by the appellate courts in SAIF v. Casteel, 74 Or App 566 (1985), vacated, 301 Or 151 (1986). In order to fully consider the question, we withdraw our Order on Remand for reconsideration. We also request further briefing from the parties.

The Order on Remand dated May 27, 1986 is withdrawn. The insurer's brief in support of its request for offset is due 14 days from the date of this order. Claimant's response brief is due 14 days from the mailing date of the insurer's brief.

IT IS SO ORDERED.

RICHARD M. DESKINS, Claimant
Evohl F. Malagon, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB 85-00088
June 2, 1986
Order of Abatement

The Board has received claimant's request for reconsideration of our Order on Review dated May 6, 1986. In the aforementioned order, we affirmed the Referee's order which found that the self-insured employer unreasonably failed to pay temporary disability benefits pursuant to a previous Referee's order. However, we increased a penalty and an accompanying attorney's fee for the employer's unreasonable conduct. In addition, we found that the Referee had erroneously closed the claim and allowed an offset.

On reconsideration, claimant asserts that he is entitled to additional awards of attorney fees. He bases his contentions on two grounds. First, relying on the recent Court of Appeals' decision in Travis v. Liberty Mutual Insurance, 79 Or App 126 (1986), he contends that he should receive an attorney's fee for prevailing on the self-insured employer's cross-request in which the employer argued that claimant was not entitled to temporary disability compensation. Secondly, citing Shoulders v. SAIF, 300 Or 606, 609 (1986), claimant asserts that he is entitled to an attorney's fee for prevailing on the "premature claim closure" issue, and thereby the offset issue. Claimant argues that his success on these issues has, in effect, entitled him to increased compensation. In response to claimant's arguments, the employer suggests that we modify claimant's $1,500 attorney's fee award to include all issues, not just the penalty issue.

In order to allow sufficient time to consider the issues raised by claimant's request for reconsideration, the above noted Board order is abated.

IT IS SO ORDERED.

DUANE B. DRIVER, Claimant
Welch, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-10533 & 84-10534
May 22, 1986
Order of Abatement

The Board has received the SAIF Corporation's motion to reconsider our Order on Review dated May 6, 1986.

In order to allow sufficient time to consider the motion, the above noted Board order is abated. Claimant and the Farmer's Insurance Group are requested to file a response to the motion within 21 days.

IT IS SO ORDERED.

IRENE M. GONZALEZ, Claimant
Michael B Dye, Claimant's Attorney
Cummins, et al., Defense Attorney

WCB 84-12022
April 17, 1986
Order of Abatement

The Board has received the insurer's request to reconsider our Order on Review dated March 27, 1986.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and the claimant is requested to file a response to the motion within 21 days.

IT IS SO ORDERED.

EARL P. HOUSTON, Claimant
Richard O. Nesting, Claimant's Attorney
Lindsay, et al., Defense Attorneys

WCB 83-00851
April 9, 1986
Order of Abatement

The Board has received the insurer's request to reconsider our Order on Review dated March 18, 1986.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and claimant is requested to file a response to the motion within 21 days.

IT IS SO ORDERED.

WORKERS' COMPENSATION CASES

Decided in the Oregon Supreme Court:

Decided in the Oregon Court of Appeals:

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
WILLIAM O. OLSON, Claimant.

OLSON,
Petitioner,

v.

E.B.I. COMPANIES et al,
Respondents.

(83-04101; CA A34569)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 18, 1985.

Edward J. Harri, Albany, argued the cause for petitioner. On the brief were J. David Kryger and Emmons, Kyle, Kropp, Kryger & Alexander, P.C., Albany.

Jerald P. Keene, Portland, argued the cause for respondents. With him on the brief was Roberts, Reinisch & Klor, P.C., Albany.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed.

BUTTLER, P. J.

Claimant seeks review of an order of the Workers' Compensation Board which reversed the referee's decision that his disability is compensable as an aggravation of a 1979 injury.

Claimant compensably injured his neck and upper back in February, 1979, while working for ASB Construction, an Oregon employer. After treatment, he was released for work in January, 1980. In February, 1983, while working in California for M & H Construction, a California employer, he worked for four hours operating a backhoe under conditions that required him to work with his neck in a twisted position. Shortly thereafter he began having more difficulty.[1] The symptoms were identical to those that claimant experienced in 1979. Although claimant had not been completely free of symptoms since he was released for work in 1980, he had not received any medical treatment. He sought treatment for his 1983 problems in Oregon and compensation from ASB's insurer, EBI, claiming an aggravation of the 1979 injury. EBI denied the claim. Ultimately, in July, 1983, claimant underwent surgery.

The referee concluded that claimant had suffered an aggravation of the earlier injury, and set aside the insurer's denial. The Board reversed, holding that claimant had suf-

[1] It is not disputed that, for the purpose of this case, M & H Construction is a California employer.

fered a new injury for which ASB Construction was not responsible. We affirm.

Although claimant was not asymptomatic before the 1983 incident, his condition had been fairly stable and he had not needed treatment. The evidence does show, however, that his condition after the 1979 injury deteriorated independently of the 1983 incident. Dr. Tiley, an examining physician, wrote:

> "[T]here is certainly no question in my mind that the 1979 incident in February was a material contributing factor to the spondylosis with its radicular component, that lead [*sic*] to the surgical treatment * * *."

There is also evidence that the 1983 work exposure was a material contributing cause of claimant's disability. Dr.

Melgard, claimant's treating physician, wrote, on May 26, 1983:

> "* * * There is an unequivocal relationship to the injury of February 8, 1983 when the patient was using a backhoe working on a freeway. He had a previous problem in 1979, and apparently had an irritation of the nerve roots at C5-6 and C6-7 at that time, but the current episode in February of 1983 was the insighting [*sic*] current cause."

In a letter questionnaire, Melgard answered "Yes" to the insurer's question of whether the February 8, 1983, occurrence was a material contributing factor to claimant's current condition.

On *de novo* review, we find that claimant's February, 1983, work exposure in California was a discrete event that brought on symptomatology almost immediately and that it contributed independently to claimant's disability. Accordingly, his disability is the result of a new injury, rather than an aggravation. *Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976). We also find that the 1979 Oregon injury was a material contributing cause of the disability. In *Miville v. SAIF,* 76 Or App 603, 710 P2d 159 (1985), we held, under similar circumstances, that the policy stated in *Grable v. Weyerhaeuser Company,* 291 Or 387, 631 P2d 768 (1981), would require the Oregon employer to remain responsible *if* the claimant had filed a claim in the foreign state where the second injury occurred and that claim had been rejected and *if* the Oregon injury was a material contributing cause of his present disability. Here, no claim was filed in California. We hold, therefore, that the Oregon employer is not responsible for claimant's disability.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
THOMAS L. RUNFT, Claimant.

RUNFT,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 83-03962; CA A34302)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 31, 1985.

Diana Craine, Portland, argued the cause for petitioner. On the brief were Jeffrey S. Mutnick, Robert K. Udziela and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed.

BUTTLER, P. J.

Claimant seeks review of an order of the Workers' Compensation Board affirming the referee's order holding that SAIF, as insurer for Specialized Service, is not responsible for claimant's asbestosis.

Claimant worked for Specialized Service as a mechanic for seven years, from 1959 to January, 1966, fabricating brake linings for trucks, automobiles and industrial machinery. The work produced great clouds of asbestos dust. Claimant worked in a small room, without ventilation or respiratory protection. Later he worked as a brake mechanic for four years at International Harvester, where he was exposed to asbestos occasionally when he cleaned out old brake shoe dust. The record does not show the details of exposure or the dates of employment. In January, 1983, claimant filed a claim with SAIF (Specialized Service's insurer) for compensation based on injurious exposure to asbestos. In March, the claim was denied. In August, 1983, Dr. Lawyer, a specialist in pulmonary disease, determined that claimant suffered from asbestosis.

Claimant filed a claim against Specialized Service only, and no subsequent employers were joined by employer or claimant. Although employer denied compensability, as well as responsibility, it now agrees that the condition is a compensable occupational disease, and uncontradicted medical evidence indicates that claimant's work at Specialized Service

was the major contributing cause of the disease. The only question is whether the last injurious exposure rule may be used by SAIF as a defense to this claim on the theory that work conditions at the later employer *could* have caused the disease, relieving SAIF of responsibility.

As a rule of "liability" in cases of successive employment, each of which has contributed to the totality of the disease, the last injurious exposure rule assigns responsibility to the last employer where work conditions could have caused a worker's disabling condition. *Bracke v. Baza'r,* 293 Or 239, 248, 646 P2d 1330 (1982). As a rule of proof, if a claimant proves that the disease was caused by work exposure, the last employment where work conditions could have caused the disease is considered to have caused it, even though the claimant has not proved that the conditions of the last

employment were the actual cause and even though work conditions at a previous employment also could have caused the disease. *Bracke v. Baza'r, supra,* 293 Or at 249. Here, as in *Bracke,* there is no problem of proof. The record shows that both employments contributed to the disability. Here, as in *Bracke,* claimant proved that his disease was work-related without reliance on the last injurious exposure rule; however, unlike in *Bracke,* he did not show that he became disabled solely as a result of work conditions at employer. The rule enters the case only because employer contends that the subsequent employer should be held responsible, because working conditions there were injurious. In *Bracke,* the Supreme Court acknowledged an employer's right to use of rule[1] in that manner:

> "The operation of the rule, as we said in *Inkley,* [*v. Forest Fiber Products Co.,* 288 Or 337, 605 P2d 1175 (1980)] provides certainty in a way which is 'somewhat arbitrary.' It operates generally for the benefit of the interests of claimants. It is fair to employers only if it is applied consistently so that liability is spread proportionately among employers by operation of the law of averages. We hold that employers have and may assert an interest in the consistent application of the last injurious exposure rules, either as to proof or liability, so as to assure that they are not assigned disproportionate shares of liability relative to other employers who provide working conditions which generate similar risk." 293 Or at 249.

Then, in a footnote, 293 Or at 250 n 5, the court questioned the use of the last injurious exposure rule of proof as a defense to defeat the rights of a claimant who successfully proves actual causation.

In *SAIF v. Luhrs,* 63 Or App 78, 83, 663 P2d 418 (1983), we attempted to reconcile those seemingly contradictory statements. We stated:

> "* * * We believe that the right to assert the rule defensively depends on whether that single employer [the only one against whom a claim was made] is the last employer where working conditions were such that they could have caused the disease. If so, the rule may not be asserted as a defense. Where, however, the employer against whom the claim is filed is not the last employer where working conditions were potentially injurious, that employer may assert the rule as a defense;

[1] In our opinion in *Bracke,* 51 Or App 627, 626 P2d 918 (1981), we disapproved our statement in *Holden v. Willamette Industries,* 28 Or App 613, 560 P2d 298 (1977), that the rule works both ways—that is, both for and against a claimant.

however, whether it will be successful depends on the medical evidence, as in *Bracke.* * * *"

We concluded that, if the claimant's evidence is that the working conditions at the earlier employment were the actual cause of the disease and that the later exposure was non-injurious, the defense will not succeed.

Here, as in *Luhrs,* SAIF is entitled to raise the last injurious exposure rule as a defense to responsibility. There is evidence, not only of a later employment where working conditions could have caused the disease, but that those conditions were injurious. Claimant did not become disabled during his employment with employer. Dr. Lawyer testified unequivocally and without contradiction that claimant's four-year employment at International Harvester contributed to his asbestosis to a lesser extent, but "significantly." Accordingly, SAIF has established the last injurious exposure defense. *See FMC Corp. v. Liberty Mutual Ins. Co.,* 70 Or App 370, 689 P2d 1046 (1984), *mod* 73 Or App 223, 698 P2d 551, *rev den* 299 Or 203 (1985).

Claimant contends, however, that more is required of SAIF. He correctly notes that the rule of last injurious exposure "operates generally for the benefit of the interests of claimants." *Bracke v. Baza'r, supra,* 293 Or at 249. At the same time, it is employed to spread liability "fairly among employers by the law of averages." *Bracke v. Baza'r, supra,* 293 Or at 248. To achieve both objectives, claimant argues, we should hold that the employer against whom a claim is filed must join the subsequent employer to whom it seeks to shift responsibility. *See Bracke v. Baza'r, supra,* 293 Or at 250 n 5.[2] Although that proposed rule has some appeal, we find no authority that would permit joinder when, as here, compensability, as well as responsibility, was at issue at the time when the claim was denied and at hearing. *See* ORS 656.307;[3] OAR 436-54-332.

Affirmed.

[2] Here, claimant could not have filed a claim against International Harvester at the time of the hearing, when the defense of last injurious exposure was raised by SAIF, because the time for filing a claim had expired. ORS 656.807(4).

[3] ORS 656.307 provides:

"(1) Where there is an issue regarding:

"(a) Which of several subject employers is the true employer of a claimant worker;

"(b) Which of more than one insurer of a certain employer is responsible for payment of compensation to a worker;

"(c) Responsibility between two or more employers or their insurers involving payment of compensation for two or more accidental injuries; or

"(d) Joint employment by two or more employers,

"the director shall, by order, designate who shall pay the claim, if the claim is otherwise compensable. Payments shall begin in any event as provided in ORS 656.262(4). When a determination of the responsible paying party has been made, the director shall direct any necessary monetary adjustment between the parties involved. Any failure to obtain reimbursement from an insurer or self-insured employer shall be recovered from the Administrative Fund.

"(2) No self-insured employer or an insurer shall be joined in any proceeding under this section regarding its responsibility for any claim subject to ORS 656.273 unless the issue is entitled to hearing on application of the worker.

"(3) The claimant shall be joined in any proceedings under this section as a necessary party, but may elect to be treated as a nominal party."

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Johnnie Stepp, Claimant.

STEPP,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 83-01242; CA A34646)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 10, 1986.

David C. Force, Eugene, argued the cause and filed the brief for petitioner.

John A. Reuling, Jr., Assistant Attorney General, Salem, argued the cause and filed the brief for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Gillette, Presiding Judge Pro Tempore, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

Claimant seeks review of a Workers' Compensation Board order reversing a referee's award of permanent total disability. The Board found that claimant had failed to prove a permanent worsening of his compensable condition. We affirm.

In January, 1977, claimant sustained multiple compensable injuries. The claim was closed in October, 1978, with an award of 15 percent unscheduled permanent disability. Pursuant to an agreement of the parties, a stipulated order dated April 11, 1979, increased the award to 80 percent. In May, 1980, claimant made an aggravation claim. On November 5, 1981, a hearing was held on SAIF's denial of that claim. On April 30, 1982, a referee set aside the denial and ordered the claim reopened as of May 16, 1980, and the Board affirmed. On January 25, 1983, a determination order closed the aggravation claim with an award of temporary total disability and determined that claimant was not entitled to an award of permanent partial disability in excess of the 80 percent earlier stipulated. Claimant requested a hearing. The referee concluded that he was permanently and totally disabled. The Board reversed, because the evidence failed to show a permanent worsening of claimant's compensable condition since the last arrangement of compensation, *i.e.*, the April 11, 1979, stipulated order. The Board found:

> "We agree with the Referee's finding that claimant's physical condition is not substantially different now than it

was at the time of the prior [hearing on the denied aggravation claim] in November 1981. We also agree with the Referee that claimant's mental condition is not substantially different than it was at the time of the November 1981 hearing. In addition, and more important, we find that claimant's physical and mental conditions are no different now than they were at the time of the execution of the 1979 stipulation awarding claimant 80% permanent partial disability and we, therefore, disagree with the Referee's award of permanent total disability.

"Although it is true that claimant suffered an aggravation of his condition in May 1980, the medical evidence clearly indicates that this was only a temporary exacerbation and that claimant has since returned to his pre-aggravation status with no additional impairment."

ORS 656.273(1) governs the compensation to which a worker is entitled as the result of a worsening of a compensable condition:

"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."

In order to prevail on an aggravation claim under the statute, a worker must show (1) a worsening of the compensable condition since the last award or arrangement of compensation and (2) a causal connection between the worsening and the compensable condition. *Brewer v. SAIF,* 59 Or App 87, 89, 650 P2d 947 (1980). Under ORS 656.273(1), a worker who proves a temporary worsening is entitled to additional temporary compensation. Similarly, proof of a permanent worsening entitles the worker to additional permanent compensation.

After reviewing the record *de novo,* we agree with the Board that claimant failed to prove a permanent worsening of his compensable condition since the stipulated order. Although there is substantial evidence that claimant suffered an aggravation in May, 1980, we are satisfied that that worsening was temporary and that claimant thereafter returned to his preaggravation status, without any additional permanent impairment. In a report dated August 17, 1982, claimant's doctor summed up claimant's condition:

"It is my opinion that treatment is only palliative and not curative in general for this patient. He will always have exacerbations and remissions, and there is also an emotional component with his chronic, irreversible problems.

"I feel his permanent partial disability or impairment, is adequately rewarded at 80% * * *."

Claimant appears to argue, however, that, once he proves a temporary worsening, he is entitled to a redetermination of the extent of his permanent disability, even though his compensable condition has not permanently worsened. He cites no authority for that proposition, and we have found none.[1] The effect of that argument would allow him to

relitigate the April, 1979, stipulated order for permanent partial disability. That is not permissible. The stipulated

[1] *But see Hanna v. SAIF,* 65 Or App 649, 652, 672 P2d 67 (1983), holding that, under ORS 656.268(5), a change in a worker's condition is not required to obtain a redetermination of the extent of disability on the termination of a vocational rehabilitation program.

order is conclusive as to the extent of the disability on that date. *Waldroup v. J. C. Penney Co.*, 30 Or App 443, 448, 567 P2d 576 (1977). That determination cannot be relitigated in an aggravation claim. *Deaton v. SAIF*, 33 Or App 261, 263, 576 P2d 35 (1978). Without a permanent worsening of the compensable condition, there is no justification for redetermining the extent of permanent disability.[2]

Affirmed.

[2] Claimant can also be understood to argue that he was, in fact, permanently and totally disabled when he stipulated to the permanent partial disability award. Without evidence of a permanent worsening since that time, he is bound by the stipulation.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Gavin L. Smith, Claimant.

SMITH,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION et al,
Respondents.

(WCB 83-04541; CA A36412)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 10, 1986.

Edward J. Harri, Albany, argued the cause for petitioner. On the brief were J. David Kryger, and Emmons, Kyle, Kropp, Kryger & Alexander, P.C., Albany.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause and filed the brief for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Gillette, Presiding Judge Pro Tempore, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

Claimant seeks review of a Workers' Compensation Board order reversing a referee's order which allowed claimant's aggravation claim and dismissing the claim as untimely filed. The issues are (1) whether the claim was timely filed, and (2) if so, whether claimant proved a worsening of his compensable condition. ORS 656.273(1). We hold that the claim was timely filed but that claimant failed to prove a worsening. We therefore affirm.

On March 10, 1977, claimant suffered a compensable low back injury. The claim was closed by a determination order on September 27, 1977. Claimant continued to work

until May, 1978, when he quit, because he felt that he could no longer work; he has not worked since.[1] Claimant requested a hearing on the claim closure. On May 6, 1980, the referee awarded 70 percent unscheduled permanent partial disability. The Board reduced the award to 50 percent; we reinstated the referee's award. *Smith v. SAIF,* 51 Or App 833, 627 P2d 495 (1981).

Claimant continued to have problems after the hearing. On April 16, 1980, he saw Dr. Clibborn, complaining of severe low back pain and burning pain in both legs. Clibborn treated claimant at least through April 26, 1982, sending periodic progress reports to SAIF. On July 17, 1981, claimant saw Dr. Stanley, complaining of knee and low back pain. On February 14, 1982, Stanley examined claimant for pain in his left hip and on March 5, for right elbow and shoulder pain.[2] Stanley also sent progress reports to SAIF. Dr. Tsai examined claimant in October, 1979 and in March, 1983. He concluded that there had been a deterioration of claimant's condition during that interval. Dr. Norton reviewed the medical reports and disagreed with Tsai's conclusion.

SAIF denied the aggravation claim. The referee set aside the denial and found that claimant had proved an aggravation. The Board reversed, deciding that the claim was not timely filed within the period provided by ORS 656.273(4).

The first issue is whether claimant filed his claim before his aggravation rights had expired. ORS 656.273(4)(a) provides, with two exceptions not relevant here, that an aggravation claim "must be filed within five years after the first determination made under ORS 656.268(4)." The first determination was made on September 27, 1977. Claimant did not file a written aggravation claim. He relies on several doctors' reports that were sent to SAIF before September 27, 1982. The Board decided that none of those reports was sufficient to constitute an aggravation claim. We disagree.

In *Haret v. SAIF,* 72 Or App 668, 671-72, 697 P2d 201, *rev den* 299 Or 313 (1985), we stated:

"ORS 656.273(3) provides:

> " 'A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation.'

"That statute replaced *former* ORS 656.271(1) (*repealed by* Or Laws 1973, ch 620, § 4), which provided that an aggravation claim 'must be supported by a written opinion from a physician that there are reasonable grounds for a claim.' The purposes of the statutory change were to make the physician's report itself the claim and *to delete any requirement that the report do more than request additional services.* When the carrier receives such a report, it then becomes its responsibility to determine whether a worsening has occurred and to accept or deny the aggravation claim.

[1] In 1979, employer offered claimant a "light duty" job within the limitations specified by his physicians. Claimant refused the offer, because "he is hardly able to negotiate himself around the home," "he could accomplish [the job] activities only on good days," his wife had to help him dress and his legs gave way occasionally.

[2] At the hearing, claimant's attorney stated:

"[T]o make this simple in regard to the shoulder and elbow, * * * claimant has no contention that that's caused from his low back, and so that's not an issue * * * "

"Even with the statutory change, not every medical report is an aggravation claim. We held in *Wetzel v. Goodwin Brothers*, 50 Or App 101, 622 P2d 750 (1981), that a medical chart note sent to the insurer at its request did not constitute an aggravation claim. The note included a statement that the claimant's condition 'is not changing.' Almost anything more than that, however, can be an aggravation claim. The physician's report need not 'adduce facts sufficient to show an aggravation; *it need only show the need for further treatment of the injury.' Clark v. SAIF*, 50 Or App 139, 143, 622 P2d 759 (1981)." (Emphasis supplied; footnote omitted.)

Each of the doctors' reports indicated a need for further treatment.[3] The claim was timely filed.[4]

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[3] For example, on August 13, 1980, Clibborn wrote to SAIF:

"This patient is not the usual case. As you know he has been disabled since March 10, 1977.

"He first came in to our office on April 16, 1980. He complained of severe pain in his low back with burning pain into both of his legs.

"The patient's improvement has been slow but steady. We will get him down to two (2) visits a month as soon as we can. He should be at that level within two (2) months."

On April 13, 1981, Clibborn wrote:

"This patient has required regular care during the past year due to a deterioration in his low [back] condition, which produced severe pain in his low back. He is much better off at this point. Our treatment from this point on should be considered palliative only. He should be able to get by now with 2-3 visits per month * * *."

On April 22, 1982, Stanley reported:

"[Patient] returns. He has had increased back pain. This is essentially similar to what he had previously. This is another bad episode.

"EXAMINATION is the same as it was previously. I think it is just recurrence of his back pain. * * * If he does not improve might consider bringing him in for some P[hysical] T[herapy] and some pelvic traction."

[4] The Board stated:

"Claimant argues that ORS 656.273(3) requires only a 'physician's report indicating a need for further medical services or additional compensation' to be statutorily sufficient to make a claim for aggravation. This argument overlooks the inter-relationship of ORS 656.273(3) and ORS 656.245. This inter-relationship has been explained in *Evans v. SAIF*, 62 Or App 182, [660 P2d 185] (1983); *Dwayne G. Cary*, 36 Van Natta 265 (1984); and *William A. Newell*, 35 Van Natta 629 (1983) and we find nothing in this case to cause us to depart from the reasoning in those cases. *Cf. Haret v. SAIF*, 72 Or App 668, [697 P2d 201] (1985) (not every medical report is an aggravation claim, but almost anything that indicates a worsening of the condition would be enough); *Gerald I. Halle*, 37 Van Natta ____ (May 7, 1985) (aggravation claim is made when there is a request for further medical services due to a worsened condition). A claim for medical services within the aggravation period does not present an aggravation claim requiring reopening unless there is something about the claim that makes it clear that the medical services are needed to treat a worsened condition that is related to a compensable injury."

Even under the Board's analysis, at least one of the doctors' reports was sufficient to constitute a timely claim for aggravation. On April 26, 1982, Clibborn wrote to SAIF:

"*As you probably realize, this patient had a worsening of his back pain in September of 1981.* Since that time, he has had pain in his low back with tension in his upper back and neck.

"*These problems began after his March, 1977 injury.* Although this man is permanently disabled, we feel his present treatments are necessary to minimize his present pain.

"Our treatments are not corrective relating to his low back, but they are corrective relating to his upper back and neck pain.

"He has improved a great deal over the last several months, and we hope he will soon be medically stationary." (Emphasis supplied.)

In order to establish an aggravation claim, claimant must show "worsened conditions resulting from the original injury." ORS 656.273. "Worsened conditions" means a change in condition which makes a claimant more disabled, either temporarily or permanently, than he was when the original claim was closed. *See Stepp v. SAIF,* 78 Or App 438, ___ P2d ___ (decided this date); *Miller v. SAIF,* 78 Or App 158, ___ P2d ___ (1986). At this point, we reiterate a fundamental principle of workers' compensation law: Because compensation for an unscheduled disability is awarded for loss of earning power, *see* ORS 656.206(1)(a); 656.210; 656.212; 656.214(5), *more disabled* means less able to work.

At the time of the last award of compensation, in May, 1980, claimant suffered from sharp pain in the low back and both legs; that finding was also reported by Tsai in March, 1983. In 1980 and in 1983, his pain was increased by bending, twisting, stooping and reaching; the same is true now. In 1980, he could only sit 20 minutes; Tsai reported the same limitation in 1983. In 1980, his pain was aggravated by standing 15 minutes or walking more than three blocks. Ascending and descending stairs was painful, as it is now. In 1980 he could only drive 20 miles; he testified that he now has back pain after driving 15 miles. In 1980, he could lift ten pounds; although he testified that he can now lift less than in 1980, he again said he could lift ten pounds. He testified that he has trouble sleeping now due to his pain, but admitted to a similar problem in 1980. He testified that he started using a cane in 1982, because his leg would give out; he said that the giving out is worse now than it was in 1980; but he also admitted that his leg never gave out on him in 1982, even though it was giving out on him about two times a month at the time of his 1980 hearing. He testified that he cannot mow his lawn or do housework now but admitted that he could not mow his lawn and was able to do very little housework in 1980. Finally, he testified that in 1980 he had to lie down and rest about two hours per day and that he presently rests about three and a

half hours per day. However, his testimony at the 1980 hearing was that he then had to rest four hours a day. Essentially, claimant admitted that his average day in 1980 was pretty much the same as it is now.

After reviewing the record *de novo,* we conclude that, even if claimant's condition has changed, he has failed to prove that he is less able to work now than before the alleged aggravation.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
James W. Foushee, Claimant.
CONSOLIDATED FREIGHTWAYS,
Petitioner,
v.
FOUSHEE et al,
Respondents.
(WCB 82-06050, 81-10270; CA A32574)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 27, 1985.

Allan M. Muir, Portland, argued the cause for petitioner. With him on the brief were Dennis S. Reese and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Deborah L. Sather, Portland, argued the cause for respondent Freightliner Corporation. With her on the brief were Frank A. Moscato and Moscato & Byerly, Portland.

Alan M. Scott, Portland, argued the cause for respondent James W. Foushee. With him on the brief were Jill Backes and Galton, Popick & Scott, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed.

BUTTLER, P. J.

This worker's compensation case presents the question whether, in order to establish an aggravation claim under ORS 656.273, it is necessary to prove a worsening of the underlying condition. The referee held that claimant had not shown a worsening of the underlying condition and upheld employer's denial of the claim. The Board reversed, holding that increased symptoms alone may constitute an aggravation, without a worsening of the underlying condition, and that claimant had shown such an aggravation. Employer seeks review, and we affirm.

Claimant suffered a back injury in 1980 while working for Consolidated Freightways, which on August 1, 1981, became self-insured. On September 23, 1981, claimant was found to be medically stationary, and soon thereafter he returned to his regular work. A determination order on November 2, 1981, awarded 10 percent permanent partial disability.

In April, 1982, while employed by Freightliner, claimant was given new job duties. Shortly thereafter he began to suffer pain and could not work, and he requested that his claim be reopened. Consolidated Freightways accepted

responsibility for medical treatment but would not reopen the claim. A hearing on the denial was postponed so that claimant could file a new injury claim against employer. He did, and it was denied.

The parties' dispute concerns whether the April, 1982, occurrence constituted a new injury, an aggravation or neither. There is evidence that claimant has suffered back pain since his injury in 1980. No specific event precipitated the increased severity of his symptoms in April, 1982. The evidence shows that the work he performed at his new job assignment was no more strenuous than his previous work. Dr. Rusch characterized claimant's current condition as an "aggravation" of his back condition. There is no evidence that any incident contributed independently to the cause of his increased disability, and we find that he has not suffered a new injury. *Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976).

The second inquiry is whether there is sufficient

evidence to show that claimant has suffered an aggravation of the 1980 compensable injury, so as to qualify for increased benefits under ORS 656.273, which requires that there be a "worsened condition." Consolidated Freightways maintains that there can be no aggravation without a worsening of the underlying condition, and the referee agreed.

The term "worsened condition" is used with reference to compensability under a variety of circumstances. In *Weller v. Union Carbide,* 288 Or 27, 602 P2d 259 (1979), it is used in connection with the compensability of a preexisting disease. There, the court held that, for the condition to be compensable, a claimant must show a worsening of the underlying condition as a result of his employment, not just a worsening of symptoms. *Weller* does not apply to an industrial injury claim. *Barrett v. D & H Drywall,* 300 Or 325, 709 P2d 1083 (1985), *on reconsideration* 300 Or 553, ___ P2d ___ (1986).

For an aggravation to exist, a claimant must already have established the compensability of the underlying condition. To establish an aggravation of that compensable condition, it is sufficient to show that the symptomatology of the condition has worsened so that the claimant is more disabled than at the time of the last arrangement of compensation. ORS 656.273; *see Smith v. SAIF,* 78 Or App 443, ___ P2d ___ (1986); *Ellis v. SAIF,* 67 Or App 107, 677 P2d 57 (1984); *Nelson v. SAIF,* 49 Or App 111, 634 P2d 245 (1980). It is not necessary to establish a worsening of the *underlying* compensable condition.[1]

Here, the record indicates that claimant has experienced new and more severe symptoms since the last arrangement of compensation and that, as a result, he is more disabled. His increased disability is a compensable aggravation.

Affirmed.

[1] A case holding to the contrary, *Scheidemantel v. SAIF,* 68 Or App 822, 683 P2d 1028, was withdrawn 70 Or App 552, 690 P2d 511 (1984).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of William J. Anderson, Claimant.

ANDERSON,
Petitioner,

v.

PUBLISHERS PAPER CO. et al,
Respondents.

(WCB 82-07774; CA A33788)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 18, 1985.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief were Daniel C. Dziuba and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Jerald P. Keene, Portland, argued the cause for respondents. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

Before Buttler, Presiding Judge, and Warren and Rossman Judges.

BUTTLER, P. J.

Reversed and remanded.

Warren, J., dissenting.

BUTTLER, P. J.

Claimant seeks review of an order of the Workers' Compensation Board which reversed the referee and held that claimant had not established good cause for failing to request a hearing within 60 days of the denial of his claim. ORS 656.319(1).[1]

The facts are generally undisputed, and we adopt the Board's findings:

> "* * * Claimant compensably injured his left thumb on January 7, 1981. The claim was accepted [by Publishers Paper], processed and closed by a Determination Order dated November 17, 1981 which granted no award for permanent disability. Shortly after the Determination Order, claimant traveled to Wyoming where he worked for about a month or two, first in the oil fields and then in a hotel. His hand continued to bother him while he worked in Wyoming. He did not file a claim against either of his Wyoming employers.

[1] ORS 656.319 provides, in part:

"(1) With respect to objection by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless:

"(a) A request for hearing is filed not later than the 60th day after the claimant was notified of the denial; or

"(b) The request is filed not later than the 180th day after notification of denial and the claimant establishes at a hearing that there was good cause for failure to file the request by the 60th day after notification of denial."

"Claimant returned to Oregon where he saw Dr. Button on April 2, 1982. Dr. Button had previously examined claimant twice at the insurer's request. Dr. Button reported to the insurer and verbally told claimant that claimant had experienced an overuse syndrome while working in Wyoming and that [the present problem relates more to his most recent employment rather than to his past work at Publishers Paper]. The insurer interpreted Dr. Button's report to be an aggravation claim [against Publishers Paper], and issued a denial on April 28, 1982.

"That denial contains the usual notice about the right to request a hearing. Claimant testified that he took no action after he received the denial because Dr. Button had told him that his problems were unrelated to his compensable Oregon injury. However, claimant also testified that his receipt of the denial prompted him to go to Dr. Lawton for assistance.

"On June 14, 1982 Dr. Lawton reported to the insurer that he believed that claimant's condition was an aggravation of his compensable Oregon injury. On June 24, 1982 Dr. Lawton reiterated his opinion that claimant's condition had worsened. The record contains no information about whether or to what extent Dr. Lawton expressed these thoughts to claimant.

"Claimant's request for hearing on the April 28 denial was filed on August 27, 1982, i.e., beyond the 60 day limit but within the additional time permitted upon a showing of good cause for delay beyond 60 days."

Button's letter to EBI reported conditions suggesting a possible need for treatment; therefore, it constituted an aggravation claim. ORS 656.273(3); *see Haret v. SAIF,* 72 Or App 668, 672, 697 P2d 201, *rev den* 299 Or 313 (1985).[2] Although somewhat ambiguous, it did not exclude Publishers' liability; it simply stated that another employer was involved. Publishers was bound to respond. ORS 656.273(b); ORS 656.262. It correctly treated the letter as an aggravation claim, which it denied.

The Board assumed, as claimant argues, that claimant did not file a request for hearing because he subjectively believed, on the basis of statements made by Button, that it was unlikely that he could prevail. The Board applied a rule that it had applied in an earlier decision: Claimant's subjective belief as to the non-compensability of his claim is not good cause for his failure to file a timely request for hearing.

In *Brown v. EBI Companies,* 289 Or 455, 616 P2d 457 (1980), the Workers' Compensation Board had decided that the claimant had not shown good cause for failing to request a hearing within 60 days after the denial of his claim, ORS 656.319(1)(b), because it believed that *Sekermestrovich v. SAIF,* 280 Or 723, 573 P2d 275 (1977), required that result. The court pointed out that in *Sekermestrovich* it had held that "good cause" as used in ORS 656.319(1)(b) means the same kind of "mistake, inadvertence, surprise or excusable neglect" that permits relief from a default judgment under *former* ORS 18.160 (*repealed by* Or Laws 1981, ch 898, § 53). It went on to hold that, given the court decisions under *former* ORS 18.160, it was at least within the range of the Board's discretion to

[2] We do not decide whether an insurer's consulting doctor's letter to the insurer saying that the insurer is not responsible would be an aggravation claim to which the insurer would be required to respond.

relieve a claimant from a default caused by the mistake or neglect that was claimed in *Brown*. Because a finding of good cause was not foreclosed by *Sekermestrovich*, as the Board had thought, the case was remanded to the Board to make its own judgment on the basis of *former* ORS 18.160 and the cases decided under it.

Since *Brown*, ORS 18.160 has been repealed and the material language it contained is included in ORCP 71B(1). The rule, however, authorizes relief from a judgment for "mistake, inadvertence, surprise, or excusable neglect," eliminating the requirement in *former* ORS 18.160 that the mistake be that of the moving party. Here, the referee concluded that claimant had established good cause, without referring to ORCP 71B(1) or cases decided under *former* ORS 18.160. In reversing the referee, the Board examined neither the rule nor the cases, as *Brown* requires that it do.[3] Instead, it applied a broadly formulated rule that it had adopted in a prior Board decision.

Accordingly, we must reverse and remand to the Board for reconsideration under the appropriate law. A decision about "good cause" is for the Board to make in the first instance. *Brown v. EBI Companies, supra.* We need not decide how we would review the Board's decision on that question, given the footnote in *Brown* on which employer relies. However, it is difficult to believe that the Supreme Court in *Brown* intended to say that, although our review under the Workers' Compensation Act is *de novo*, judicial review of whether good cause exists or not under ORS 656.319 is limited by the Administrative Procedures Act as interpreted in *McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979).[4] If

that is what the court meant, there may be other questions arising under the Workers' Compensation Act that are subject to that kind of limited review.

Reversed and remanded.

WARREN, J., dissenting.

The majority reads more into *Sekermestrovich v. SAIF*, 280 Or 723, 573 P2d 275 (1977), and *Brown v. EBI Companies*, 289 Or 455, 616 P2d 457 (1980), than is warranted.

[3] Whether the Supreme Court decided *Sekermestrovich v. SAIF, supra*, correctly may be an open question. Two judges dissented in that case, and three dissented in *Brown v. EBI Companies, supra*, on the ground that the court should not have applied *former* ORS 18.160 to Workers' Compensation Act cases.

[4] Employer contends that our scope of review is limited to whether the Board acted within the limits of the discretion delegated to it and that we may not disturb the Board's decision, unless it is unlawful in substance. *McPherson v. Employment Division, supra.* In so contending, it relies on a footnote in *Brown v. EBI Companies, supra*, 289 Or at 460 n 3:

> "One difference between ORS 18.160 and ORS 656.319(1)(b), not noted in *Sekermestrovich v. SAIF, supra*, is that ORS 18.160, wisely or not, states relief from default judgments as a matter of the trial court's 'discretion,' while 'good cause' under ORS 656.319(1)(b) is not a matter of 'discretion' but of agency judgment in the sense stated in *McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979)."

We are not certain what the court meant by that footnote, particularly in the light of its having stated that it was within the Board's range of discretion to relieve a claimant from a default under the facts of that case.

Sekermestrovich, according to *Brown,* established two principles: (1) "Good cause," as it is used in ORS 656.319, refers to the same kind of mistake, inadvertence, suprise or excusable neglect that permits relief from a default judgment under *former* ORS 18.160 (*repealed by* Or Laws 1981, ch 898, § 53), now ORCP 71B(1). (2) The personal negligence of a claimant's attorney is not, as a matter of law, good cause.

In *Brown,* the question was whether negligence in the chain of communications, having nothing to do with the attorney personally, is not good cause as a matter of law. The Board, citing *Sekermestrovich,* had held that it was not. The court stated, in referring to the cases construing *former* ORS 18.160, that *it is at least within the range of the Board's discretion* to relieve a claimant from a default caused by negligence of communication. The Board was not required to find, as a matter of law, that the facts did not constitute good cause. The court concluded by saying:

> "We do not hold in turn that on the facts of this case the claimant had 'good cause' for the delayed filing as a matter of law. We hold only that a finding of 'good cause' was not forclosed by our decision in *Sekermestrovich v. SAIF,* as the Board appears to have thought. *This judgment was for the referee and the Board to make in the first instance."* 289 Or at 460. (Emphasis supplied.)

The court did not say, as the majority would suggest, that the Board must decide in every case whether the facts would justify setting aside a judgment under *former* ORS 18.160. It

said only that a decision on good cause under the facts was within the Board's discretion. The Board was not, as a matter of law, required to decide the case one way or another. Our review of that exercise of discretion is governed by the standard stated in *McPherson v. Employment Division,* 285 Or 541, 591 P2d 1381 (1979). *See Brown v. EBI Companies, supra,* 289 Or at 460 n 3. The term "good cause" is a delegative one, and we should not disturb the Board's decision unless it is "unlawful in substance." *McPherson v. Employment Division, supra,* 285 Or at 557.

What the Board has done here is precisely what the court in *Brown* said it should do. There is no requirement that the Board articulate more than it did—that a claimant's subjective belief as to the validity of a claim is not good cause for the late filing of a hearing request.

I respectfully dissent.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Francis G. Shaw, Claimant.

SHAW,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION et al,
Respondents.

(WCB 83-04250; CA A34384)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 24, 1985.

Rick W. Roll, Tillamook, filed the brief for petitioner.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent State Accident Insurance Fund Corporation. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

No appearance for respondent Molded Fibreglass.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Reversed; referee's order reinstated.

WARDEN, J.

Claimant petitions for judicial review of an order of the Workers' Compensation Board reversing the referee's award of permanent total disability and finding claimant not entitled to an increased disability award. On *de novo* review, we reverse the Board and reinstate the referee's order.

Claimant injured his right knee by tripping over a hose at work on September 3, 1977. He has since undergone five operations on the knee and has received awards totalling 112.5 degrees for scheduled disability equal to 75 percent loss of the right leg. Weakness in the knee causes him to fall and restricts his standing, sitting, walking and driving. He is unable to crawl, squat or kneel. He testified that knee pain forces him to lie down at least once a day for several hours. Claimant's treating physician, Dr. Hazel, stated on August 30, 1979:

> "I think he has probably worked as hard at rehabilitating the knee as anyone that I have cared for. At the present time I think * * * that he will probably never return to his usual vigorous occupation of working in a fiberglass molding plant. He is in need of rehabilitation."

Claimant also has preexisting back and neck problems caused by two automobile accidents and a high school

football injury. He testified to back discomfort requiring him to lie down approximately twice a week, "snapping and popping" in his neck and numbness in his fingers. The Vocational Rehabilitation Division's supervising counselor, Scott, stated on July 24, 1982, that "claimant has extremely poor motor and finger skills to the extent that they suggest he will fail at any task which requires either fine manipulation or quick repetitive movements."

The probability of successful rehabilitation is lessened by claimant's lack of learning skills. He is unable to retain textbook information. A vocational evaluation on March 10, 1982, placed his reading, spelling and arithmetic skills at grade levels 5.1, 3.3 and 5.5, respectively. He suffers from dyslexia and organic brain dysfunction in the left hemisphere, where many verbal abilities are centered. He has serious memory deficits and difficulty reading words more than four letters long. On March 16, 1981, Barnes, of the

Counseling Center at Chemeketa Community College, administered a series of tests on referral from Scott. She reported: "Because of the weakness of both visual and auditory memory skills, learning to read or do anything else is going to be slow and difficult."

Requirements for stooping and kneeling prevented claimant from returning to his previous occupation of making fiberglass walls, and his skills at that occupation are nontransferable, because of the knee injury. In early 1982, he began vocational rehabilitation and attempted auto painting and drafting courses. His physical limitations prevented completion of the auto painting course; his mental and learning abilities were insufficient for the drafting course.

Dr. Castles, a psychologist, informed Scott on April 30, 1981, that claimant was a poor candidate for vocational rehabilitation, stating, "He should probably be awarded social security and allowed to go on with his life at the marginal level he appears to maintain. He is now doubly handicapped—intellectually and physically and his physical abilities were all he really had going for him." Scott concluded on July 24, 1982, that "when Mr. Shaw had both his body and his visual abilities whole, he was able to function. However, when his body was injured, he moved from being a marginal worker to a disabled worker."

The referee awarded permanent total disability. The Board reversed, holding that claimant is not entitled to permanent total disability because he failed to satisfy the work search requirements of ORS 656.206(3) and that he is not entitled to an increase in the award of scheduled disability for his right leg.

A claimant who is not totally incapacitated can be permanently and totally disabled because of a combination of medical and nonmedical factors which renders him unable to work at a gainful and suitable occupation. *Clark v. Boise Cascade Corp.*, 72 Or App 397, 399, 695 P2d 967 (1985). Nonmedical considerations include age, education, adaptability to nonphysical labor, mental capacity, emotional condition and the state of the labor market. *Welch v. Banister Pipeline*, 70 Or App 699, 701, 690 P2d 1080 (1984), *rev den* 298 Or 470 (1985). A claimant is statutorily required to make reasonable efforts to obtain regular gainful employment, ORS

656.206(3),[1] unless the attempt would be futile. *Welch v. Banister Pipeline, supra,* 70 Or App at 701.

Although claimant, at age 39, is relatively young, the evidence as a whole leads to the conclusion that a job search would be futile. He was educated through the ninth grade but tests show his learning to be at about the fourth or fifth grade level. His work experience is limited to manual labor occupations which are now unsuitable because of his physical limitations. Added to his lack of education and the fact that his work experience is limited to manual labor, claimant's lack of mental capacity persuades us that he is permanently totally disabled. His organic brain dysfunction makes it very difficult for him to learn and stands as a formidable barrier to his adaptation to nonphysical labor. The psychological and vocational testing evidence supports the conclusion that his inability to perform most physical labor has foreclosed any realistic possibility of employment.[2]

Given claimant's physical and mental limitations, his unsuccessful attempts at vocational rehabilitation constitute a reasonable attempt to obtain regular gainful employment. *See Wiley v. SAIF,* 77 Or App 486, 713 P2d 677 (1986); *Welch v. Banister Pipeline, supra.* He has demonstrated a willingness to work but has been unable to become successfully retrained. "[A] worker's physical impairment need not be complete, *i.e.,* the worker need not be a 'basket case,' if the injury has left him or her incapable of performing any services for which there exists a reasonably stable market." *Wilson v. Weyerhaeuser,* 30 Or App 403, 409, 567 P2d 567 (1977). As in *Wilson,* the evidence here demonstrates that the ability to perform physical labor has always been claimant's only

employable asset. Without it, his services have little or no marketable value.[3]

Reversed; referee's order reinstated.

[1] ORS 656.206(3) provides:

"The worker has the burden of proving permanent total disability status and must establish that the worker is willing to seek regular gainful employment and that the worker has made reasonable efforts to obtain such employment."

[2] Claimant's award can be adjusted if, through vocational rehabilitation, on-the-job training, or otherwise, he is no longer permanently incapacitated from regularly performing work at a gainful and suitable occupation. ORS 656.278; *Lohr v. SAIF,* 48 Or App 979, 985, 618 P2d 468 (1980). There is some evidence that claimant's best chance at rehabilitation would be through repetitive, on-the-job instruction. However, he is not *presently* employable in the general labor market, and we must decide whether claimant is permanently totally disabled on circumstances existing at the time of the decision. *Gettman v. SAIF,* 289 Or 609, 614, 616 P2d 473 (1980); *Clark v. Boise Cascade Corp., supra,* 72 Or App at 401.

[3] Respondents point to claimant's ability to sit or stand for two hours at a time and his minimal abilities to lift, carry and bend, as suggesting that he is not totally disabled. However, they have not suggested any type of work that he would be able to perform successfully, and we are convinced that he would be unable to sell his services on a regular basis in a hypothetically normal labor market.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Maxine P. Robinson, Claimant.

ROBINSON,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB 82-05121 and 81-10158; CA A34685)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 5, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief were Christopher D. Moore and Malagon & Associates, Eugene.

John A. Reuling, Jr., Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Salem.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Reversed; referee's order reinstated.

WARDEN, J.

This workers' compensation case is before us for the second time. In *Robinson v. SAIF,* 69 Or App 534, 686 P2d 1053, *rev den* 298 Or 238 (1984), we reversed the Board, finding that claimant had timely filed her claim. She petitions for judicial review of the Board's order on remand, reversing the referee's order and denying her occupational disease claim. The issue is whether her occupation caused a chemical sensitivity. On *de novo* review we find that claimant has satisfied her burden of proof. We reverse.

Claimant is 55 years old. She suffers from a hypersensitivity to certain chemicals: phenols, hydrocarbons and formaldehyde. The medical evidence establishes that a susceptible individual can become sensitized through exposure to a high concentration of those chemicals and, once sensitized, will suffer a reaction from much lower concentrations. Relevant to this appeal are the high concentrations of the chemicals found in mobile homes and carpeting and in the pressed wood, synthetics, waxes, oils and cleaners used in making and maintaining furniture. Furniture, carpeting and mobile homes go through a "gassing out" process whereby they release quantities of formaldehyde, phenol and hydrocarbons over a period of time. When the products are new, the amount of chemicals released is greatest.

Mobile homes apparently have a higher formalde-

hyde concentration than traditional homes. Claimant lived in a traditional home before 1971 and had new carpet installed in it in 1967. In 1971, she moved into a new mobile home furnished with new carpeting. She began working for Struther's Furniture (SAIF's insured) in March, 1975, in an often hot, poorly ventilated showroom with low ceilings in some areas. It had been remodeled with new carpeting and wallpaper. In October, 1975, the warehouse that supplied the store burned down. After that, new furniture was uncrated in the showroom each week. Claimant gradually began experiencing fatigue, headaches and dizziness. Her symptoms abated when she worked in another warehouse, which had high ceilings and large open doors and which was well ventilated. In the spring of 1977 she had new carpeting installed in her mobile home. She was laid off in December, 1978, and worked for Adamson's Furniture during the early part of 1979

but was forced to quit due to increasing fatigue, headaches and dizziness.

In 1980, Dr. Gambee, a clinical ecologist specializing in allergies, examined claimant, using a sublingual technique, and found a chemical sensitivity to phenol, hydrocarbon and formaldehyde. He stated:

> "Since the work environment that [claimant] described to me, consisting of synthetic fabrics, furniture using particle board, poorly ventilated, no air conditioning, and uncomfortably warm, would all contribute to the gassing out process, then I would think that her environment could well be one in which one would become sensitized to chemicals.
>
> "I do not feel that all of Mrs. Robinson's health problems are due to her work environment. There are other factors in her life and lifestyle that are deleterious to optimal health."

Gambee was unable to pinpoint whether claimant's problem was a result of, or just aggravated by, her work activity. Claimant testified that, after Gambee had identified the problems, she had obtained relief by avoiding exposure to synthetic materials. She had also experienced improvement after stopping work at Struther's.

Dr. Morgan, also a clinical ecologist specializing in allergies, examined claimant in June, 1981. He noted that claimant had found some relief from the sublingual antigens prescribed by Gambee. He stated,

> "[Claimant's] history is, I believe, indicative of a typical case of susceptibility to environmental chemical exposures * * *. [Her] history indicates a definite deterioration in her state of health after being employed in the furniture store for a period of time. Daily exposure to the fumes emanating from new items of furniture are quite capable of inducing this type of sensitivity in a susceptible individual."

Dr. Jacobson, an allergist, examined her in October, 1981. In his report, he critized sublingual provocative testing and treatment and concluded:

> "Therefore, I do not feel that the prior sublingual testing, diagnosis, and treatment of Mrs. Robinson is valid. In addition, I feel that there is a substantial question that her own environmental exposure to the 'allergens' (chemicals) isn't greater at home than it was at work. The patient has lived in a mobile home for ten years and had new carpets installed just

> prior to the onset of symptoms. It is well documented that mobile homes have a higher concentration for *[sic]* formaldehyde and a variety of other chemicals used in the resins, adhesives, carpets, finishes, paneling, and etc [*sic*] The patient also had new carpet in her home about five years ago. If chemicals from new carpets at her place of employment were responsible for her symptoms then why not also at home."

Jacobson testified that, although a 48-hour patch test for formaldehyde sensitivity exists, he did not administer it, because claimant's symptoms were not typical. He admitted, however, that symptoms vary. He believed that claimant's symptoms did not correlate with exposure and disagreed with Morgan's and Gambee's diagnoses, because there was no objective measurement of exposure at either claimant's home or workplace.

Morgan reported in October, 1982, that, after seeing claimant in September, 1982, his conclusions were the same as he had reported earlier. He stated that mobile homes probably vary in formaldehyde levels, depending on the manufacturer. He compared exposure from her mobile home and her workplace, asserting:

> "Moreover, there is a progressive outgassing which occurs as the mobile home ages. In the case of the furniture store, there is presumably a constant turnover of items, with new items being constantly brought in. This would presumably maintain a high constant level of textile chemical fumes in the air on an ongoing basis."

Morgan acknowledged the controversy surrounding the sublingual method but believed that the "overall available information tends to confirm sublingual testing as a valid procedure." He did not believe that the diagnosis rested solely on sublingual testing but stated that claimant's experiences and "the observations made relating her state of health to environmental conditions [were] much more impressive." Finally, he stated, "Based on all of the information available to me, I am still of the opinion that the exposure at Struther's Furniture Store is the *major contributing factor* to [claimant's] illness." (Emphasis supplied.) No doctor attributed claimant's sensitivity to employment at Adamson's. Gambee and Morgan found that that exposure simply caused a predictable exacerbation of symptoms.

The referee found Morgan and Gambee most persuasive. He noted that Jacobson had lost his objectivity. He found claimant's testimony to be credible and that it supported a determination that her level of exposure was extraordinary. He noted that "[e]ven Dr. Jacobson did not rebutt *[sic]* Dr. Morgan's conclusion that sensitivity can be induced by an extreme exposure." He concluded that claimant had sustained her burden of proof and had shown that exposure on the job at Struther's was the major contributing cause of her disease. He also concluded that, although her symptoms did not become so severe that they required to quit work before her employment with Adamson's, there was no proof that that exposure caused or increased her sensitivity and that, therefore, the claim against Adamson's failed.

The Board reversed, stating that claimant had failed to sustain her burden of proof in the claim against Struthers. It noted that Gambee voiced no opinion on the major cause question; Morgan indicated only that claimant's work *could* contribute to her sensitivity;[1] and Jacobson enumerated several other significant, potentially causative, factors and opined that it was impossible to determine if the occupational exposure was the major cause of her disability.

Claimant must prove she has an occupational disease by a preponderance of the evidence. ORS 656.802(1)(a) defines "occupational disease" 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."

The Supreme Court has interpreted that definition to preclude a claim if the "off-the-job condition or exposure is a condition substantially the same as that on the job *when viewed as a cause* of the particular kind of disease claimed as an 'occupational disease.' " *James v. SAIF,* 290 Or 343, 350, 624 P2d 565 (1981). (Emphasis in original.)

The referee correctly concluded that the last injurious exposure rule does not apply to this case. Gambee and

Morgan found that claimant had already become sensitized before begining work at Adamson's. Their view was that that employment only caused a predictable exacerbation of symptoms. This case is analogous to *Bracke v. Baza'r,* 293 Or 239, 649 P2d 1330 (1982). The "meat wrappers' asthma" involved in *Bracke* is characterized by symptoms that come and go, depending upon conditions of exposure, but once one is sensitized, the sensitization is permanent. The same is true in this case. Accordingly, *Bracke* instructs that Adamson's, the last employer, is not liable, because the employment "did not contribute to the cause of, aggravate, or exacerbate the underlying disease * * *. Rather, claimant's subsequent employment only activated the symptoms of a pre-existing disease." 293 Or at 250.

The difficulty in this case is that claimant has become sensitized to chemicals that are present throughout the environment. This type of disease can be analogized to mental illness caused by a type of stress found in both the workplace and at home. In those cases we "look either to the degree or to the quantum of stress on the job as compared to that off the job to resolve the issue of compensability." *Dethlefs v. Hyster Co.,* 295 Or 298, 308, 667 P2d 487 (1983). Similarly, in this case we must analyze the degree or quantum of exposure to the offending chemicals on and off the job to determine compensability. *When viewed as a cause of her sensitivity,* we find that claimant's exposure off the job was not substantially the same as her exposure on the job. Exposure to high concentrations of chemicals can sensitize a susceptible individual, and the evidence supports a finding that the concentrations were significantly higher on the job.

[1] The Board apparently overlooked Morgan's statement in his report of October, 1982, that the exposure at Struther's was the "major contributing factor" to claimant's illness.

Claimant periodically had new carpeting installed in her home without any problems. She lived in a mobile home for approximately six years before the onset of symptoms. As a mobile home ages and "outgasses," it expels less and less quantities of chemicals. In contrast, at claimant's workplace, new furniture was continually received and uncrated in the showroom where she worked. Morgan's conclusion logically follows that "[t]his would presumably maintain a high constant level of textile chemical fumes in the air on an ongoing basis." In addition, the warmth and lack of ventilation at Struther's accelerated the gassing out process, releasing still more chemicals. She experienced symptoms when working in

the showroom but found relief when working in the well ventilated warehouse or resting at home. These factors support the conclusion that work was the major contributing cause of the disease.

This case presents conflicting medical evidence from three doctors who specialize in allergies.[2] All agree that claimant's symptoms are not due to a true allergy. Morgan and Gambee, the treating physicians, diagnosed a chemical sensitivity. Although Gambee was unable to conclude whether claimant's "medical problem [is] a result of, or [is] just aggravated by," her employment, Morgan stated that her employment is the "major contributing factor" of her illness. Jacobson acknowledges claimant's "symptom complex," but his diagnosis is "etiology undetermined." He disparaged the technique used and the diagnoses and treatment prescribed by Gambee and Morgan. However, we note that their treatment accorded claimant some relief. In the absence of countervailing considerations, we accord more weight to the opinions of the treating physicians. *Weiland v. SAIF*, 64 Or App 810, 814, 669 P2d 1163 (1983).[3]

To recover, a claimant must prove that the conditions at work were the major contributing cause of the disability. *SAIF v. Gygi*, 55 Or App 570, 574, 639 P2d 655, *rev den* 292 Or 825 (1982). Although the specific chemical cause of claimant's sensitivity is not conclusively established, she has shown by a preponderance of the evidence that the major contributing cause was her work environment at Struthers, which exposed her to concentrations of chemicals much greater than she was ordinarily exposed to outside the course of employment. *See Reining v. Georgia-Pacific Corp.*, 67 Or App 124, 676 P2d 926 (1984).

Reversed; referee's order reinstated

[2] Claimant was examined by other physicians as well, but they were unable to diagnose definitively the cause of her symptoms. We have reviewed all of the medical evidence but concentrate on the opinions of Morgan, Gambee and Jacobson because of their specialties and the fact that they addressed the chemical sensitivity issue.

[3] There is some controversy as to the efficacy of Gambee's and Morgan's testing and treatment methods, but claimant is not required to establish medical certainty. *Hutcheson v. Weyerhaeuser*, 288 Or 51, 55, 602 P2d 268 (1979).

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Anna M. Adsitt, Claimant.

ADSITT,
Petitioner,

v.

CLAIRMONT WATER DISTRICT et al,
Respondents.

(WCB 84-02227; CA A35718)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 31, 1986.

James L. Francesconi, Portland, argued the cause for petitioner. With him on the brief was Francesconi & Cash, P.C., Portland.

Gregory K. Zeuthen, Oregon City, argued the cause and filed the brief for respondent Clairmont Water District.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent SAIF Corporation. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Joseph, Chief Judge, and Van Hoomissen and Young, Judges.

JOSEPH, C. J.

Reversed and remanded for acceptance of claim.

JOSEPH, C. J.

Claimant seeks review of a Workers' Compensation Board order which denied her on the job stress claim. On *de novo* review we find that claimant suffered an exacerbation of her pre-existing mental disease and that work stress was the major contributing cause of the exacerbation. We therefore reverse and remand for acceptance of the claim.

Claimant, who is in her early fifties, has a long history of alcohol abuse accompanying or caused by depression and low self-esteem, all superimposed on a hysterical personality. She has frequent mood shifts and cries easily. At the time in question she was also going through a stressful menopause. She married for the second time when she was 36 years old and has a daughter and a son by that marriage. The marital relationship has had its ups and downs, with the downs exceeding the ups. Her family life has been a source of stress, which contributed to her continued drinking; several times she considered divorce. Her son had behavior problems in school, and in late 1980 he began several months of therapy with Dr. Cooley, a psychologist. The therapy involved the entire family relationship, and it apparently led to temporary improvement. The therapy was renewed for a short period in March and April, 1983.

In late 1979, claimant began working for employer as the billing clerk in a three-person office. She enjoyed the work, particularly the public contact. Evaluations of her job performance were generally favorable, with some references to poor work organization and emotional instability. The other people in the office were Johnson, employer's superintendent, and Browning, the bookkeeper. When Johnson had a stroke in the summer of 1982, Browning was appointed office manager. She had previously trained claimant and had always been the lead person in the office. She acted as though she had supervisory authority and generally kept check on whether claimant was doing her job, partly because some of Browning's work was based on claimant's work. On the other hand, employer's board, when it adopted a job description for Browning's position, deleted from her responsibilities supervision of the billing clerk. It did not change the job description when it made Browning office manager.

Claimant did not believe that Browning could legitimately supervise her and resented her attempts to do so. The organizational situation was sufficiently ambiguous that claimant had a reasonable basis for her belief. However, Johnson consulted Browning when he made his annual evaluation of claimant's work performance and otherwise relied on her to deal with claimant. Johnson disliked the personnel part of his job, and he occasionally asked Browning to deliver criticisms of claimant which he wished to make or to participate in meetings where he and claimant discussed particular problems about her work.

Claimant believed that Browning harassed her after becoming office manager by constant criticism of her work and appearance, that Browning had no right to supervise her and that Johnson did not act to straighten things out. As a result of Browning's actions, claimant felt herself under increasing stress, and her drinking and other problems became worse than they had been at any time since she took the job, ultimately leading to her resignation in August, 1983. Employer argues that Browning and Johnson acted appropriately under employer's rules in giving claimant only the gentle criticism which was absolutely necessary to the adequate performance of her job and that claimant's problems are the result of her pre-existing disease and of non-work stress. Although the referee, and to a lesser extent the parties, believed that the case turned on whether the events of which claimant complains really occurred, we do not see any real conflict in the evidence on that point. Rather, the disagreements in the testimony are the result of differences of perception of the meaning of events which all witnesses agree actually did happen. The crucial question is whether claimant's interpretations of these events, and the effects of those interpretations in producing her mental problems, make her condition in August, 1983, compensable.

Claimant and Browning brought different needs and expectations to their work, and those differences are the source of most of the problems that claimant experienced. Claimant lives an isolated life in a rural area with her husband and children. She does not have many friends and, during most of the time she worked for employer, her home life gave her little emotional support. She saw her job as a social outlet and a co-worker as someone with whom she ought to be able to

discuss her problems. She enjoyed talking with customers when they came to pay their bills; even talking with those whose accounts were delinquent gave her an opportunity to share and possibly to help solve their problems. In that way the job provided the supportive human contact that she strongly desired. Browning, on the other hand, emphasized the work to be done. She is considerably younger than claimant, and she saw the job as a career rather than as being in any sense a social occasion. She wanted a pleasant relationship with her co-workers, but primarily she wanted an opportunity to do her work and expected them to do theirs efficiently and competently. Claimant's constant talk and frequent personal phone calls upset her, and she had little tolerance either for claimant's delays in doing the paperwork which was necessary for Browning's own work or for the general disorganization of claimant's work.

The differences in attitude and expectations between claimant and Browning are crucial to their different perceptions of what happened. We find that all of the things about which claimant testified actually occurred.[1] Browning criticized claimant for failing to post payments promptly, went through her desk searching for items which Browning needed in order to make required reports, left adhesive tabs on certain papers instructing claimant what to do with them and asking why she had not processed them previously, criticized her for dirty hair and was unresponsive to her attempts at conversation. In one instance which particularly upset claimant, Browning urged claimant to take an afternoon off and then called her at home about her failure to "back up" several weeks' of computer work. When claimant finally complained to Johnson about Browning's actions, Johnson told her that Browning had acted properly and refused to consider any changes.

Although employer presents a reasonable explanation for each of Browning's and Johnson's actions and suggests that most of the problems arose from claimant's failure to do her own work, those explanations are irrelevant. Claimant's complaints are based on events that actually occurred. Although her belief that they represented a campaign of

harassment and rejection may have been a misperception of the purpose behind them, she did not misperceive the events themselves. Those events, viewed objectively, were capable of producing stress. An employe subject to frequent criticism of herself and her work in a relatively short period could experience stress, especially when all previous criticisms had been readily resolved.[2] Thus two of the criteria for compensability of a stress claim are met.

In order for claimant's claim to be compensable she must also have suffered a mental disability, and the real

[1] The specific incidents we now discuss all occurred during the months immediately before claimant stopped working for employer.

[2] This case is distinguished from *Leary v. Pacific Northwest Bell*, 67 Or App 766, 680 P2d 5 (1984), because the claimant in *Leary* misperceived the actual events. In contrast, claimant in this case correctly perceived the events, although she may not have correctly interpreted their meaning.

events must have been the major contributing cause of that disability. *McGarrah v. SAIF,* 296 Or 145, 675 P2d 159 (1983); *Elwood v. SAIF,* 67 Or App 134, 676 P2d 922 (1984), *rev and remanded on other grounds,* 298 Or 429, 693 P2d 641, *on remand* 72 Or App 771, 697 P2d 567, *rev den* 299 Or 443 (1985). The described events did not cause claimant's underlying mental illness and alcoholism. However, an exacerbation of an underlying condition caused by work activities is itself a compensable occupational disease if it reflects a worsening of the condition and involves an increase in pain which produces disability or requires medical services. *Weller v. Union Carbide,* 288 Or 27, 35, 602 P2d 259 (1979). The exacerbation need not be a *permanent* worsening of the condition, so long as it is a worsening. *Wheeler v. Boise Cascade,* 298 Or 452, 457, 693 P2d 632 (1985). We find that claimant suffered an exacerbation of her underlying condition immediately before she left work and that that exacerbation was a worsening of her condition.

Johnson and Browning both thought that claimant was in worse condition in the months before she quit, and the medical evidence leads to the same conclusion. Her family physician, who had decided against prescribing anti-depressants in the fall of 1982 because he was worried about how they would interact with alcohol, began prescribing them in May, 1983. Claimant continued on the medication until she quit. Dr. Turco, SAIF's psychiatrist, noted that her alcoholism had increased during the employment and believed that she

had suffered a situational reaction. Cooley and claimant's physician also believed that she was in a particularly difficult state at that time. Although there may be a distinction in a physical disease between an increase in symptoms and a worsening of the underlying condition, *but see Weller v. Union Carbide, supra,* 288 Or at 30 n 2, nothing in the record suggests a physical component to claimant's problems. We can find no basis for a distinction between the symptoms of a mental disorder and the disorder itself; if the symptoms are worse, the disorder has necessarily worsened, at least until the symptoms abate. The exacerbation of claimant's condition therefore constituted a worsening of her disease.

It is clear that the work conditions were the major contributing cause of claimant's worsening. Her family situation was much less tense than it had previously been and was not a significant cause of stress. When claimant described her problems, she concentrated almost exclusively on her difficulties with Browning and what she saw as a continuous barrage of unfair criticism of her job performance. Claimant's physician, Cooley and Turco agreed that those difficulties were the major contributing cause of her worsened condition. Turco points out that a person without claimant's underlying problems might have performed adequately and thus not have been subjected to criticism or might have responded appropriately to any criticism which she did receive, but that is also irrelevant. It does not matter who is responsible for the work conditions or whether claimant's perceptions of those conditions is the same as an objective outside observer's. The conditions could produce stress and did produce a worsening of claimant's condition. *See Petersen v. SAIF,* 78 Or App 167, 714 P2d 1108 (1986); *SAIF v. Shilling,* 66 Or App 600, 675 P2d

1081 (1984); *SAIF v. Gygi*, 55 Or App 570, 576-77, 639 P2d 655, *rev den* 292 Or 825 (1982). The exacerbation of claimant's condition meets the *McGarrah* and *Weller* tests.

SAIF argues, nonetheless, that the claim should not be compensable, because what happened to claimant was not in the scope of her employment. It points out that ORS 656.802(1)(a) defines an occupational disease as one "which arises out of and *in the scope* of the employment * * *," but a compensable injury is one which arises "out of and *in the course* of employment * * *." ORS 656.005(8)(a). (Emphasis

supplied.) It asserts that the scope of employment is a narrower concept than the course of employment and that what claimant experienced was not in the scope of her employment. We need not decide what distinctions may exist between these definitions, for what happened to claimant was in the scope of her employment. Criticism of an employe's job performance is a normal part of employment and is within its scope. Browning's other actions which contributed to claimant's condition related to the criticism she gave and were thus also within the scope of claimant's employment. The exacerbation of claimant's underlying depression and alcoholism was a compensable occupational disease.

Reversed and remanded for acceptance of the claim.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Lewis Yock, Claimant.

GLOBE MACHINE,
Petitioner,

v.

YOCK,
Respondent.

(WCB 84-00449; CA A36515)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 31, 1986.

Jas. Adams, Portland, argued the cause for petitioner. With him on the brief was Mitchell, Lang & Smith, Portland.

Willard E. Merkel, Portland, argued the cause for respondent. With him on the brief was Galton, Popick & Scott, Portland.

Before Joseph, Chief Judge, and Van Hoomissen and Young, Judges.

JOSEPH, C. J.

Affirmed.

JOSEPH, C. J.

Globe Machine seeks review of a Workers' Compensation Board order which found that claimant's disabling psychological breakdown and alcohol abuse are the results of stress that he encountered while working for Globe and one of its subsidiaries. We affirm.

Claimant, who was born in 1930, was an engineer in the wood products industry for almost 30 years. In 1978, he left his employer of 20 years to become the part-owner of a corporation which operated a lumber mill in California. The recession began soon afterwards, and the mill was one of the early casualties; the corporation went bankrupt in 1979. After completing the liquidation, claimant went to work for Globe as an engineer, soon moving into a supervisory position. In July, 1981, Globe purchased Hildebrand North America, a manufacturer of dry kilns, and installed claimant as its president. He continued to report to Globe's president. Claimant soon discovered that Hildebrand's financial condition was almost hopeless; the company filed for reorganization in bankruptcy in September, 1981, and was eventually liquidated. Claimant remained as president through the liquidation and in that position had to deal with the pressures of laying off employes, cutting the pay of those who remained, fending off creditors, many of whom were his personal friends, and struggling to find some way for the company to survive. He worked 12- to 14-hour days, often seven days a week, for months at a time. He believed, with some reason, that a number of the Hildebrand employes were more loyal to the company's customers than to the company. He also found the uncertainties of managing a business to be significantly more difficult than had been his previous experience in managing engineering projects.[1]

Claimant had been a heavy drinker for many years before 1979; his drinking had affected his health. In 1972, he broke a rib during a drunken fight at a poker game. Beginning in 1974, he had a series of hospitalizations for pancreatitis, which his physicians related to his heavy consumption of

whiskey.[2] They noted liver problems which seemed to decrease when he stopped drinking; one physician suspected cirrhosis. Over the years, claimant would stop drinking for a period and then begin again, with renewed drinking eventually resulting in a hospitalization.

In September, 1979, claimant was diagnosed as diabetic. His physician told him that he could not drink any more, and he stopped. According to his testimony, he did not drink again until July, 1982, a year after he became president of Hildebrand. For reasons we discuss in more detail below, we find that he did stop drinking in 1979, but that he began again in the fall of 1981, several months after taking over Hildebrand. His mental state declined steadily thereafter, and his physical condition with it, partly because he did not take

[1] Claimant testified that he did not experience similar stress with the failure of the mill he partly owned, because that failure was the result of the recession, not of anything he or his employes did or did not do. He therefore did not feel personally responsible for the failure.

adequate care of his diabetes. At the same time, his marriage failed, because he was totally absorbed with his work and lost touch with his family. In early 1982, when the IRS charged claimant, as the responsible officer of Hildebrand, with a large liability for the company's unpaid withholding taxes, his wife left him and did not renew contact for a year.

When claimant became president of Hildebrand, Globe's president thought that he was capable of handling the job. Globe's corporate counsel described claimant at that time as vigorous and self-assured, with a "can-do" attitude. A Hildebrand employe described him as a dominant figure, immediately taking charge of the company. According to that employe, claimant originally drank only coffee and iced tea at lunch, but after several months he began consuming alcohol instead. He thereafter began losing weight, grew despondent and had a complete change of attitude. Globe's corporate counsel described him at the end of 1981 as no longer well-groomed, nervous and unable to concentrate. Toward the end of his employment with Globe, in the summer of 1983, the corporate counsel no longer believed that claimant was fully in touch with reality.

Claimant did not recover from the decline which began in the fall of 1981. Globe eventually became aware of his

drinking and ultimately insisted that he enter an alcoholic rehabilitation program. He did so in November, 1982, but he stayed only long enough to get his diabetes temporarily under control. After the Hildebrand liquidation was complete, claimant returned to working with Globe directly in a position with far less responsibility than previously. His condition did not improve and probably worsened. He left work in August, 1983, and has not worked since. Before he left, Globe's president prepared a workers' compensation claim form which claimant signed. The form listed hypertension caused by job stress as the condition for which he sought compensation.[3]

Claimant is clearly suffering from a complex of conditions; employer recognizes his problem but denies that it is related to his work. Dr. Parvaresh, Globe's psychiatrist, testified that claimant's major problem is organic brain syndrome, brought on by years of alcohol abuse. According to Parvaresh, claimant's alcoholism is probably physically based, the result of hereditary enzyme deficiencies. Like most alcoholics, claimant lies about his alcoholism or does not recognize it, with the result, in claimant's case, that his alcoholism, diabetes and hypertension have created a vicious circle which is taking him steadily downhill. Parvaresh does not believe that claimant's work for Hildebrand caused his disease;

[2] Claimant testified that he believed the cause of his pancreatitis to be an injury to his pancreas when he broke his rib. There is no medical evidence supporting that theory.

[3] Claimant had hypertension when he first went to work for Globe. Although the employment may have exacerbated it, partly because he did not take his medication regularly, it appears to be the least of his problems. At the hearing Globe moved to limit claimant's evidence to hypertension. The referee denied the motion in his order, and Globe did not raise the issue before the Board. In this court it argues that claimant should be limited to hypertension or, at least, to the issues raised in the hearing. By not renewing its motion before the Board, it failed to preserve it for our review. *See Thomas v. SAIF*, 64 Or App 193, 667 P2d 565 (1983). It also has not shown any prejudice from the referee's action or that it was unable to present its full case at the hearing.

rather, it simply placed him in a position where his preexisting deficiencies became obvious. Because of claimant's failure to recognize his problems with alcohol, and because alcoholics typically lie about their consumption, Parvaresh does not believe that claimant stopped drinking in 1979. His opinion of the cause of claimant's condition was partially based on his conclusion that claimant had always continued heavy drinking without any significant breaks.

Claimant clearly does not recognize—or at least does not admit—the seriousness of his problem with alcohol even

now. His historical statements about consumption must be treated with caution. However, other evidence convinces us, as it convinced the Board, that claimant did not drink, or did not drink excessively, from September, 1979, until late 1981. His wife and daughter, both of whom lived with him during that time, did not see any signs of drinking, and they were quite familiar with the signs. Claimant normally did most of his drinking in the evening, starting with a drink or two "to unwind," but he did not unwind in that fashion during that period. Those around him believed that he was in control of himself when he took over Hildebrand; several months later he seemed different, both to those who had known him previously and to those who had recently met him. That was precisely the time, according to his wife, when he again began having a few drinks in the evening. He went to a hospital on April 27, 1982, complaining of upper gastric pain, and told a physician that he had been drinking for six or seven months. That timing is also consistent with the changes others observed in claimant.

The only evidence which does not tie claimant's renewed drinking to his job is Parvaresh's opinion that he suffers from organic brain syndrome and that he must have been drinking all day, because all alcoholics lie about their drinking. Parvaresh did not see claimant until his symptoms were well established, and he did not administer any tests which would detect the presence of that syndrome. He based his diagnosis in part on claimant's wide-based gait, which is an indication of difficulty in foot positioning and walking. Other medical evidence attributes that gait to diabetic neuritis, which has produced almost total numbness in claimant's feet. In short, the preponderance of the evidence is that claimant's current problems are the result of depression, anxiety and renewed drinking which were caused by the stress he experienced at Hildebrand.[4]

The evidence on the nature of alcoholism in this record is limited and contradictory. Dr. Pidgeon, claimant's

psychiatric expert, considers alcohol abuse to be the result of an underlying psychiatric disorder rather than a separate diagnosis; Parvaresh believes it to be a disease in itself with a

[4] There is no evidence of significant non-job-related stress or other causation. Although claimant's marriage broke up in early 1982, that was itself a product of claimant's heavy workload and of his attempt to cope with his depression and stress by drinking. The marriage was in reasonably good condition before claimant began working for Hildebrand.

significant physical basis.[5] Whichever opinion is correct, if either, claimant's work caused a worsening of his condition. If his alcohol abuse is a symptom of underlying depression and anxiety, the work stress produced or exacerbated those problems. If alcoholism is in itself a disease, he lost control of the disease because of work stress. Stress is therefore the major cause of his psychological decline and the resulting physical effects[6] which amount to a compensable condition.

A psychological condition may be an occupational disease without being caused by a claimant's work; it is sufficient if the work is the major contributing cause of an aggravation of the disease. ORS 656.802(1)(a); *James v. SAIF,* 290 Or 343, 350, 614 P2d 565 (1981); *SAIF v. Gygi,* 55 Or App 570, 573-74, 639 P2d 655, *rev den* 292 Or 825 (1982). A claimant may prevail by showing that the "work precipitated or worsened the condition." *Maddox v. SAIF,* 59 Or App 508, 510, 651 P2d 180 (1982). The real conditions that claimant faced on the job were objectively capable of producing and did produce stress and were a major contributing cause of his mental disorder. *McGarrah v. SAIF,* 296 Or 145, 675 P2d 159 (1983); *Elwood v. SAIF,* 67 Or App 134, 137, 676 P2d 922 (1984), *rev and remanded on other grounds,* 298 Or 429, 693 P2d 641, *on remand,* 72 Or App 771, 697 P2d 567, *rev den* 299 Or 443 (1985). When claimant began work, his problems were under control; as a result of the work they went out of control. Claimant's loss of control over his alcoholism together with

his depression and anxiety constituted a compensable worsening of his underlying disorder.

Affirmed.

[5] This is another case in which counsel have given us little assistance in resolving a scientific dispute. Neither psychiatrist was asked to describe research studies supporting his opinion or to comment on studies supporting a different conclusion. Indeed, the experts mention no studies, and counsel made no other attempt to probe the foundations of their opposing views. We are left with conclusory and contradictory statements from two experts, with no certain way for us to evaluate either. *See SAIF v. Carter,* 73 Or App 416, 419 n 1, 698 P2d 1037 (1985). Fortunately, we can decide this case without having to choose between the competing scientific views.

[6] As claimant points out, alcoholism is only part of a complex problem which the stress produced. Pidgeon testified that, in layman's terms, claimant suffered a nervous breakdown; he has never recovered. Claimant's difficulties include alcohol abuse, depression, anxiety, diabetic neuritis and a general loss of control over his diabetes and his hypertension. The work stress produced depression and anxiety, which led to renewed alcohol abuse, which led to loss of control over the other conditions, and the loss of control over his diabetes contributed to the diabetic neuritis.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

COOK, dba Gresham Health Center
Nurse Practitioner Clinic,
Petitioner,

v.

WORKERS' COMPENSATION DEPARTMENT,
Respondent.

(5-1984; CA A33602)

Judicial Review from Workers' Compensation Department.

On petitioner's petition for reconsideration filed October 10, 1985. Former opinion filed August 7, 1985, 74 Or App 722, 704 P2d 554.

Vernon Cook, Gresham, for petition.

Theodore C. Falk and Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland, filed a brief amicus curiae for Nurse Practitioners Special Interest Group.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

RICHARDSON, P. J.

Reconsideration allowed; petition for judicial review dismissed as moot.

RICHARDSON, P. J.

Petitioner filed a petition for review of our decision, which we treat as a petition for reconsideration. ORAP 10.10. We allow reconsideration and dismiss the original petition for judicial review as moot.

Petitioner filed what she denominated as a "Petition for Review of an Order Adopting a Rule." It in effect is a challenge to a rule of the Workers' Compensation Department pursuant to ORS 183.400(1). We issued a decision that the case was "affirmed without opinion." 74 Or App 722, 704 P2d 554 (1985).

The rule, OAR 436-69-301, was challenged as not being properly adopted, not within the statutory authority of the department and unconstitutional. In general, it relates to who may provide medical services to injured workers and receive reimbursement under the Workers' Compensation Act. Although the entire rule was included in the challenge, in reality petitioner objects only to the subsection relating to nurse practitioners.

Subsequent to our decision, the Workers' Compensation Department substantially amended the rule, effective

January 1, 1986.[1] A significant amendment of a rule challenged under ORS 183.400(1) while a decision is pending essentially moots the challenge. *Amicus* agrees that some of the initial objections to the rule are removed by the amended rule but argues that there are other objections that the amendment does resolve. However, *amicus* is not the petitioner; if petitioner wishes to seek review of the amended rule, she may do so.

Petitioner and *amicus* also contend that we must issue a written opinion in most cases and especially cases brought under ORS 183.400. We agree with the point only as to ORS 138.400 proceedings and not for the reasons advanced in the petition for reconsideration or the brief of *amicus*. A challenge to an administrative rule filed in this court under ORS 183.400(1) is in essence an original proceeding and our determination as to the validity of the rule should, in most instances, be by a written decision. We cannot simply affirm

without opinion, because there is no decision of a lower tribunal to affirm. A sufficient written decision in this case would have been a simple statement that the rule is upheld. However, because the rule challenged has been amended, our decision is that the petition is moot and must be dismissed.

Reconsideration allowed; petition for judicial review dismissed as moot.

[1] The rule has since been renumbered OAR 436-10-050.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

SUGURA et al,
Appellants,
v.
McLAUGHLIN,
Respondent.

(A8311-06834; CA A35735)

Appeal from Circuit Court, Multnomah County.

Vincent A. Deguc, Judge Pro Tempore.

Argued and submitted December 9, 1985.

Alan M. Scott, Portland, argued the cause for appellants. With him on the brief was Galton, Popick & Scott, Portland.

Thomas W. Brown, Portland, argued the cause for respondent. With him on the brief was Cosgrave, Kester, Crowe, Gidley & Lagesen, Portland.

Before Richardson, Presiding Judge, Joseph, Chief Judge, and Warden, Judge.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

This is an action for damage arising out of personal injuries suffered by plaintiff Michael Sugura and the resulting loss of consortium by his wife, plaintiff Ida May Sugura.[1] Plaintiff is an employe of the gas company. He was injured by defendant's negligent operation of a backhoe while performing services for Northwest Natural Gas Company. The issue is whether defendant is an independent contractor, as the company nominally designated him, or an employe of the company and thereby exempt from this action under the Workers' Compensation Law. *See* ORS 656.018(3). The trial court granted defendant's motion for summary judgment, and plaintiffs appeal. Plaintiffs argue that "the undisputed facts establish that [d]efendant was an independent contractor," and defendant argues that "[t]he undisputed evidence established as a matter of law that defendant was a fellow employee of plaintiff." Neither party suggests that there was a factual question, rendering summary judgment inappropriate.

In *Woody v. Waibel,* 276 Or 189, 554 P2d 492 (1976), the issue was whether the plaintiff was an independent contractor or was an employe of the defendant and was therefore foreclosed by the Workers' Compensation Law from maintaining the action. The court said:

> "Chief Judge Schwab's concurrence to the Court of Appeals opinion in this case stated that 'whether plaintiff is an employe or an independent contractor is for the trier of fact to decide.' There appears to be Oregon authority supporting this proposition. *See, Butts v. State Ind. Acc. Com[m].,* 193 Or 417, 239 P2d 238 (1951); and *Wallowa Valley Stages v. [Oregonian],* 235 Or 594, 386 P2d 430 (1963) (vicarious liability). It is true that there may be questions concerning facts surrounding the arrangement between the parties which would be relevant in determining control. In this sense, the question is one for the trier of fact. However, where there is no dispute as to what the arrangement is, the question of employee or independent contractor status is one of law for the court. To the extent that the *Butts* and *Oregonian* cases can be interpreted as recognizing a contrary principle, they must be repudiated." 276 Or at 192-93, n 3.

Compare Robinson v. Omark Industries, 46 Or App 263, 611 P2d 665 (1980), *rev dismissed* 291 Or 5 (1981).

The parties do not disagree about the "facts surrounding the arrangement" between defendant and the company. Their disagreement is over whether, given those facts, the legal nature of the arrangement is an independent contractor or an employment relationship. *Woody v. Waibel, supra,* makes it clear that, notwithstanding its evidentiary and inferential determinants, that question is one for the court. We therefore conclude that the trial court correctly determined that the case was appropriate for summary judgment. We also agree that, balancing the incidents of the relationship, defendant was the company's employe. Plaintiffs' action is therefore barred by ORS 656.018(3).

Affirmed.

[1] The singular term "plaintiff" in the rest of this opinion refers to Michael Sugura.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Pauline L. Travis, Claimant.

TRAVIS,
Petitioner,

v.

LIBERTY MUTUAL INSURANCE et al,
Respondents.

(WCB 82-03177; CA A35209)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 6, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief were Malagon & Associates, Eugene.

Allan M. Muir, Portland, argued the cause for respondents. With him on the brief were Delbert J. Brenneman and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Reversed and remanded for award of attorney fees; otherwise affirmed.

WARREN, J.

Claimant seeks review of a Workers' Compensation Board order which affirmed the referee's determination of the extent of her disability and held that the insurer could recover an overpayment of temporary total disability. She also seeks attorney fees for prevailing before the Board on the insurer's cross-petition. On *de novo* review, we affirm the Board's decision concerning the extent of disability and the recovery of the overpayment and reverse as to attorney fees.

Claimant asked the Board to award permanent total disability or additional permanent partial disability; the insurer cross-petitioned, seeking a reduction in permanent partial disability. The Board affirmed the referee's order. It declined, however, to award attorney fees to claimant for prevailing on the cross-petition. We conclude that the insurer's cross-petition was a request for review "initiated by an employer or insurer," as provided by ORS 656.382(2),[1] and that claimant was entitled to attorney fees under that section.

[1] ORS 656.382(2) provides:

"If a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer or insurer, and the referee, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney's fee in an amount set by the referee, board or the court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal."

Claimant seeks a reversal of the portion of the Board's order which allowed the insurer to offset overpayments of temporary total disability against future payments of permanent partial disability. Claimant's claim was initially closed by a determination order dated October 28, 1977, and reopened and reclosed by a determination order on September 25, 1980. That determination order awarded additional temporary total disability from March 14 to August 22, 1980. The insurer inadvertently paid temporary total disability for August 22 to September 25, 1980. Claimant filed a request for hearing on the September 25, 1980, determination order, which she later withdrew. In the meantime, the claim was reopened and reclosed by a determination order on November 27, 1981, which awarded temporary total disability from

January 1 to October 23, 1981. A second overpayment resulted from the insurer's inadvertent payment of temporary total disability for October 23 to November 27, 1981. The insurer did not seek a hearing on either of the determination orders; however, at the hearing sought by claimant on the second determination order, it asked to recover the overpayments. The referee allowed the recovery of both overpayments, pursuant to OAR 436-54-320.

Neither the amount nor the existence of the overpayments is contested. Claimant only asserts that the insurer was not entitled to recover the 1980 overpayment, because, by the time of the hearing, the determination order of September 25, 1980, had become final and had not been challenged by the insurer. She contends that the right of an insurer to recover an overpayment is subject to the one year period for seeking a hearing on a determination order. ORS 656.268(6). We disagree.

The only section dealing specifically with the offset of overpayments of temporary total disability is ORS 656.268(4).[2] As we stated in *Forney v. Western States Plywood*, 66 Or App 155, 672 P2d 1376 (1983), that section describes pre-determination order offsets; it does not deal with the offset of overpayments discovered after a determination order has become final. In *Forney*, we implicitly decided that, in that circumstance, the insurer may still recover an overpayment by offsetting it against future compensation after obtaining the approval of a referee or the Board. That was done here. As claimant concedes, the insurer did not discover the overpayment until more than one year after the determination order was issued.[3] It was not restricted by ORS 656.268(4) to seeking an offset of the overpayment within the time allowed for seeking review of the determination order.

Reversed and remanded for an award of attorney fees; otherwise affirmed.

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[2] ORS 656.268(4) provides, in part:

> "Any determination under this subsection may include necessary adjustments in compensation paid or payable prior to the determination, including disallowance of permanent disability payments prematurely made, crediting temporary disability payments against permanent disability awards and payment of temporary disability payments which were payable but not paid."

[3] Although the suggestion is made, claimant does not actually contend that the insurer waived its right to collect the overpayment because it unreasonably delayed raising the issue. *See Forney v. Western States Plywood, supra*, 66 Or App at 160. Additionally, there has been no showing that the delay was unreasonable.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Jim D. Shipley, Claimant.

SHIPLEY,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB TP-84013; CA A34822)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 30, 1985.

Marla McGeorge, Portland, argued the cause for petitioner. On the brief was Allen T. Murphy, Jr., Portland.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent. On the brief were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., and Donna Parton Garaventa, Assistant Attorney General, Salem.

Before Richardson, Presiding Judge, Joseph, Chief Judge, and Warden, Judge.

JOSEPH, C. J.

Affirmed.

JOSEPH, C. J.

Plaintiff seeks review of a Workers' Compensation Board order which held that his recovery of a judgment against an insurance company, arising out of an earlier judgment against its insured for injuring plaintiff, was subject to a workers' compensation third-party lien under ORS 656.593(1).

Plaintiff's compensable injury occurred in 1978, while he was employed as a jailer. He was moving an unconscious, intoxicated person in the drunk tank when the person opened his eyes and hit the plaintiff in the throat, injuring him. The injury was covered by SAIF. Plaintiff sued the person for negligence, and the jury awarded him $98,000. The person's insurance carrier, St. Paul Fire and Marine, refused payment on the ground that the striking was intentional, not negligent. Plaintiff then filed an action against the insurer on the policy, and a jury awarded him $120,000, the amount of the original judgment plus interest.

Plaintiff's counsel then advised him that the third-party lien statute under which SAIF claimed a right to part of the proceeds applies only to an action for the negligence or intentional wrong of a third person, not to an action on an insurance policy. Plaintiff informed SAIF that he believed that it did not have a lien on the funds. SAIF requested Board

review, and the Board held that SAIF has a lien and allocated the proceeds in accordance with the statute.

ORS 656.578 provides, in part:

> "If a worker receives a compensable injury due to *the negligence or wrong of a third person* * * * entitling the worker * * * to seek a remedy against such third person, such worker * * * shall elect whether to recover damages from such * * * third person." (Emphasis supplied.)

ORS 656.593 provides, in part:

> "(1) If the worker * * * elect[s] to recover damages from the employer or third person * * * the proceeds of any damages recovered * * * by the worker * * * *shall be subject to a lien* of the paying agency for its share of the proceeds as set forth in this section * * *." (Emphasis supplied.)

Plaintiff argues that the lien can only arise out of an action for the "negligence or wrong of a third person" and not out of an

action by the beneficiary of an insurance contract. We disagree.

Plaintiff elected to seek recovery against the third party, and he successfully obtained an award of damages for the negligently inflicted injury. Only because the third party's insurer denied coverage did plaintiff have to initiate an action to recover the amount of the judgment. That action was ancillary to the action against the insured, because, without the judgment against the insured, no cause of action against the insurer could have existed. Plaintiff's ultimate recovery of damages arose out of the negligent conduct of the third party, and the proceeds are properly subject to a lien by SAIF.

Plaintiff also argues that the Board did not have jurisdiction to issue an order resolving the conflict over the distribution of the proceeds. SAIF argues that, under ORS 656.593(3),[1] the Board has the authority to resolve any conflict as to what may be a just and proper distribution. That provision only applies to proceeds recovered through a settlement, not a judgment. However, ORS 656.593(1)(d) states that any conflict as to the amount which the paying agency may retain from a damage recovery shall be resolved by the Board. The Board in this case did have authority to distribute the proceeds according to the statutory formula and to resolve any conflicts over the amount the paying agency receives.

Plaintiff argues, finally, that he should retain more than one-third of the proceeds for his attorney fees. ORS 656.593(1)(a) states:

> "Costs and attorney fees incurred shall be paid, such attorney fees *in no event to exceed* the advisory schedule of fees established by the board for such actions." (Emphasis supplied.)

The Board established a fee schedule, effective February 1, 1979, that placed a maximum limit on attorney fees, in third-

[1] ORS 656.593(3) provides:

> "A claimant may settle any third party case with the approval of the paying agency, in which event the paying agency is authorized to accept such a share of the proceeds as may be just and proper and the worker or the beneficiaries of the worker shall receive the amount to which the worker would be entitled for a recovery under subsections (1) and (2) of this section. Any conflict as to what may be a just and proper distribution shall be resolved by the board."

party claims, of 33-1/3 percent of the gross recovery. OAR 438-47-095. Plaintiff's attorney received the maximum allowable award of attorney fees under the rule in effect at the time of recovery.[2] The Board correctly applied the statute in distributing the proceeds.

Affirmed.

[2] In *Wattenbarger v. Boise Cascade Corp.*, 301 Or 12, ___ P2d ___ (1986), the Supreme Court held that the advisory schedule of fees set by the Workers' Compensation Board is not binding on appellate courts. In the statute applicable to this case, the legislature specifically said that "attorney fees [are] in no event to exceed the advisory schedule." ORS 656.593(1)(a).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Robert W. Brown, Claimant.

BROWN,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB 83-10907; CA 34238)

Judicial Review from Worker's Compensation Board.

Argued and submitted September 5, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief was Malagon & Associates, Eugene.

John A. Reuling, Jr., Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

NEWMAN, J.

Affirmed.

NEWMAN, J.

Claimant petitions for review of an order of the Workers' Compensation Board that reversed the referee and reinstated SAIF's denial of his claim for medical services. We affirm.

During January, 1983, claimant worked at a demolition project in downtown Portland as an electrician. Over the course of two weeks, he was exposed to asbestos dust. Shortly thereafter, he was laid off. Claimant saw a television program which described the dangers of exposure to asbestos, and he

became concerned that his exposure might have damaged his health. He filed a claim in September, 1983, and then was examined by a number of physicians. The consensus among the doctors was that he was presently healthy but that his exposure might someday result in mesothelioma or another asbestos-related disability. They advised him to quit smoking and submit to regular chest x-rays.

SAIF denied the claim, asserting that claimant was not exposed to asbestos during the course of work activities and that he did not have any asbestos-related lung disease. The referee set aside the denial, found that claimant had been exposed to asbestos and ruled that work-related exposure to asbestos constitutes a non-disabling compensable injury:

> "The exposure at this time is an injury in and of itself within the meaning of the law in that it was an occurrence which reasonably required medical services. It also, of course, may form the basis of an occupational disease claim sometime in the future.
>
> "* * * * *
>
> "I find that it was reasonable under the circumstances for this claimant to obtain medical services, i.e., evaluation, base line testing and medical advice regarding the consequences of his exposure. I find that the medical services are covered under ORS 656.245."

Although agreeing that claimant had been exposed to asbestos dust, the Board disagreed with the referee's conclusion that exposure could constitute an "injury" and reinstated the denial:

> "Claimant seems to be arguing that he has been injured because he requires medical services. From our review of this

> scant record we conclude that what medical services claimant has sought were sought *solely* to learn what his physical condition was. Claimant learned from his visits with the physicians that his condition was excellent. He also learned that he should stop smoking cigarettes. None of the medical services claimant has sought were [*sic*] *required.* Claimant has no condition that requires treatment." (Emphasis in original.)

ORS 656.245 states that "for every compensable injury, the insurer * * * shall cause to be provided medical services for conditions resulting from the injury * * *." "Compensable injury" is defined by ORS 656.005(8)(a) as

> "an accidental injury * * * arising out of and in the course of employment requiring medical services or resulting in disability or death * * *.

A "nondisabling compensable injury" is defined by ORS 656.005(8)(c) "as any injury which requires medical services only." Under ORS 656.245, a "compensable injury" is a prerequisite for compensation.[1] Generally, an occupational disease is treated like an "injury."[2] Claimant concedes that he

[1] Neither the Workers' Compensation Law, ORS 656.001 to ORS 656.794, nor the Occupational Disease Law, ORS 656.802 to ORS 656.824, defines the word "injury." *See* ORS 656.005.

[2] An occupational disease is:

> "Any disease or infection which arises out of and in the scope of employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein." ORS 656.802(1)(a).

Except as otherwise provided in ORS 656.802 to ORS 656.824, an occupational disease is considered an injury. ORS 656.804; ORS 656.807(5).

has as yet suffered no occupational disease as a result of his exposure to asbestos. He did not offer evidence that the exposure resulted in any change in his physical condition. Rather, he argues that "in cases of potentially toxic or poisonous exposure, it is the exposure to the dangerous substance that is an 'injury'."

In *Johnson v. SAIF*, 78 Or App 143, 714 P2d 1098 (1986), a claimant who was exposed to asbestos in 1941, before the enactment of the occupational disease law, Or Laws 1943, ch 442, sought compensation for his subsequent asbestos-related disease. We discussed the word "injury" in ORS 656.202(2), which states:

> "Except as otherwise provided by law, payment of benefits

> for injuries or deaths under ORS 656.001 to 656.794 shall be continued as authorized, and in the amounts provided for, by the law in force at the time the *injury* giving rise to the right to compensation occurred." (Emphasis supplied.)

We held that, in order to avoid an implicit retroactive application of the statute, "for purposes of ORS 656.202(2), the 'injury' resulting from an occupational disease occurs on the date of last exposure," rather than on the date of disability. 78 Or App at 146.

Johnson, however, is not controlling here. Although we equated "injury" with exposure for the purpose of determining the applicability of the statute which was enacted after the exposure but before the disability, our decision was explicitly limited to ORS 656.202(2) and cannot be read to hold that, as a general rule, an occupational disease occurs at the time of the exposure which causes the disease. That reading is inconsistent with the wording of the occupational disease law. *See, for example,* ORS 656.807(1) and (4). Our decision in *Johnson* reflected our concern that using the date of disability to determine the law governing the claim would effect a retroactive application of the occupational disease law in the absence of an expression of legislative intent to make the law retroactive. 78 Or App at 148. *Johnson* does not offer any support for claimant's argument that exposure constitutes an "injury" independently of the subsequent development of an occupational disease. The claimant in *Johnson* developed an occupational disease, which constituted an injury within the meaning of ORS 656.005(8). See n 2, *supra.* He was not claiming compensation for the exposure apart from the disease. The issue there was not *whether* an "injury" had occurred, but *when* the "injury" occurred.

We hold that claimant's exposure to asbestos was not by itself an "injury." Although the legislature enacted ORS 656.005(8)(c) to provide compensation for non-disabling injuries, we do not believe that it intended to provide compensation if the claimant does not prove that he has suffered actual physical or mental harm. *See* 1B Larson, *Workmen's Compensation Law* 7-575, § 42.10 (1986). Claimant's medical evidence showed that his exposure might result in a disease in the future, but he offered no evidence of any existing condition that would presently constitute an "injury" within the meaning of ORS 656.005(8).

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Georgia L. Pierson, Claimant.

PIERSON,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB 82-09450; CA A33907)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 5, 1985.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief were Diane L. Craine, John S. Stone and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

NEWMAN, J.

Reversed; referee's order reinstated.

NEWMAN, J.

Claimant petitions for review of an order of the Workers' Compensation Board which reversed the referee's order and denied her claim for aggravation of her compensable arm injury. We reverse the Board and reinstate the referee's order.

On April 22, 1977, claimant suffered a compensable injury to her right shoulder and elbow while employed at Bill's Tavern in Portland. After moving to Coos Bay, she was examined and treated by Dr. Smith, an orthopedist, who concluded that claimant had a post-traumatic lateral epicondylitis of the right elbow. When conservative treatment failed, Smith performed a surgical release of the medial epicondylar area of her right elbow. In May and June, 1978, claimant was evaluated at the Callahan Center. Her discharge report indicated that, in addition to her shoulder and elbow problems, she "over-focus[ed] on physical symptomatology" and tended "to gain considerable 'secondary gain' from her injury." On October 9, 1978, Smith examined claimant, diagnosed "continued disability following strain of right shoulder and elbow" and stated that her condition was stationary. A February 27, 1979, stipulated order granted her compensation for 35 percent loss of her right arm and 20 percent unscheduled disability for her right shoulder injury.

Claimant returned to Smith in 1981. He reported:

> "[Claimant's] examination shows considerably more functional loss today than when I examined her last in October, 1978. * * * It is hard to know how much of her shoulder motion loss, loss of elbow extension, and weakness of grip is functional and how much has a true organic basis."

Smith referred her to Dr. Bernstein, who performed a neurologic examination. Bernstein concluded that her condition was "most suggestive of marked functional overlay" and that "her prognosis * * * for any significant symptomatic functional recovery is nil."

In July, 1982, claimant consulted Dr. Whitney, an orthopedist. He noted that her symptoms were "indicative of a

psychogenic origin."[1] In a letter to SAIF, he also stated that claimant suffered from "marked functional overlay," although he found it "impossible to respond with any medical certainty" to the question of the relationship of her present symptoms to her compensable injury.

Dr. Martin, a psychiatrist, examined claimant on March 6, 1983. He initially stated that her symptoms were probably in part psychogenic and added:

> "It would be my opinion that [claimant] most likely will have problems associated with depression and anxiety prior to the injury and that these were possibly aggravated by that injury."

When claimant's counsel sought clarification, Martin responded:

> "That sentence was worded incorrectly and should read it would be my opinion that [claimant] most likely did have problems associated with depression and anxiety prior to the injury and that these were probably aggravated by that injury."

Claimant requested that her claim be reopened as an aggravation, ORS 656.273, and SAIF denied the claim. She sought a hearing, and the referee reversed.

> "As I view it, the *weight* of the evidence indicates that subsequent to her award of permanent disability in February, 1979 the claimant began to experience increased functionally disabling pain in her right shoulder and arm; that this increased pain is probably psychological in origin; that the psychologically based pain is probably at least materially related to the 1977 compensable injury." (Emphasis in original.)

SAIF requested review, and the Board reinstated the denial, stating merely:

> "Claimant is required to prove by a preponderance of the persuasive evidence that her condition has worsened, and that such a worsening is due to her 1977 injury. At best, the evidentiary scales are evenly balanced; therefore, we conclude that claimant has failed to sustain her burden of proof."

---

[1] Whitney prescribed medication, because he was unable to rule out an organic basis for claimant's symptoms. SAIF initially denied the claim for Whitney's services, but the referee and Board found them compensable under ORS 656.245(1). SAIF has not cross-petitioned from that holding.

Claimant's aggravation claim is governed by ORS 656.273(1), which 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."

To establish an aggravation of her previous compensable injury, claimant must show, by a preponderance of the evidence, that the symptomatology of her condition has worsened to an extent that she is more disabled than she was at the time of the last arrangement of compensation. *Consolidated Freightways v. Foushee,* 78 Or App 509, ___ P2d ___ (1986); *see Barrett v. D & H Drywall,* 300 Or 325, 709 P2d 1083 (1985); *on reconsideration* 300 Or 553, 715 P2d 90 (1986).

On *de novo* review, we hold that claimant has met her burden. She and her husband testified at the hearing that she was more disabled then than she was at the time of her initial award. The referee apparently believed their testimony, and the Board did not say that it disbelieved it. Moreover, Smith, who treated the original injury, stated that claimant was suffering from "considerably more functional loss" in 1981. In fact, the evidence is undisputed that the symptomatology associated with claimant's compensable 1977 injury has worsened since the time of the original award and that claimant is more disabled than she was then.

SAIF argues that any worsening of claimant's condition is a result of functional overlay and that "functional overlay cannot of itself trigger a right to compensation." That argument, however, is not supported by the cases. An aggravation caused by a functional overlay is compensable, *Childers v. SAIF,* 72 Or App 765, 697 P2d 564 (1985); *Colbert v. SAIF,* 54 Or App 763, 635 P2d 1363 (1981), even if there is no psychogenic component in the original injury. *Scheidemantel v. SAIF,* 70 Or App 552, 690 Or App 511 (1984). "It is not necessary to establish a worsening of an *underlying* compensable condition to prove an aggravation." *Consolidated Freightways v. Foushee, supra,* 78 Or App at ___. (Emphasis in original.) It is sufficient that claimant proved that the symptomatology of her condition has worsened to the extent that she is more disabled.

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
George E. Johnson, Claimant.

JOHNSON,
Petitioner,

v.

ARGONAUT INSURANCE COMPANY et al,
Respondents.

(82-06854; CA A36179)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 16, 1985.

Philip F. Schuster, II, Portland, argued the cause and filed the brief for petitioner.

Richard Wm. Davis, Portland, argued the cause for respondents. With him on the brief was Lindsay, Hart, Neil & Weigler, Portland.

Before Richardson, Presiding Judge, Joseph, Chief Judge, and Warden, Judge.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

The issue in this workers' compensation case is whether claimant has proven an aggravation of his compensable low back injury. *See* ORS 656.273(1). The Workers' Compensation Board found that claimant was not credible and therefore reversed the referee's order, which had held that claimant had proved his claim. We affirm.

Although we agree with the Board that claimant's credibility is suspect, it is not so weak that it completely undermines his claim. However, even assuming that claimant is credible, he has failed to prove his claim.

To establish an aggravation claim, a claimant must prove by a preponderance of the evidence a worsening of his condition since the last arrangement of compensation and a relationship between that worsening and his compensable injury. *Hoke v. Libby, McNeil & Libby,* 73 Or App 44, 46, 697 P2d 993 (1985). There is no objective evidence that claimant's underlying back condition has worsened, but he has suffered an increase in pain. He need not prove a worsening of his underlying condition to prove his claim, *Consolidated Freightways v. Foushee,* 78 Or App 509, ___ P2d ___ (1986), but, in order for his increased pain to constitute an aggravation, he must prove that it has made him less able to work than he was at the time of the last arrangement of compensation. *Consolidated Freightways v. Foushee, supra; Smith v. SAIF,* 78 Or App 443, ___ P2d ___ (1986); *Miller v. SAIF,* 78 Or App 158, 714 P2d 1105 (1986); *McElmurry v. Roseburg School District,* 77 Or App 673, 714 P2d 264 (1986). On *de novo* review, we conclude that claimant has not proved that he is more disabled as a result of his pain.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
William E. Karr, Claimant.

KARR,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION et al,
Respondents.

(WCB 84-07920; CA A36 329)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 22, 1986.

Edward J. Harri, Albany, argued the cause for petitioner. On the brief were Richard T. Kropp and Emmons, Kyle, Kropp, Kryger & Alexander, P.C., Albany.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed.

BUTTLER, P. J.

Claimant seeks review of a Workers' Compensation Board order affirming the referee's decision that he was not entitled to temporary total disability after his retirement.

Claimant injured his back on the job in July, 1980, while working for the Linn County Road Department. He underwent a long period of treatment and tried unsuccessfully many times to return to work. In October, 1982, the county asked claimant, then age 61, if he had plans to retire, and he indicated that he did not. In June, 1983, the county advised him that it had no work for him because of his physical limitations.

In July, 1983, Dr. Erkkila reported that claimant was medically stationary but that, because of the extent of his limitations, he could do no heavy work. On July 12, 1983, a determination order awarded claimant time loss to June 3, 1983, and 40 percent permanent partial disability. That order was affirmed by a referee and is not in issue. On August 8, 1983, claimant applied for Social Security disability and retirement benefits, and, sometime between August 23, 1983, and October 18, 1983, he applied for early retirement benefits under PERS. Disability benefits were denied, but Social Security and PERS retirement benefits were granted and were paid retroactively to July and August, 1983, respectively. The county terminated his employment on September 9, 1983.

On August 23, 1983, claimant was examined by a doctor, who recommended surgery, which was performed on February 27, 1984. SAIF reopened the claim, effective February 27, 1984, but has not paid temporary disability benefits since the claim was closed in July, 1983. Claimant contends that he is entitled to those benefits from and after August 23, 1983, and requested a hearing when SAIF refused to pay them. The referee concluded, relying on *Cutright v. Weyerhaeuser Co.*, 299 Or 290, 702 P2d 403 (1985), and *Stiennon v. SAIF*, 68 Or App 735, 683 P2d 556, *rev den* 298 Or 238 (1984), that claimant was not entitled to temporary total disability payments, because he had voluntarily retired. The Board agreed.

Claimant asserts that he is entitled to time loss, because his retirement was not voluntary in that it was necessitated by his physical condition. Whatever the reason,

claimant has withdrawn from the work force. Temporary total disability is awarded for lost wages, *see* ORS 656.210(1), and a person who has withdrawn from the work force has no lost wages. *Cutright v. Weyerhaeuser Co., supra,* 299 Or at 302. After his retirement, claimant was not entitled to temporary total disability payments.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Patricia M. Knupp, Claimant.

KNUPP,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION et al,
Respondents.

(WCB 82-05092; CA A34440)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 20, 1985.

Stanley Fields, Salem, argued the cause for petitioner. With him on the briefs were Sharon Stevens and Michael B. Dye, Salem.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Affirmed.

WARDEN, J.

Claimant petitions for judicial review of a Workers' Compensation Board order denying her claim for aggravation of a compensable 1974 injury. We affirm.

Claimant was working as a flagger on a highway construction project in 1974 when she was struck by a car. SAIF accepted the claim for injuries to her knees and low back. The injury left her with an abnormal gait. In late December, 1981, her right knee buckled, and she fell, injuring her right shoulder and neck. On February 1, 1982, Dr. Warner, a chiropractor who saw claimant in late January, sent a letter to SAIF diagnosing her condition as chronic lumbo-sacral strain. SAIF accepted the aggravation claim and paid temporary total disability benefits and medical bills. On April 26, 1982, a thoracic outlet syndrome was diagnosed by Dr. Becker, and on May 5, 1982, Dr. Gaiser submitted to SAIF a diagnosis of "cervico thoracic sprain" and "thoracic outlet syndrome." Gaiser noted "undetermined" as to whether the injury was work related. On May 14, claimant had surgery for thoracic outlet syndrome. On June 4, 1982, SAIF issued a partial denial of responsibility for the thoracic outlet syndrome. Claimant sought review.

Although claimant was represented by counsel until a few weeks before the hearing, she represented herself at the May, 1983, hearing. The referee found that the claim was not compensable. Claimant then sought review by the Board, which remanded the case to the referee for determination of whether SAIF's acceptance of the aggravation claim included acceptance of the claim for the thoracic outlet syndrome. If it did, SAIF would have been precluded by *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1983), from later issuing a denial.

The scope of the remand was limited to the *Bauman* issue. At the remand hearing, claimant was represented by counsel. SAIF submitted medical exhibits on the issue of whether it had accepted the claim. Claimant had had the exhibits at the time of her first hearing, but she had not submitted them. The referee admitted the exhibits for the limited purpose of the remand. The referee found that, after SAIF received a medical report from Gaiser, SAIF had tried to contact him on three occasions. On May 13, someone from Gaiser's office had called and left the message, "Dr. feels condition is related." On May 14, SAIF told the hospital that it would not authorize the operation. On June 1, SAIF received an opinion from its neurological consultant that the condition was not work related. The denial followed. The referee found no wrongful denial under *Bauman,* and claimant did not seek review.

Instead, claimant moved the Board for a further remand for the receipt of the medical exhibits on the issue of causation of the thoracic outlet syndrome. The Board declined. On review, claimant refers to those exhibits to support her arguments that the condition was related to her compensable 1974 injury. In its brief, SAIF moved to strike the references to and arguments based on the exhibits. Claimant replied that the exhibits have become part of the record which the court must consider under ORS 656.298(6), which provides:

"The review by the Court of Appeals shall be on the entire record forwarded by the board. The court may remand the case to the referee for further evidence taking, correction or other necessary action. However, the court may hear additional evidence concerning disability that was not obtainable at the time of the hearing. The court may affirm, reverse, modify or supplement the order appealed from, and make such disposition of the case as the court determines to be appropriate."

Claimant argues that "the statute does not restrict the court's consideration of exhibits that were accepted for limited purposes at hearing." She is not correct. The scope of review of an order was considered by this court in *Mansfield v. Caplener Bros.*, 3 Or App 448, 474 P2d 785 (1970). At that time review of an order was in the circuit court under *former* ORS 656.298(6).[1] We held:

"If the system contemplated by [ORS 656.298(6)]—*de novo* review on the record—is to have any meaning, it is

that there be a specific time as of which issues are to be determined. The Workmen's Compensation Law contemplates that it be the time of hearing. ORS 656.295(3) and (5)." 3 Or App at 452.

In 1977, the legislature changed review from the circuit court to the Court of Appeals but did not alter the scope of review. Our *de novo* review of a Board order is limited to the record before the Board, except for "evidence concerning disability that was not obtainable at the time of the hearing." Here the issue is whether the condition is related to the compensable injury. The exhibits had been generated before the hearing and were in claimant's possession. They were not only obtainable, they had been obtained, but they were not made a part of the record. The Board found that the case had not been improperly developed, ORS 656.295(5), and refused to consider the exhibits. Therefore, the scope of our review on the issue of causation does not include the exhibits that were admitted on remand on the *Bauman* issue.[2]

In order to prove her aggravation claim, claimant must prove both that the 1974 injury caused the 1981 fall, and that the fall was a material contributing cause of her thoracic outlet condition.[3] On *de novo* review we agree with the referee and the Board that claimant failed to prove that the thoracic outlet syndrome was caused by the fall.

Affirmed.

[1] *Former* ORS 656.298(6) provided:

"The circuit court review shall be by a judge, without a jury, on the entire record forwarded by the board. The judge may remand the case to the hearing officer for further evidence taking, correction or other necessary action. However, the judge may hear additional evidence concerning disability that was not obtainable at the time of the hearing. The judge may affirm, reverse, modify or supplement the order appealed from, and make such disposition of the case as the judge determines to be appropriate."

[2] This case does not have any bearing on our consideration of evidence improperly excluded by the referee or Board.

[3] Relying on *Stone v. SAIF*, 294 Or 442, 656 P2d 940 (1983), claimant has argued that the only issue is whether her fall resulted from the 1974 injury, because SAIF conceded that the thoracic outlet syndrome was caused by the fall and that, because of the concession, the referee decided an issue which was improperly before him. We disagree. Although the attorney for SAIF inartfully stated the issues, he did not concede an issue, as was done in *Stone*. Furthermore, the parties here, again unlike in *Stone*, conducted the hearing as though both the cause of the fall and the cause of the condition were in dispute.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
T. L. Allie, Claimant.

ALLIE,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION et al,
Respondents.

(WCB 83-07475; CA A35500)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 16, 1985.

George W. Sohl, Medford, argued the cause and filed the brief for petitioner.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents. On the brief were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Donna Parton Garaventa, Assistant Attorney General, Salem.

Before Richardson, Presiding Judge, Joseph, Chief Judge, and Warden, Judge.

WARDEN, J.

Affirmed.

WARDEN, J.

In this workers' compensation case the issue is the extent to which claimant's disability is related to his compensable injury. A determination order, which was affirmed by a referee and by the Workers' Compensation Board, awarded compensation for 40 percent unscheduled permanent partial disability. Claimant asserts that he is permanently and totally disabled as a result of his injury. We affirm.

Claimant is a dump truck driver. On August 24, 1981, he sustained a compensable injury to his neck and lower back. He initially sought chiropractic treatment with Dr. Bamforth, who diagnosed the condition as a cervical sprain. On September 11, 1981, he was examined by Dr. Weinman for low back pain. Weinman's report indicates that, although claimant had complained of neck pain after the injury, it had largely disappeared by the time of the September 11 examination.

Claimant was examined on December 14, 1981, by Dr. Peterson, an orthopedic surgeon, for both low back and neck pains. Peterson also diagnosed the condition as a cervical sprain. At that time the major complaint involved lumbar pain with some decreased cervical range. Peterson then referred claimant to Dr. Campagna, a neurological surgeon, who exam-

ined him on March 8, 1982. Campagna diagnosed degenerative cervical disc disease and concluded that claimant was suffering from a post-traumatic aggravation of cervical spondylosis and a lumbar sprain, secondary to the August, 1981, industrial accident. He performed a cervical laminectomy to reduce nerve root compression on March 24, 1982. His surgical notes indicate that he found a "considerable amount of cervical spondylosis," a degenerative arthritic condition. Claimant continued to suffer neck, left shoulder and left hand pain after the laminectomy.

Examinations by Dr. Johnson and, at SAIF's request, three physicians from Orthopedic Consultants confirmed the presence of cervical spondylosis. Both Johnson and Orthopaedic Consultants indicated that further treatment could not improve the condition. The May 5, 1983, Orthopaedic Consultants report stated that claimant's condition should be considered stationary. Campagna reported on

September 22, 1983, that claimant's neck condition was stationary and that no further treatment was indicated. Campagna concluded that claimant suffered moderate impairment of his neck as a result of the August, 1981, accident. A determination order declared claimant stationary as of June 14, 1983.

The preponderance of the medical evidence indicates that claimant is permanently and totally disabled. The issue is whether his current cervical condition, which is a major element of his disability, is related to the compensable 1981 industrial accident.[1] He has the burden of proving by a preponderance of the evidence that his current disabling symptoms were brought on by the compensable injury. *Barrett v. D & H Drywall*, 300 Or 325, 709 P2d 1083 (1985). This case involves expert analysis, rather than expert external observation. Therefore, we do not give special credit to the evidence from treating physicians as opposed to other doctors. *Hammons v. Perini*, 43 Or App 299, 602 P2d 1094 (1979).

Claimant relies in part on the diagnostic reports of Campagna. They amount to conclusory statements that claimant had suffered moderate neck impairment from the accident and that he suffered "post-traumatic aggravation of cervical spondylosis," but they offer no explanation of the pathology of the alleged traumatic aggravation of the spondylosis. Dr. Buonocore testified that he was claimant's family doctor and had been treating him over the years for a variety of ailments unrelated to the injury. He assisted Campagna in performing the laminectomy. He testified that cervical spondylosis occurs naturally as a degenerative disease. He agreed that claimant's spondylosis probably pre-existed his industrial injury but that the injury caused the condition to become symptomatic. Buonocore believed that claimant's current disability is related to the injury, apparently because he believes that the extensiveness of claimant's spondylosis is

[1] SAIF's expert witness, Tennyson, a neurological consultant, believes that Campagna's cervical laminectomy surgery was unrelated to claimant's industrial injury. The referee found that SAIF had already accepted the claim for the surgery and that, pursuant to *Bauman v. SAIF*, 295 Or 788, 670 P2d 1027 (1983), it could not later deny responsibility. Therefore, the only issue remaining is whether claimant's post-surgical condition is related to the industrial injury.

not consistent with the natural progression of the disease and, therefore, must be related to the industrial injury.

Claimant also submitted Peterson's deposition. Peterson inferred a relationship between claimant's current symptoms and his injury from the chronology of events. Claimant had never suffered any lumbar or cervical pain before his injury but suffered from both after the accident.[2] As we noted in *Bradshaw v. SAIF,* 69 Or App 587, 589, 682 P2d 165 (1984), "we have always been hesitant to infer causation from chronological sequence." In *Bradshaw,* the claimant prevailed because of the very close connection between the injury and the condition and "because of the careful elimination of all alternative causes." 69 Or App at 590. In *Edwards v. SAIF,* 30 Or App 21, 566 P2d 189, *rev den* 279 Or 301 (1977), involving a complex medical problem, we refused to rely on a "natural inference" based on the timing and location of the condition, when the medical evidence did not support such an inference. *See Volk v. Birdseye Division,* 16 Or App 349, 518 P2d 672, *rev den* (1974). The referee did not find Peterson's opinion relating claimant's disability to his injury on a "historical, *post hoc* basis" convincing and neither do we. This case is closer to *Edwards* than to *Bradshaw.*

SAIF called Tennyson, who offered a detailed analysis leading to his conclusion that claimant's current cervical disability is not related to his injury or to the subsequent surgery.[3] Tennyson believes that claimant's injury resulted in a cervical sprain, the diagnosis initially made by Bamforth, Weinman and Peterson. He noted that complaints of cervical pain had largely dissipated by September, 1981, as reported by Weinman, and that the recorded symptoms immediately after the injury were compatible with a cervical sprain but not with nerve root compression. Tennyson's opinion is that claimant's current symptoms are due to the natural progression of the degenerative process and that he would have the same symptoms today, even if the August, 1981, injury had not occurred. The referee found Tennyson's testimony persuasive, as do we.

Claimant has failed to link his industrial injury with his symptoms of a progressive, degenerative disc disease.[4]

Affirmed.

[2] Peterson stated:

"[I]t would be my opinion that his symptoms are based upon a combination of cervical degenerative disc *[sic]* that are unrelated to his injury, and whatever influence the injury brought on it in making his previous existing problems symptomatic, and whatever influence came from the injury itself, and the other effects of what may have been a product of surgery in possible scar development."

[3] There was evidence that post-surgical scarring might produce nerve root irritation.

[4] Claimant alternatively asks us to remand the case so that he can offer Campagna's testimony in response to Tennyson. The Board did not abuse its discretion in refusing to remand for further testimony, and we also decline, finding that this case was not improperly, incompletely or otherwise insufficiently developed. *Bailey v. SAIF,* 296 Or 41, 672 P2d 333 (1983).

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Donald B. O'Dell, Claimant.

O'DELL,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 83-05083; CA A35559)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 6, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief was Malagon and Associates, Eugene.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Reversed and remanded for determination of attorney fees for delay; referee's assessment of penalty reinstated; otherwise affirmed.

WARREN, J.

Claimant seeks review of a Workers' Compensation Board order which reversed the referee's assessment of a penalty and award of attorney fees. We reverse and remand.

Claimant injured his knee at work in September, 1982. In February, 1983, he was found to be medically stationary and a determination order was issued on May 5, 1983, awarding temporary total disability to February 3, 1983. Claimant requested a hearing, seeking, among other things, a determination that the claim had been prematurely closed. Following the request for hearing, he saw Dr. Jones, who notified SAIF on July 8, 1983, that claimant continued to suffer knee pain and that an arthroscopic examination was necessary to determine the cause of the pain. SAIF agreed to pay for the examination as a diagnostic procedure. On September 30, 1983, Jones performed the arthroscopy and shaved a synovial tag which he believed was capable of causing pain. The knee appeared to be normal in all other respects. Jones reported on September 30 that it would be several months before he would know whether the tag, was the cause of claimant's knee pain. SAIF treated the report as an aggravation and began paying time loss on November 1, 1983, as of September 30, 1983.

A hearing on the May 5, 1983, determination order was held on November 22, 1983, but the record was held open for Jones' final opinion on the results of the arthroscopy. In the meantime, SAIF had reviewed Jones' surgery report and had concluded that the arthroscopy had resulted in "essentially negative findings." It sent a letter to claimant denying his "aggravation claim" on the ground that the knee condition had not materially worsened since claim closure. On January 3, 1984, Jones advised SAIF that claimant had improved dramatically since the surgery and that the pain was gone. He was also of the opinion that claimant's earlier knee pain was related to his original injury. SAIF then re-opened the claim, and the Worker's Compensation Department issued a determination order on February 21, 1984, awarding temporary total disability from the date of the surgery through January 3, 1984.

The hearing which had been pending since November 22, 1983, reconvened on May 22, 1984. In view of Jones'

opinion, the referee determined that, at the time of the original claim closure, claimant was not medically stationary and that the claim had been prematurely closed. He awarded temporary total disability for the "gap" in time loss payments from February 3, 1983, to the date of the surgery. At the same time, like SAIF, he treated Jones' September 30, 1983, report of the arthroscopic surgery as an aggravation claim and assessed a $50 penalty against SAIF pursuant to ORS 656.262(10) for unreasonably delaying commencement of time loss payments until November 1, 1983. He also awarded claimant attorney fees under ORS 656.382(1). The Board reversed the referee as to the penalty and attorney fees only, and our review is limited to that issue.

SAIF contends that, because it was ultimately determined that the claim had been prematurely closed, Jones' report on the September 30, 1983, surgery should not be treated as an aggravation claim. If it is not, there is no basis for the assessment of a penalty and the award of attorney fees. At the time of the surgery, however, the claim was still closed, and SAIF's position was that it should remain closed. SAIF has treated Jones' surgery report as an aggravation claim. For that reason, there is no justification for SAIF's failure to pay interim compensation within 14 days of the September 30, 1983, report. The referee's assessment of a penalty and the related award of attorney fees was proper.

Reversed and remanded for determination of attorney fees for delay;[1] the referee's assessment of a penalty is reinstated; otherwise affirmed.

[1] We know of no statutory basis for the referee's award of insurer paid attorney fees for "establishing a new date for future aggravation rights" and for "getting SAIF to, in effect, withdraw their *[sic]* denial," and we affirm the Board's reversal of the referee's award of attorney fees for those "services."

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
James E. Carlson, Claimant.

CARLSON,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 84-02203; CA A35106)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 10, 1986.

David C. Force, Eugene, argued the cause and submitted the brief for petitioner.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent. On the brief were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Linda DeVries Grimms, Assistant Attorney General, Salem.

Before Gillette, Presiding Judge, Pro Tempore, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Reversed and remanded with instructions to accept claim.

VAN HOOMISSEN, J.

Claimant seeks review of an order of the Workers' Compensation Board that affirmed the referee's order sustaining SAIF's denial of his occupational disease claim for bilateral rotator cuff tendonitis. The issue is compensability. On *de novo* review, we reverse and remand.

Claimant, age 61 at the time of the hearing, worked for employer on the green chain pulling veneer from 1967 until 1983. Before that he had worked on the green chain for another employer for six years. In January, 1983, he started feeling pain in his shoulders. By June, 1983, he was unable to continue working. In January, 1984, he filed a claim for compensation. He alleged that "[s]ixteen years on green chain either caused or accelerated the bilateral rotator cuff tendonitis." SAIF denied the claim.

Dr. Baker, claimant's treating orthopedic physician, diagnosed his problem as bilateral rotator cuff tendonitis with partially frozen shoulders "due to wear and tear over the past 60 years." He could not say with reasonable medical probability that claimant's problem was specifically caused by his work. He said that it was the result of wear and tear that must be attributed, at least in part, to claimant's work activity over the years and that he would not have reached his present level of disability had he not been working on the green chain or some equivalent activity.

Dr. Degge, an orthopedic physician, examined claimant at SAIF's request. He stated that, although the underlying condition may have been pre-existing and non-work related, his present problem "apparently developed * * * as a result of repetitive use of the arms while working on the green chain over a prolonged period." He concluded that "[w]hile the condition of [claimant's] neck and shoulders might have occurred as a natural progression of his chronic [pre-existing] condition, there is little doubt that the repetitive use of his arms in pulling, lifting, pushing, etc., accelerated this process *and would, therefore, constitute an aggravation of a pre-existing condition.*" (Emphasis supplied.)

In order to prevail, claimant had to prove by a preponderance of the evidence that his work activity and conditions caused a worsening of his underlying disease

resulting in an increase in pain to the extent that it produced disability or required medical services. *Weller v. Union Carbide,* 288 Or 27, 35, 602 P2d 259 (1979).

We understand both doctors to have concluded that claimant's work on the green chain caused a worsening of his pre-existing condition. That worsening caused increased pain, which required him to seek medical services. Both doctors agree that he would not have reached his present level of disability without the effects of his employment. *See Kepford v. Weyerhaeuser Co.,* 77 Or App 363, 366-67, 713 P2d 625, *rev den* 300 Or 722 (1986). We conclude that his condition is compensable. *Weller v. Union Carbide, supra.*

Reversed and remanded with instructions to accept claim.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of David A. Anderson, Claimant.

ANDERSON,
Petitioner,

v.

E.B.I. COMPANIES et al,
Respondents.

(WCB 82-02326; CA A34842)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 14, 1985.

Marilyn K. Odell, Eugene, argued the cause and filed the brief for petitioner.

William H. Walters, Portland, argued the cause for respondents. With him on the brief were Donald P. Bourgeois and Miller, Nash, Wiener, Hager & Carlsen, Portland.

Before Gillette, Presiding Judge, Pro Tempore, and Van Hoomissen and Young, Judges.

GILLETTE, P. J., Pro Tempore.

Affirmed.

GILLETTE, P. J., Pro Tempore

Claimant seeks review of an order of the Workers' Compensation Board (Board) affirming a referee's opinion and order that held time-barred his request for hearing on a denial of benefits and, he argues, effectively precluded future claims for benefits. We affirm.

In September, 1978, claimant suffered an injury to his left shoulder in an on-the-job accident. The injury was diagnosed as a rotator cuff tear. His claim was eventually accepted by the employer's insurer as a disabling occupational injury. A determination order was issued, awarding time loss only. The claim was thereafter reopened twice, with an award of permanent partial disability following the first reopening and surgery and additional permanent partial disability following the second reopening.

Thereafter, in February, 1981, claimant was treated in the emergency room of McKenzie-Willamette Memorial Hospital in Springfield for non-work related injuries received in a motorcycle accident. The hospital report indicates injuries to his left leg and ankle and the AC joint of his left shoulder. X-rays of the left shoulder taken at the time revealed that the AC joint was intact and that there were no appreciable bony or soft tissue abnormalities. The hospital billed EBI, the compensation insurance carrier, for medical services and treatment.

On March 6, 1981, EBI sent a letter to claimant, stating, in part:

> "We have received medical reports and billings from McKenzie-Willamette Hospital in Springfield, Oregon regarding treatment for your left leg, shoulder and ankle.
>
> "Please be advised that EBI on behalf of Carters, Inc. must respectfully deny responsibility for the above injuries *including any further responsibility or treatment for your left shoulder* due to the following legal and factual reasons:
>
> "1. The above mentioned injuries were sustained in a motorcycle accident on or about February 2, 1981.
>
> "2. The above injuries did not arise out of or in the course and scope of your employment at Carters, Inc." (Emphasis supplied.)

The letter was apparently sent to claimant's mother's house.

At the time, however, claimant was incarcerated; he was not released until April 9, 1981. He did not request a hearing on the denial letter within either 60 or 180 days, as required by ORS 656.319. On March 12, 1982, claimant filed a request for hearing, which stated, in pertinent part:

> "This is a protective request for hearing with respect to all issues which could be or might be raised with respect to this case. A formal request for hearing will be issued upon receipt of the medical and claims information from the insurer."

On September 16, 1982, claimant was examined by Dr. Butters, an orthopedic surgeon, for his shoulder problems. Butters diagnosed an "impingement process as well as recurrent subluxation of the shoulder." He recommended that claimant's case be "re-opened" for a program of physical therapy and suggested the possibility of further surgery.

On September 23, 1982, claimant requested another hearing, listing as reasons, *inter alia*, "[a]ggravation-medical report to follow; defacto denial; failure to pay medical costs or reimbursement to claimant; failure to properly process claim; penalties and fees." The date of injury was indicated as "9-19-78," the date of his compensable injury. On October 7, 1982, he filed a supplemental request for hearing, specifically raising for the first time the issue of the permissibility of the March 6, 1981, denial of "any further responsibility" by EBI. On December 3, 1982, Butters sent a letter to EBI, stating that his letter of September 16, 1982, requesting authorization to treat claimant, was for palliative or noncurative treatment. The letter further stated that "[t]his treatment would not require that his claim be 're-opened' in the legal sense of the word."

On December 15, 1982, a hearing was held. A number of issues were raised, including EBI's denial letter of March 6, 1981, and the subsequent *de facto* denial of claimant's aggravation claim on the basis of Butters' letter of September 16. The referee held, *inter alia*, that claimant's failure to timely request a hearing regarding the March 6, 1981, denial barred any related claims. She further held that the language in the March 6, 1981, denial apparently disclaiming further responsibility or treatment for claimant's left shoulder was proper and that claimant was thereby precluded from raising later claims for aggravation. Finally the order said that, even

assuming an improper notice of denial, claimant had failed to show that Butters' letter of September 16 constituted an aggravation claim or that, on the merits, there was an aggravation. The Board affirmed the referee without an opinion. This petition for review followed.

Claimant now raises only the issues of proper notification of denial, the prospective denial of benefits in the March 6, 1981, denial, and the alleged *de facto* denial of the September 16, 1982, claim for aggravation.

Claimant first argues that he was not properly notified of the denial mailed by EBI on March 6, 1981. The referee found that the denial was mailed in care of claimant's mother to 4723 Union Terrace, Springfield, Oregon, 97477. The record shows that claimant had contacted EBI on January 26, 1981, to request that all further correspondence be sent to his mother's house at 4733 Union Terrace, Springfield, Oregon, 97477. Despite the incorrect address on the denial letter, claimant concedes in his brief that the disputed letter was delivered to his mother's house on March 10, 1981. That is where he had asked that it be delivered. The notice was proper; the request for a hearing was untimely.

Claimant next argues that the Board erred in holding that EBI was authorized to deny all future claims for compensation related his accepted compensable injury. The referee's opinion and order, which the Board affirmed, stated, in part:

"The denial of March 6, 1981 denied any further responsibility or treatment for the claimant's left shoulder. *The denial remains in effect by operation of law and the claimant is precluded from later attacking the effect of that denial by subsequent claims of aggravation. As such the claimant then has no further rights for benefits from the injured left shoulder* and the remaining issues raised by the claimant would have to be decided against him." (Emphasis supplied.)

EBI conceded at oral argument that the emphasized language is "not written as clearly as one would hope for"; it also conceded that its letter of March 6 purported to cut off all future benefits. For each worsening to the same area, a worker is entitled to demonstrate that the original compensable injury is a material contributing cause of the worsened condition. We find the denial of March 6, 1981, reasonable, except as to its prospective effect.

Next, claimant contends that the Board erred in denying his claim for aggravation, arising from the September 16, 1982, examination by Butters. The referee first concluded that, even if the request for hearing was not time-barred, no "claim" for aggravation was filed. We do not agree. Butters' report of September 16 related claimant's condition to the date of his compensable injury and stated that his "case should be re-opened." Although EBI relied on subsequent statements by Butters to argue that a valid claim was not filed, that reliance is in error. A letter or physician's report demonstrating a need for further treatment of the injury is in itself a claim for aggravation. ORS 656.273(3); *Haret v. SAIF*, 72 Or App 668, 697 P2d 201 (1985). We turn to the merits.

The referee found that claimant "failed to show an aggravation." We agree. After his report of September 16, Butters sent a follow-up letter, dated December 3, 1982, in which he explained that his request for authorization in the earlier report to treat claimant was for noncurative therapy and did not "require that his claim be 're-opened' in the legal sense of the word." Moreover, he stated that he was unable to comment "on any relationship that [claimant's] reported current condition may or may not have with his prior industrial claim * * *." In addition, Butters stated the following during his deposition:

"Q. [By EBI attorney] Then you can't say with a medical probability because of lack of knowledge of claimant's' shoulder that that 1978 event contributed at all to the instability in the shoulder, can you?

"A. [Dr. Butters] No.

"Q. Because you didn't see him, for one?

"A. I'm just going on what's in the record.

"Q. Right. And because of that inability to so state, then you can't state with a medical probability that the 1978 event contributed to the need for surgery or the symptomatology for which you saw him in 1982?

"A. Okay. Yes."

Claimant has failed to show that his original, compensable injury remains a material contributing cause of his present condition. *Grable v. Weyerhauser Company*, 291 Or 387, 400-01, 631 P2d 768 (1981).

Finally, claimant requests penalties and attorney fees for EBI's *de facto* denial of his aggravation claim. Assuming, as we do, that Butters' report of September 16 constituted a claim for aggravation, EBI was required to give written notice of acceptance or denial within 60 days. ORS 656.262(6). We have already concluded that it was improper for EBI to rely on the denial of March 6, 1981, to deny the aggravation claim. We find no evidence to indicate that claimant received any other written notice of denial. Nonetheless, ORS 656.262(10)[1] only provides for the assessment of penalties on "amounts then due." There is no duty to pay interim compensation for medical services pending acceptance or denial, ORS 656.262(6); *Poole v. SAIF,* 69 Or App 503, 508, 686 P2d 1063 (1984), and we have concluded that claimant failed to establish aggravation. As a consequence, there were no "amounts then due" and no penalty can be assessed under ORS 656.262(10).

Claimant's request for attorney fees pursuant to ORS 656.382(1)[2] must also be denied. Because the evidence indicates that no compensation was due, it was not unreasonable for EBI to refuse to pay compensation and, thus, no attorney fees are warranted. *Poole v. SAIF, supra,* 69 Or App at 508.

Affirmed.

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[1] ORS 656.262(10) provides:

"If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

[2] ORS 656.382(1) provides:

"If an insurer or self-insured employer 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 insurer shall pay to the claimant or the attorney of the claimant a reasonable attorney fee as provided in subsection (2) of this section. To the extent an employer has caused the insurer to be charged such fees, such employer may be charged with those fees."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Timothy R. Puderbaugh, Claimant.

PUDERBAUGH,
Petitioner,

v.

WOODLAND PARK HOSPITAL et al,
Respondents.

(84-07461; CA A36790)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 12, 1986.

William H. Schultz, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Yvonne P. Meekcoms, Portland, argued the cause for respondents. With her on the brief were Bruce L. Byerly and Moscato & Byerly, Portland.

Before Richardson, Presiding Judge, and Warren and Deits, Judges.

PER CURIAM

Affirmed.

PER CURIAM

The issue in this workers' compensation case is whether claimant's injury is compensable. He injured himself while playing softball on a team sponsored by his employer. The referee concluded that the injury was compensable; the Board reversed. Applying the analysis we used in *Rose v. Argonaut Ins. Co.*, 77 Or App 167, 711 P2d 218 (1985), and *Richmond v. SAIF*, 58 Or App 354, 648 P2d 370, *rev den* 293 Or 634 (1982), to the facts here, we conclude, on *de novo* review, that his injury did not arise "out of and in the course of employment." ORS 656.005(8)(a). It is therefore not compensable.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Philip F. Lyster, Claimant.
KIENOW'S FOOD STORES, INC.,
Petitioner,
v.
LYSTER et al,
Respondents.
(82-10572 and 83-00589; CA A32603)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 8, 1985.

Patric J. Doherty, Portland, argued the cause for petitioner. With him on the brief were Dennis R. VavRosky and Rankin, McMurry, VavRosky and Doherty, Portland.

Robert D. Wollheim, Portland, argued the cause for respondent Philip F. Lyster. With him on the brief were Welch, Bruun and Green, Portland.

Jerald P. Keene, Portland, argued the cause for respondents Cupples Paper Bag Company and Royal Insurance Co. With him on the brief were Craig A. Staples and Roberts, Reinisch & Klor, P.C., Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Affirmed.

WARDEN, J.

Kienow's Food Stores, Inc. (Kienow's) seeks judicial review of an order of the Workers' Compensation Board affirming the decision of the referee.[1] It raises two issues. The first is whether the Board erred in refusing to remand the case to the referee for the consideration of additional evidence. The second is whether a time loss disability constituted an aggravation of an injury sustained while working for a previous employer or a new injury. We conclude that the Board was correct in refusing to remand and in finding an aggravation of claimant's earlier injury. We affirm.

On June 27, 1980, while employed by Kienow's, claimant suffered a compensable neck and shoulder injury which was nondisabling. It occurred while he was lifting a 50-pound box of produce. He testified that he felt neck and right shoulder pain and that something "pulled." He saw a doctor the next day and had a stiff neck for some time thereafter. There was no time loss. Claimant left Kienow's employ in October, 1980. He sought no further treatment in the period of his employment with Kienow's and did not limit his work or off the job activities.

[1] Claimant, in his responding brief, joins Kienow's, assigning essentially the same errors and making parallel arguments.

Claimant began working for Cupples Paper Bag (Cupples) in January, 1981. Dr. Gambee, an orthopedist, saw him on June 18, 1981. He noted that claimant complained of stiffness in the neck and shoulder and a "cracking" sound in the shoulder. Claimant related those symptoms to the injury at Kienow's.

Dr. Holman, a chiropractor, reported on September 3, 1982, after reviewing claimant's complaints and the history, "I cannot 100% say that this injury * * * is related to the injury of 1980[;] however[,] in reviewing his comments and the situation in which he was injured[,] everything points to the fact that this injury is related to the on the job injury of 1980." He went on to state his opinion that claimant's work at Cupples, including moving 50-pound bundles and putting them onto pallets, would be the kind of work that would continually aggravate the condition.

Claimant filed a claim indicating that on October 10, 1982, he had developed a stiff neck at Cupples while picking up and throwing away strippings from rolls and throwing material into a baling machine. He was seen again on October 11, 1982, by Gambee, who diagnosed a neck sprain phenomenon with brachioplex irritation, "causally related to his original industrial accident." He was also seen by Dr. Long, a physical medicine rehabilitation specialist, who reported on December 14, 1982, that the current right neck and shoulder symptoms reflected a soft tissue strain and were a result of the June, 1980, injury at Kienow's and that the condition was recently aggravated by work performed for Cupples. On December 23, 1982, Long reiterated that he believed that claimant's current problems were related to the 1980 injury. He asserted that, although work performed at Cupples contributed to the recent increase in symptoms, because claimant had not been symptom-free before his work at Cupples, the 1982 incident did not cause a significant injury or change claimant's basic underlying condition.

Long changed his opinion on April 11, 1983, and stated that, after reviewing the medical records provided to him and his own records, he believed that the 1980 injury at Kienow's was a material contributing factor to claimant's 1982 shoulder problems. He also found it probable that the work performed at Cupples between June, 1981, and October, 1982, contributed independently to the shoulder problem. He believed that the increase in symptoms occurring in September and October, 1982, indicated a worsening of the pre-existing underlying condition.

Gambee stated on April 25, 1983, that the work at Kienow's was the cause of most of claimant's persisting complaints. He labeled it the "triggering" force and asserted that the work at Cupples probably was not much of a causative factor. He did not believe that the work at Cupples caused any pathological worsening of the pre-existing problems.

Dr. Schmidt stated on April 26, 1983, that the Kienow's injury formed a "substrate" of injury which was exacerbated by the work at Cupples. He concluded that the 1982 event was an exacerbation of a "pattern" which had begun in 1980. On May 31, 1983, Gambee called claimant's injury at Kienow's the causative factor behind his neck

problem and brachioplexus neuritis and said that in his opinion the work activity simply aggravated or irritated them and made him worse only temporarily.

The referee held that the total weight of the collective doctors' opinions showed an aggravation. Several months after the referee's decision was issued, and after a request by petitioner's claims handler, Long prepared another report. The Board affirmed the referee, denied petitioner's motion to remand for the taking of evidence of that report and refused to consider it in its own review. We agree with the Board and decline to remand to the referee for the taking of further evidence.[2]

ORS 656.295(5) provides that, "if the board determines that a case has been improperly, incompletely or otherwise insufficiently developed or heard by the referee, it may remand the case to the referee for further evidence taking, correction or other necessary action." The Board properly found that the case had not been "improperly, incompletely or otherwise insufficiently developed." Additionally, there must be "good cause" or some other compelling basis for this court to remand. *See, e.g., Russell v. A & D Terminals,* 50 Or App 27, 30, 621 P2d 1221 (1981). We find none in this case.

The new report in question was based on information available before the hearing. According to the report, claimant's symptoms had not changed significantly since before the hearing. The report was merely an attempt by Long to explain the change in his opinions. There is no compelling reason for remanding to the referee. *See Gallea v. Willamette Industries,* 56 Or App 763, 643 P2d 390 (1982).

The second issue is whether the disability was an aggravation of the first injury sustained at Kienow's or a new injury caused by activity at Cupples which contributed to the disability. On *de novo* review, we are convinced that the work

conditions at Cupples, although capable of causing the disability, did not contribute to it. Therefore, the first employer, Kienow's, is liable. The conclusions of the referee and the Board are amply supported by the record.

First, the physicians who have examined claimant are nearly unanimous in their opinions that his underlying condition was not changed by the Cupples incident. That work merely aggravated the symptoms of his condition. We find that view persuasive. The lone dissenter is the current treating physician, Long, who, until April, 1983, concurred with the aggravation diagnosis of the other physicians. Ordinarily, more weight will be given to the opinion of the treating physician. *See, e.g., Weiland v. SAIF,* 64 Or App 810, 669 P2d 1163 (1983). However, in this case, Long did not examine

[2] This court cannot, as claimant argues, directly consider Long's additional medical report in our judicial review. ORS 656.298(6) gives this court the power to "hear additional evidence concerning disability that was not obtainable at the time of the hearing." Long's report was not *available* at that time, because it was not in existence, but it was *obtainable.* It only needed to have been requested at the appropriate time. *Penifold v. SAIF,* 49 Or App 1015, 1021 n 7, 621 P2d 646 (1980).

claimant at the critical times, that is, soon after the injuries. He examined him for the first time two months after the Cupples incident. Because he had no basis of comparison with claimant's previous condition, we do not accord his opinion regarding a change as much weight as we do the opinions of the physicians who were able to observe claimant's condition before the October, 1982, incident. *See Orman v. SAIF,* 68 Or App 260, 263, 680 P2d 1024 (1984).

In comparison, Gambee examined claimant after the injury at Kienow's and before the Cupples incident, as well as the day after that incident. Therefore, his opinion that there was no "pathological worsening of [claimant's] pre-existing problems" due to the Cupples incident has some persuasive force. He had an opportunity to observe claimant's underlying condition before the second injury. In addition, Holman had examined claimant one month before the incident at Cupples. He found that the right scapula was rotated medially from its normal position. He repositioned it but predicted that it would misalign when claimant began work again.

Responsibility in such a case does not shift to the later employer.

> "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. * * * This group * * * 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." *SAIF v. Brewer,* 62 Or App 124, 128, 659 P2d 988 (1983) (quoting 4 Larson, *Workmen's Compensation Law* 17-71 - 17-78, ¶ 95.12 (1976) (emphasis deleted)).

The example given by Professor Larson is particularly appropriate to this case.[3] *See also Bracke v. Baza'r,* 293 Or 239, 244, 649 P2d 1330 (1982); *Smith v. Ed's Pancake House,* 27 Or App 361, 364, 556 P2d 138 (1976).

Finally, we also note that, ever since the Kienow's injury, claimant has continually experienced symptoms for which he has consulted physicians. One month before the Cupples incident, he consulted Holman, complaining of neck pain, stiff neck, sleeping problems and back and right shoulder pain. His activity at Cupples caused the condition he incurred at Kienow's to become disabling. *See CECO Corp. v. Bailey,* 71 Or App 782, 693 P2d 1325, *rev den* 299 Or 154 (1985).

Affirmed.

[3] Professor Larson refers to a "second period of disability." We do not find it significant that the first injury at Kienow's did not result in time loss or a period of disability.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Lee E. Short, Claimant.

SHORT,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION et al,
Respondents.

(WCB 83-00025; A35087)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 20, 1985.

Richard A. Sly, Portland, argued the cause for petitioner. With him on the brief was Bloom, Marandas & Sly, Portland.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents. On the brief were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Ann F. Kelley, Assistant Attorney General, Salem.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Order modified to provide that claimant's psychological condition was aggravated as of September 1, 1982; order reducing penalties and attorney fees for delay reversed and referee's order reinstated in that respect; otherwise affirmed.

WARDEN, J.

Claimant seeks review of a Workers' Compensation Board order which modified the referee's order in these respects: (1) It found that claimant had proved a worsening as of March 30, 1983, rather than September 29, 1982; (2) it reduced the penalties and attorney fees assessed against SAIF for delay in paying interim compensation; (3) it reversed the assessment of penalties for SAIF's delay in denying the claim; and (4) it increased the attorney fees awarded to claimant's attorney for prevailing on the denied claim. Claimant asserts that (1) she has proved a worsening as of March 12, 1981, (2) the referee correctly assessed penalties and attorney fees and (3) the Board awarded insufficient attorney fees to her for prevailing on the claim denial. We modify the order to provide that claimant has proved a worsening as of September 1, 1982, and reverse the Board and reinstate the referee's order with respect to penalties and attorney fees for late denial and late payment of interim compensation.

Claimant suffered a compensable occupational injury on February 1, 1977, when she fell down a flight of stairs and struck her head. The claim was closed in July, 1979, and she

was awarded 35 percent unscheduled disability for her neck and "mild" psychological conditions. There was no diagnosis of an organic brain injury at that time.

In March, 1981, Dr. Fleming conducted tests which indicated the presence of an organic brain injury; however, he did not diagnose it. Dr. Howieson examined claimant on August 30 and September 1, 1982, and diagnosed an organic brain injury that was not progressive and probably had existed since the accident. On September 24, 1982, claimant's attorney wrote to SAIF requesting a reopening of the claim for treatment of claimant's cognitive difficulties which were a result of her compensable injury. He asserted that her condition was worse and enclosed Howieson's reports, which related the cognitive defects to her 1977 injury. Howieson thought it highly unlikely that claimant would return to work. She described claimant as incapacitated by her mental problems and stated that the

> "considerable emotional distress that Ms. Short has experienced during her long disability claim procedure may have exacerbated her mental problems at this time. However, I

> suspect that the underlying cognitive disorder has remained essentially unchanged since the time of the accident."

Howieson prescribed regular supportive counseling with a trained professional. "Without treatment, her prognosis for improvement in functioning is guarded at best."

In response to questions by claimant's attorney, Howieson stated:

> "Regarding your question as to whether or not Ms. Short's condition has worsened, I do believe that her behavior has deteriorated over the years since her initial injury. She is depressed, confused, and has developed maladaptive ways of dealing with problems. Because of her inability to understand the reasons for many of her problems, she has been unable to develop effective solutions. Over the years, she has learned a form of helplessness from repeated failures and she has become socially withdrawn and mistrustful. The longer that she goes without assistance, the worse these problems will become. Therefore, I would conclude that Ms. Short's condition has worsened since the initial injury and I believe that it is reasonable to assume that her condition has worsened since at least March, 1981."

Claimant's daughter and a neighbor testified to a worsening of claimant's symptoms since the original claim closure. They could not pinpoint any specific date of worsening but described a gradual worsening.

SAIF did not respond to claimant's September 24, 1982, request for reopening or to subsequent requests. On December 30, claimant requested a hearing. On March 1, 1983, SAIF paid her interim time loss from September 29, 1982, to March 2, 1983. On March 11, 1983, SAIF acknowledged her request to reopen the claim but stated that additional time was needed to investigate it. SAIF denied the claim on May 12, 1983, on the ground that there had been no worsening since claim closure. Interim time loss payments were timely after the March 1 payment until the denial on May 12.

SAIF now concedes that there has been a worsening of claimant's condition. However, it disagrees with claimant as to when the worsening occurred and, consequently, as to the date as of which she has proved an aggravation. Claimant

argues that a changed diagnosis alone is sufficient to constitute a worsening and that a worsening is proven as of March, 1981, when Fleming's tests indicated the presence of the organic brain injury later diagnosed by Howieson.

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." (Emphasis supplied.)

To establish an aggravation, there must be a worsening of the claimant's condition and a causal relation between that worsening and the compensable injury. *Hoke v. Libby, McNeil & Libby*, 73 Or App 44, 46, 697 P2d 993 (1985). If the underlying condition has not worsened, "it is sufficient to show that the symptomatology of the condition has worsened so that the claimant is more disabled than at the time of the last arrangement of compensation." *Consolidated Freightways v. Foushee*, 78 Or App 509, 512, ___ P2d ___ (1986). Claimant's organic brain injury is no worse than it was at the time of claim closure. Howieson characterized it as nonprogressive and "essentially unchanged since the time of the accident."

That Howieson's report states that claimant is now totally disabled, taken alone, does not prove an aggravation. That she was originally granted only 35 percent unscheduled permanent partial disability and that Howieson now believes that she is totally disabled does not establish that her condition has "worsened." It may simply be that the prior award was inadequate. The evidence is that claimant's organic brain damage is the same now as at the time of the accident. It was simply not diagnosed until September, 1982. An aggravation claim is not a means by which to correct an inadequate permanent disability award that was made on the basis of a flawed diagnosis. If it were, ORS 656.273 would be a means for a delayed review of erroneous findings or awards in an initial determination. *Bowser v. Evans Products Co.*, 17 Or App 542, 545, 522 P2d 1405, *rev'd on other grounds*, 270 Or 841, 530 P2d 44 (1974).[1] As we said in *Deaton v. SAIF*, 33 Or App 261, 263,

576 P2d 35 (1978):

> "At the heart of claimant's position is his belief that his initial determination was erroneous and that he should have been found permanently totally disabled. However that may be, the initial determination cannot be relitigated in an aggravation claim."

See also Dodd v. Ind. Acc. Com., 211 Or 99, 310 P2d 324, 311 P2d 458, 315 P2d 138 (1957); *but see Gilbert v. SAIF*, 63 Or App 320, 663 P2d 807 (1983).

[1] This case refers to *former* ORS 656.271, which was then the aggravation statute. It was replaced by ORS 656.273. Or Laws 1973, ch 630, § 4. Our analysis is not affected by the statutory changes.

Although there is no worsening of claimant's organic brain damage, her symptoms and her mental condition have worsened. The evidence shows a gradual worsening. Claimant's daughter and neighbor testified about her worsened symptoms; however, they could not pinpoint a specific date of worsening. On *de novo* review, we hold that claimant has proved a worsening as of September 1, 1982, the date on which she was examined by Howieson, who concluded that claimant's behavior had deteriorated and that her condition had worsened since March, 1981.[2] That conclusion is strengthened by the results of the March, 1983, Minnesota Multiphasic Personality Inventory (MMPI) profile which confirms a deterioration of claimant's emotional condition since a March, 1981, MMPI.[3]

We turn to the issue of penalties. After receiving a notice of an aggravation, an insurer has 60 days to issue an acceptance or a denial, ORS 656.262(6), or it may be subject to penalties for unreasonable delay. ORS 656.262(10). Claimant's attorney's letter of September 24, 1982, enclosing Howieson's reports was an aggravation claim. ORS 656.273(2) and (3).[4] *Stevens v. Champion International,* 44 Or App 587,

606 P2d 674 (1980). Howieson's reports indicated a need for further medical services. It was SAIF's responsibility to accept or deny the claim within 60 days. ORS 656.262(6); *Haret v. SAIF,* 72 Or App 668, 671, 697 P2d 201, *rev den* 299 Or 313 (1985). SAIF also had a duty to pay interim compensation within 14 days after notice of the claim. ORS 656.262(4). It did not pay interim compensation for six months and did not deny the claim for eight months. Therefore, we reinstate the referee's order regarding penalties and attorney fees for late payment of interim compensation and for late denial of the claim.

Finally, we affirm the Board's award of attorney fees for prevailing on SAIF's denial. The Board considered all of the evidence submitted by claimant's attorney and increased the fee awarded by the referee to $3,750, finding that an extraordinary fee was warranted. The Board also awarded $750 for services on Board review. On claimant's motion for reconsideration, the Board declined to increase the attorney fees award. The award does not appear to be unreasonable, and we defer to the Board in the light of its frequent determinations in this area; it may be expected to make consistent and knowledgeable assessments of the attorney effort involved. *Silsby v. SAIF,* 39 Or App 555, 564, 592 P2d 1074 (1979). We will alter an award only in a case of manifest abuse of discretion. *SAIF v. Peoples,* 59 Or App 593, 595, 651 P2d 1359

[2] The evidence does not show a worsening between the last award and March, 1981.

[3] The Board found that claimant had only proved a worsening as of the date of the March 30, 1983, MMPI. The evidence shows a worsening before that time.

[4] ORS 656.273(2) provides:

> "To obtain additional medical services or disability compensation, the injured worker must file a claim for aggravation with the insurer or self-insured employer. In the event the insurer or self-insured employer cannot be located, is unknown, or has ceased to exist, the claim shall be filed with the director."

ORS 656.273(3) provides:

> "A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation."

(1982); *Bentley v. SAIF,* 38 Or App 473, 481, 590 P2d 746 (1979). We find none in this case.

Order modified to provide that claimant's psychological condition was aggravated as of September 1, 1982; order reducing penalties and attorney fees for delay reversed and referee's order reinstated in that respect; otherwise affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Raymond P. Davidson, Claimant.

DAVIDSON,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 83-10512; CA A34909)

Judicial Review from Workers' Compensation Board.

On respondent's petition for reconsideration filed April 2, 1986. Former opinion filed February 26, 1986, 78 Or App 187, 714 P2d 1117.

Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Darrell E. Bewley, Assistant Attorney General, Salem, for petitions.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Petition for reconsideration allowed; former opinion withdrawn and Board's order affirmed.

WARDEN, J.

SAIF petitions for review of our decision in *Davidson v. SAIF,* 78 Or App 187, 714 P2d 1117 (1986). The petition serves as one for reconsideration in this court. ORAP 10.10. The Workers' Compensation Board had reversed the referee's award of permanent total disability and awarded no increase in permanent disability, concluding that claimant's condition had not worsened since the last determination of permanent disability. We modified the Board's order and awarded claimant an additional 56 degrees unscheduled permanent partial disability. In light of our recent opinion in *Stepp v. SAIF,* 78 Or App 438, ___ P2d ___ (1986), we allow SAIF's petition for reconsideration, withdraw our former opinion and affirm the Board's order.

Claimant has a compensable recurrent hernia condition. The last arrangement of compensation was by a stipulation dated March 18, 1983, which awarded him an additional 72 degrees of permanent partial disability for a total of 184

degrees. The next month claimant had his sixth hernia repair operation. After each operation, he has developed a new softening and laxity in his abdominal wall, eventually requiring additional surgery.

In *Stepp v. SAIF, supra,* we held that, even though the claimant had suffered an exacerbation, he was not entitled to have his permanent disability award redetermined, because the worsening was only temporary and the condition had returned to pre-aggravation status. He had not proved any permanent worsening. Similarly, in this case, on reconsideration, we find no evidence of permanent worsening of claimant's condition. His worsened condition before surgery was only temporary and, after surgery, he returned to his pre-aggravation status. Even if the full extent of his condition was unknown at the time of the stipulation, claimant still must prove a permanent worsening of his compensable condition in order to obtain an increased award of permanent disability. He has not done so. He is not entitled to any additional permanent disability. It was error for us to have held otherwise.

Petition for reconsideration allowed; former opinion withdrawn; affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Jesse B. Lavine, Claimant.

LAVINE,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 84-03050; CA A35571)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 22, 1986.

Howard R. Nielsen, Salem, argued the cause for petitioner. With him on the brief was Vick & Associates, Salem.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Affirmed.

ROSSMAN, J.

Claimant seeks review of a Workers' Compensation Board order which affirmed the referee's determination that SAIF did not have to pay for certain medical services. At issue

is the compensability of a thermogram, a diagnostic test which was performed on claimant in an effort to determine the cause of his chronic back pain.

In January, February and July, 1984, Dr. Wilson requested authorization for the thermogram, pursuant to OAR 436-69-201(13).[1] Wilson became aware on March 14, 1984, that SAIF had denied the request, even though no formal denial was issued. On August 1, 1984, the thermographic studies were performed and revealed abnormalities indicating to Wilson a need for chiropractic treatment.

SAIF questions the validity of a thermogram as a diagnostic tool. The dispositive issue, however, is whether SAIF is required to pay for the thermogram, in view of the fact that claimant did not obtain prior authorization for it, as required by OAR 436-69-201(13). Claimant asserts that the administrative rule is invalid, because it places the entire question of the compensability of a diagnostic procedure within the discretion of the insurer. We do not understand that to be the case. The rule merely requires "prior authorization"; it does not require prior authorization *by the insurer.* The insurer merely makes the first judgment, and, if it denies authorization, its decision is reviewable by the referee and the Board, either of which could have authorized the test. Because claimant failed to follow that procedure and obtain authorization before undergoing the thermogram, he is not entitled to be compensated for it.

Affirmed.

[1] OAR 436-69-201(13) provided:

"Liquid crystal thermography * * * is not reimbursable without prior authorization. Insurers may require documentation to show why its use is preferable to usual diagnostic tests."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Beverly J. Watkins, Claimant.

WATKINS,
Petitioner,

v.

FRED MEYER, INC.,
Respondent.

(WCB 83-08840; CA A34191)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 18, 1985.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief were Jeffrey S. Mutnick, Portland, and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Yvonne Meekcoms, Portland, argued the cause for respondent. With her on the brief were Deborah L. Sather and Moscato & Byerly, Portland.

Before Richardson, Presiding Judge, and Warden, and Newman, Judges.

NEWMAN, J.

Reversed; referee's order reinstated.

NEWMAN, J.

Claimant petitions for review of an order of the Workers' Compensation Board which modified the referee's order that had awarded her 45 percent unscheduled disability for injury to her neck. The Board found claimant's disability to be 20 percent. We reverse and reinstate the referee's order.

Claimant was 53 years old at the time of the hearing. She had worked for employer as a grocery checker and earned $7 to $8 per hour. In August, 1979, in a lifting incident, she sustained a compensable injury to her neck, which was diagnosed as a cervical strain. She received conservative treatment and in January, 1980, was released to return to work. She returned to work as a checker, but the lifting involved exacerbated her neck symptoms. Employer then gave her lighter duty, counting promotional coupons. That job paid approximately $3 to $4 less per hour than her job as a checker. In January, 1981, the parties stipulated to an order that claimant receive a 20 percent unscheduled neck disability award. In September, 1981, employer eliminated claimant's position as a coupon counter.

When employer terminated claimant, it referred her to vocational rehabilitation. Her vocational background consisted almost entirely of employment as a grocery clerk. After evaluation, her vocational counselor recommended that she enroll in a training program in hairdressing, cosmetology and manicure. She successfully completed the program and passed the state board examination. She also acquired her GED. With the assistance of the rehabilitation consultants, she obtained employment in a beauty salon.

Claimant testified that she is physically able to work as a hairdresser in her current position. The job requires virtually no lifting, and she can stagger her schedule of hair appointments and nail appointments so that she can alternately sit and stand. Also, if she finds herself strained, she often is able to refer customers to co-workers. At the time of the hearing, claimant was working approximately 30 hours a week for $4 per hour and no fringe benefits. She testified that employer's grocery checkers were then earning between $11 and $12 per hour, including benefits.

Claimant filed for a redetermination of her claim pursuant to ORS 656.268(5), which provides:

> "When the worker ceases to be enrolled and actively engaged in [a vocational training program], the Evaluation Division shall redetermine the claim * * * unless the worker's condition is not medically stationary."

When the Evaluation Division did not increase the January, 1981, stipulated award of 20 percent, claimant requested a hearing. The referee found claimant to be an "entirely credible witness" and concluded that her disability had significantly impaired her earning capacity. He stated:

> "This worker isn't just precluded from working as a grocery checker. She is precluded from doing any work which involves lifting, prolonged standing, or prolonged use of her arms in an extended or flex position. She has had to discontinue golfing and bowling which, to me, indicates significant limitation in the use of her shoulders and upper torso.
>
> "After giving consideration to all the evidence, I conclude claimant has sustained a marked loss of earning capacity. I conclude that loss is equal to 45% of the maximum available."

The Board reversed the referee's order and reinstated the Evaluation Division's determination order:

> "The Referee's order in this case seemingly fails to take into account the fact that since the parties stipulated that claimant sustained a 20% unscheduled disability, she has increased her potential earning capacity in at least two ways. Since the parties' January 1981 stipulation, claimant has received her GED. More significantly, however, since that time claimant has acquired the skills, as well as the licensing, required to perform work as a hairdresser, cosmetologist or manicurist. As a result, she has obtained employment in this field.
>
> "As defined by ORS 656.214(5), earning capacity is 'the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience.' Considering this definition of earning capacity, we believe the evidence of record warrants the conclusion that claimant's earning capacity has increased, rather than decreased, since the parties' stipulation awarding 20% unscheduled disability. Under these circumstances, we find that claimant is not entitled to an additional unscheduled award."

The Board's reliance on the stipulated award was incorrect. After she completed vocational rehabilitation, claimant was entitled to a *new* determination without regard to the previous award. ORS 656.268(5); *Hanna v. SAIF,* 65 Or App 649, 672 P2d 67 (1983).

> "The new determination would necessarily be based on the medical and other evidence available at that time, including that concerning the success or failure of the vocational rehabilitation program. A claimant's disability may be determined to be more or less than previously supposed after vocational rehabilitation, even absent a change in his medical condition. A change in a claimant's condition is not required to obtain a redetermination of extent of disability on termination of a program of vocational rehabilitation." 65 Or App at 652.

This is not an aggravation claim;[1] claimant did not have to prove that her condition had worsened or that her earning capacity had diminished from the time of the previous award in order to prove that she was entitled to a larger disability award.

[1] *See Stepp v. SAIF,* 78 Or App 438, ___ P2d ___ (1986).

As with any award of unscheduled permanent partial disability, the criterion for rating the disability after vocational rehabilitation is the loss of earning capacity due to the compensable injury. ORS 656.216(5). "Earning capacity" is the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills, and work experience. ORS 656.216(5). A worker's post-injury earnings can be evidence of a loss of earning capacity. *Jacobs v. Louisiana-Pacific*, 59 Or App 1, 3, 650 P2d 154 (1982); *Ford v. SAIF*, 7 Or App 549, 552, 492 P2d 491 (1972).

We agree with the referee's conclusion that claimant's injury precludes her from a large segment of the labor market, including her previous occupation of checking.[2] After successfully completing vocational rehabilitation, she was placed in a position in which she earns less than half of her pre-injury wage. Although it is true, as employer argues, that

claimant may eventually move into a more lucrative position in cosmetology, her physical limitations make that prospect far less likely. We find, like the referee, that claimant's compensable injury has resulted in a 45 percent loss of earning capacity.

Board's order reversed; referee's order reinstated.

[2] Employer does not dispute that claimant's disability is entirely due to her compensable injury.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
the beneficiary of Paul D. Rasmussen
(Deceased), Claimant.

RASMUSSEN,

Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(83-09373; CA A35498)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 6, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief were Evohl F. Malagon and Malagon & Associates, Eugene.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents. On the brief were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Donna Parton Garaventa, Assistant Attorney General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

PER CURIAM

Reversed and remanded.

PER CURIAM

Claimant, the deceased worker's beneficiary, seeks a determination that, at the time of his death, the worker was permanently and totally disabled as a result of his employment. Both the Board and the referee awarded 75 percent scheduled permanent partial disability.

At the age of 64, the worker, a welder at the same company for 31 years, suffered a compensable burn on his foot, resulting in a chronic disability. When he limited his activities, his foot would heal, but every time he attempted to return to work an ulcer would develop. Finally, unable to work, he retired. Doctors later determined that the worker had cancer, unrelated to his foot or to his employment, and that disease ultimately caused his death. SAIF asserts that the worker did not become permanently and totally disabled until after his cancer became symptomatic.

The record indicates that the worker was not able to return to his employment as a welder. Additionally, because of his age, limited experience and physical problems, his doctor and a vocational counselor were of the opinion that he was not trainable for any other job. The doctor testified, without contradiction, that the worker was permanently and totally disabled on November 15, 1982, before the cancer became symptomatic. We agree.

Reversed and remanded.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Fred C. Spivey, Claimant.

SPIVEY,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB 83-11519 & 83-07867; CA A34196)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 12, 1985.

Wilbur C. Smith, Jr., Portland, argued the cause for petitioner. With him on the brief was Galton, Popick & Scott, Portland.

Jeffrey J. Bennett, Assistant Attorney General, Salem, argued the cause for respondent. On the brief were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Darrell E. Bewley, Assistant Attorney General, Salem.

Before Richardson, Presiding Judge, and Warden and Newman, Judge.

RICHARDSON, P. J.

Remanded for entry of order directing SAIF to repay compensation improperly recouped and for determination of penalties and attorney fees for SAIF's late denial; otherwise affirmed.

RICHARDSON, P. J.

Claimant seeks review of an order of the Workers' Compensation Board affirming the referee's decision upholding SAIF's denials of both of his claims. The issues are (1) whether his claims are compensable; (2) whether he is entitled to additional interim compensation; and (3) whether he is entitled to penalties and attorneys' fees for SAIF's late denial of his first claim.

Claimant contends that he injured his back while working as a bus driver on April 21, 1983. He continued to work until the next day. The following three days were his scheduled days off. He took additional time off from work after that to attend to his duties as a union official and to take a short vacation. He first visited a doctor regarding his back injury on May 14 or May 18, 1983. SAIF received a Form 827, "First Medical Report For Workers' Compensation Claims," on May 23, 1983.[1] A workers' compensation claim form (Form 801) in the record indicates that the employer first received notice of the claim two days later. SAIF initially paid interim compensation for the period commencing on the day after his injury. However, on July 1, 1983, it informed him that he was

[1] The record contains a partially completed Form 827 signed by claimant and received by SAIF on May 20, 1983. Neither party attaches any significance to it.

not entitled to compensation for the period before he first sought medical treatment and that it would therefore recoup the amount it had paid him for that period by decreasing the amounts of future payments. It paid interim compensation through July 26, 1983, and denied the claim on July 27, 1983. Claimant returned to work in August, but he again left work on September 5, because the seat on the bus he drove irritated his back. He filed a second claim, which his employer received on October 1, 1983. SAIF did not pay any interim compensation on that claim and denied it on November 29, 1983.

The referee upheld both denials. He based his decision on claimant's lack of credibility and the lack of credible medical evidence to support the claims. The referee did not award any additional interim compensation on the first claim. On the second claim, he ordered SAIF to pay interim compensation for the period between October 1, 1983 (the date of notice to the employer) and November 29, 1983 (the date of

SAIF's denial) and a 25 percent penalty for its failure to pay the interim compensation. The referee stated that claimant was not entitled to interim compensation from the date of his injury, because SAIF's denial was being upheld. Finally, the referee found that SAIF's (four-day) late denial of the first claim was a "de minimus matter" and that SAIF was thus not liable for penalties or attorney fees. The Board adopted and affirmed the referee's opinion and order.

On *de novo* review, we agree that claimant has not proven that his injuries are work related. We therefore affirm the portion of the Board's order upholding SAIF's denials.

Claimant argues that, whether the denials are overruled or sustained, he is entitled to interim compensation on each claim for the period between the date when he left work because of the injury and the date of SAIF's denial. SAIF responds that he is entitled only to compensation for the period between the date of notice of his claim and the date of its denial. SAIF is correct, because the claim was properly denied. *Stone v. SAIF,* 57 Or App 808, 812, 646 P2d 668 (1982), *cross-petition dismissed as improvidently granted* 294 Or 442, 656 P2d 940 (1983); *Kosanke v. SAIF,* 41 Or App 17, 596 P2d 1013 (1979).[2]

Claimant contends that, even if he was not entitled to interim compensation from the date when he was injured, SAIF must repay the interim compensation that it had paid him on his first claim for the period between April 21 and May 18, 1983, because it lacked authority to recoup that amount unilaterally. An insurer may not recoup overpayments without prior authorization from the Board, the referee or the Workers' Compensation Department. *Forney v. Western States Plywood,* 66 Or App 155, 672 P2d 1376 (1983), *aff'd,* 297 Or 628, 686 P2d 1027 (1984); *Wilson v. SAIF,* 48 Or App 993,

[2] There is language in *Bono v. SAIF,* 298 Or 405, 692 P2d 606 (1984), that lends additional support to our conclusion. The court held that interim compensation need not be paid to a worker who has not demonstrated an absence from work. Applying that holding to the facts before it, the court suggested that interim compensation must be paid only for the period commencing with the date the claim was filed:

> "The referee specifically found that claimant did not have a time loss just subsequent to the injury. However, there was no finding concerning whether claimant had left work during the period immediately subsequent to the date the claim was filed. *That is the period during which interim compensation may be due in this case.* * * *" 298 Or at 410. (Emphasis supplied.)

618 P2d 473 (1980); *Taylor v. SAIF,* 40 Or App 437, 595 P2d 515, *rev den* 287 Or 477 (1979); *Horn v. Timber Products, Inc.,* 12 Or App 365, 507 P2d 36 (1973); *Jackson v. SAIF,* 7 Or App 109, 490 P2d 507 (1971). The appropriate procedure would have been to request a hearing on the issue under ORS 656.283(1).[3] Thus, regardless of whether claimant was entitled to interim compensation commencing from the date of his disability on his first claim, SAIF must repay the amount which it improperly recouped. *See Forney v. Western States Plywood, supra,* 66 Or App at 160.

Finally, claimant argues that he is entitled to penalties and attorney fees under ORS 656.262(10) for SAIF's late denial of his first claim.[4] SAIF denied the claim on July 27, 1983, four days beyond the 60-day limit for acceptance or denial of claims. *See* ORS 656.262(6). It offers no explanation for its delay. However, we cannot discern whether there were any "amounts then due" at the time of SAIF's denial upon which to calculate a penalty. *Paige v. SAIF,* 75 Or App 160, 164, 706 P2d 575 (1985). We remand for a determination whether there were any amounts due at the time of SAIF's denial and, if so, for determination of a penalty. Claimant is in any event entitled to an award of reasonable attorney fees for SAIF's late denial. *Bono v. SAIF,* 66 Or App 138, 143, 673 P2d 558 (1983), *rev'd on other grounds* 298 Or 405, 692 P2d 606 (1984); *Hewes v. SAIF,* 36 Or App 91, 583 P2d 576 (1978).

Remanded for entry of order directing SAIF to repay compensation improperly recouped and for determination of

penalties and attorney fees for SAIF's late denial; otherwise affirmed.

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[3] ORS 656.283(1) provides:

"Subject to * * * ORS 656.319 [concerning the time within which a hearing must be requested], any party or the director may at any time request a hearing on any question concerning a claim."

[4] ORS 656.262(10) provides:

"If the insurer * * * unreasonably delays acceptance or denial of a claim, the insurer * * * shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

ORS 656.382(1) provides:

"If an insurer or self-insured employer 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 insurer shall pay to the claimant or the attorney of the claimant a reasonable attorney fee as provided in subsection (2) of this section.* * *"

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Kiyoko R. Eastman, Claimant.

EASTMAN,
Petitioner,

v.

GEORGIA PACIFIC CORPORATION,
Respondent.

(WCB 83-03678; CA A33954)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 18, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief were Christopher D. Moore and Malagon & Associates, Eugene.

John M. Pitcher, Portland, argued the cause for respondent. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed as to compensability; reversed as to termination of temporary total disability.

BUTTLER, P. J.

Claimant seeks review of a Workers' Compensation Board order reversing the referee and holding that claimant's shoulder and neck condition is not compensable and that employer was entitled to terminate temporary total disability payments for a compensable carpal tunnel syndrome.

Claimant, a 21-year-old millworker, suffered a compensable injury necessitating carpal tunnel surgery on both wrists, which was performed in late 1982 by Dr. Jewell. In February, 1983, claimant saw her family physician, Dr. Wichser, for shoulder and neck pain; he prescribed therapy and medication. Claimant sought compensation for that treatment, on the assumption that her shoulder and neck pain was secondary to the carpal tunnel syndrome. Georgia Pacific denied the claim. On *de novo* review, we agree with SAIF that the evidence is not sufficient to show that claimant's present disability is work related.

Claimant also contends that employer had no authority to terminate unilaterally the temporary total disability benefits that she had been receiving as a result of her compensable carpal tunnel syndrome. In a form letter, employer sought Jewell's release of claimant for jobs that it characterized as light duty. On April 4, 1983, Jewell released claimant to light duty, with no repetitive hand motions. Claimant did not report for work, because, in her opinion, as she later

testified at hearing, "there is no light duty work there." On April 6, 1983, employer wrote a letter to claimant advising:

> "We do have light duty work available and since your physician has released you to light duty work, compensation benefits will cease as of April 4, 1983."

Claimant did not respond, and benefits were terminated as of April 4, 1983.

Former OAR 436-54-222(6), authorizing the termination of temporary total disability benefits before claim closure, provided:[1]

> "An insurer or self-insured employer shall cease paying temporary total disability compensation and start making

> payment of such temporary partial disability compensation as would be due in subsection (1) when an injured worker refuses wage earning employment prior to claim determination under the following conditions:
>
> "(a) The attending physician has been provided with a written description of the job duties and the physical requirements thereof;
>
> "(b) The attending physician agrees that the injured worker is capable of performing the employment offered as it is described; and
>
> "(c) The employer has provided the injured worker with a written offer of reasonable employment which states the beginning time, date and place; the duration of the job; the wage rate payable; an accurate description of the job duties and that the attending physician has said the worker is capable of performing the employment."

Employer attempts to justify its termination of claimant's benefits under that rule, claiming that it substantially complied with the procedural requirements, or, in the alternative, that compliance would have been futile because claimant had already decided not to work. The referee reversed the termination of benefits, finding that employer had not satisfied the procedural requirements of subparagraph (6). The Board reversed. We agree with the referee, because the rule is clear, unambiguous and specific in what is required before an employer may terminate unilaterally temporary total disability payments. Those requirements were not met here. Claimant was never given a written offer of employment that accurately described the jobs available. She was never advised of the beginning time or date or the duration of the job. Having failed to comply with the rule's requirements, employer had no authority to terminate benefits, even if claimant had already decided that she would accept no job which was offered to her.

Affirmed as to compensability; reversed as to termination of temporary total disability.

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[1] OAR 436-54-222 was renumbered to OAR 436-60-030 on May 1, 1985, and amended on December 12, 1985; it remains the same in substance.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Gary Manous, Claimant.

MANOUS,
Petitioner,

v.

ARGONAUT INSURANCE et al,
Respondents.

(WCB 83-07482; CA A36414)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 26, 1986.

Ronald L. Bohy, Salem, argued the cause and filed the brief for petitioner.

LaVonne Reimer, Portland, argued the cause for respondents. With her on the brief was Lindsay, Hart, Neil & Weigler, Portland.

Before Richardson, Presiding Judge, and Warden and Warren, Judges.

WARDEN, J.

Reversed and remanded on the issue of aggravation; affirmed on the extent of disability issue.

WARDEN, J.

In this workers' compensation case, claimant seeks judicial review of a Workers' Compensation Board order which reversed the referee and found that he had suffered a new injury rather than an aggravation of a compensable condition. We reverse.

Claimant suffered a compensable on-the-job low back sprain in December, 1979. Although he was found to be medically stationary by March, 1980, he continued to suffer moderate back pain. He was released for light work in April, 1980, and was advised to avoid repetitive lifting, bending and stooping. In June, 1980, he was diagnosed as suffering chronic low back strain and was placed on a vocational assessment program. The claim was closed in September, 1980, by a determination order which awarded him 5 percent unscheduled permanent partial disability.

Claimant later exacerbated his condition by lifting a heavy box while working at a sporting goods store, and the claim was reopened in March, 1982. Examining physicians concluded that he had a mild chronic cervical and lumbar sprain. He sufferent recurrent neck pain, which was exacerbated by certain activities; lumbar pain was also intermittent and increased with certain activities. No physical impairment was noted, but he was considered disabled by mild recurrent pain. A referee found that he had suffered an aggravation of

his earlier compensable injury and awarded an additional 10 percent unscheduled permanent partial disability in August, 1982.[1]

Although he did not seek further medical treatment, claimant continued to suffer chronic back pain. On August 14, 1983, while on a fishing trip, he slipped and fell to his knees while carrying some firewood up a steep slope. He felt an immediate sharp, stabbing pain in his back, which he testified was identical to, but more severe than, his original injury. He sought treatment from Dr. Urban, a chiropractor, who reported that the injury was an aggravation of the previous

compensable injury and represented a worsening of the underlying condition.

Respondent denied the aggravation claim, and a hearing was held in November, 1984. Relying on *Grable v. Weyerhaeuser Co.*, 291 Or 387, 631 P2d 768 (1981), the referee found that claimant's on-the-job injury was a material contributing cause of his worsened condition. On review, the Board reversed, finding that claimant had suffered a new injury that was an intervening and superseding cause of his condition and that his industrial injury was not a material contributing cause of the worsened condition. The Board concluded that claimant had not met his burden of proof, stating:

> "There is no evidence that claimant required treatment for his back condition due to residuals from the original industrial injury or that the original injury contributed in any way to the severity of claimant's condition. The only relationship between claimant's industrial injury and non-industrial injury is that the same part of his body was involved. We are not persuaded that claimant's industrial injury was a material contributing factor in his need for treatment or his disability after August 14, 1983 * * *."

We are at a loss to understand the Board's conclusion that there is "no evidence" that claimant's industrial injury contributed to the severity of his condition. Urban had reported:

> "Patient has experienced mild to moderate episodes of remission and exacerbation of the above signs and symptoms (burning pain at the base of the neck, stabbing pain in mid-back and severe dull ache in the low back) since the initial injury of 1979. The * * * fall has caused a complete exacerbation of initial signs and symptoms."

In a subsequent report to the insurer, Urban had stated:

> "Upon review of [claimant's] case history his signs and symptoms are identical however much more severe than his original injury. In my opinion this injury dated 8-14-83 is a definite aggravation to [*sic*] a previous injury and represents a worsening of his underlying condition."

Claimant had continued to suffer chronic pain associated with his original industrial accident. He was limited to light work.

[1] Claimant requested a hearing in August, 1983, regarding the extent of disability awarded by the August, 1982, determination order. It was consolidated for hearing with his subsequent aggravation claim.

The most recent incident was not particularly severe, but it caused him to suffer more intense pain in the same area.

A compensable injury need not be the sole or principal cause of claimant's worsened condition. *Peterson v. Eugene F. Burill Lumber,* 294 Or 537, 660 P2d 1058 (1983); *Coddington v. SAIF,* 68 Or App 439, 445, 681 P2d 799 (1984). We agree with the referee that Urban's findings and report are persuasive that the compensable injury was a material cause of his worsened condition and that the worsened condition is not solely the result of an independent, intervening non-industrial cause. *Grable v. Weyerhaeuser Co., supra,* 291 Or at 401.

Claimant also seeks review of that part of the Board's order affirming the extent of liability awarded in the August, 1982, determination order. On that issue we affirm the Board.

Reversed and remanded on the issue of aggravation; affirmed on the extent of disability issue.

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700 June 4, 1986 No. 337

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Randall B. Baustian, Claimant.

BAUSTIAN,
Petitioner,

v.

CONSOLIDATED FREIGHTWAYS,
Respondent,

(WCB 82-07657; CA A36932)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 7, 1986.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief was Malagon & Associates, Eugene.

Scott M. Kelley, Portland, argued the cause and filed the brief for respondent.

Before Joseph, Chief Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

Claimant seeks review of an order of the Workers' Compensation Board affirming a referee's order that upheld the self-insured employer's denial of an aggravation claim and awarded an additional 10 percent unscheduled permanent disability, making a total award of 20 percent for permanent partial disability of the low back. Claimant contends that his

condition worsened after July 8, 1982, the date of the last arrangement of compensation, and that the permanent disability award should be increased. We affirm.

Claimant worked as a long haul truck driver. On November 3, 1980, he was compensably injured when he fell while climbing down from the fuel tank on a truck. He apparently received emergency room treatment and returned to work. He continued to drive a truck for about three weeks, until the prolonged driving caused him considerable back pain. In December, he saw Dr. Fax, who found evidence of a possible disc injury. Fax believed that claimant could not return to long haul truck driving. After treating claimant with pain medication, physical therapy and traction, Fax reported in June, 1981, that claimant was "about stationary" and that he had a "very mild permanent residual disability compatible with a mild bulging disc syndrome and chronic low back strain." Fax continued to believe that claimant could not continue his former truck driving duties. He released claimant to return to work on July 13, 1981, and claimant returned to his former job on that date.

On August 20, 1981, a determination order awarded only temporary total disability benefits from November 24, 1980, through July 12, 1981. Claimant requested a hearing on the extent of his disability. Before the hearing, Fax reported on May 4, 1982, that, although claimant continued to have chronic low back and right leg pain, he did not believe that claimant was "any different" now than when he was released to work on July 13, 1981. Fax again encouraged claimant to seek retraining, because of his continued opinion that claimant's physical limitations prevented him from long haul truck driving. After the hearing, an order dated July 8, 1982, awarded claimant 10 percent unscheduled permanent partial disability for the low back. The referee, on the basis of Fax' reports, found that it was only a matter of time before

claimant's disability would force him to find other employment.

On July 22, 1982, Fax reported that claimant had increased pain and that he was finding it more difficult to drive a truck. Fax believed, consistent with his first diagnosis, that claimant was suffering from a "probable mild bulging lumbar disc." He recommended that claimant stop driving, which he did. Fax reported that claimant "subjectively was having increasing problems tho [sic] [he] did not have any objective findings." Fax' reports were treated by the employer as an aggravation claim, which it denied on August 18, 1982. Claimant requested a hearing.

In December, 1982, claimant qualified for a vocational retraining program, and he was later assigned to a one-year course in auto body repair. On July 21, 1983, Dr. Hoppert examined him and found "[c]hronic lumbosacral strain with right leg radiation, no neurologic deficit. Patient is stationary. He has mild impairment of the low back * * *." After claimant completed the auto body course, a determination order issued on March 21, 1984, closing the claim without an additional award of permanent partial disability. Claimant requested a hearing.

On December 10, 1984, a hearing was held on the denied aggravation claim and on the extent of disability. The referee upheld the denial. He found that "there was insufficient evidence that claimant sustained an aggravation," because the evidence "speaks to impairment *** not to a worsening." He did award an additional 10 percent permanent disability. He found that claimant had sustained a permanent loss of earning capacity, because he "is foreclosed from a sizeable segment of the general labor market." The Board affirmed.

To prove an aggravation of a compensable injury "it is sufficient to show that the [symptoms] of the condition [have] worsened so that the claimant is more disabled than [he was] at the time of [his] last arrangement of compensation." ORS 656.273. *Consolidated Freightways v. Foushee,* 78 Or App 509, 512, ___ P2d ___, *rev pending* (1986); *see Smith v. SAIF,* 78 Or App 443, ___ P2d ___ (1986); *Miller v. SAIF,* 78 Or App 158, 714 P2d 1105 (1986). "[M]ore disabled" means less able to work. *Smith v. SAIF,* 78 Or App at 448. Objective medical

evidence is not required; a claimant's subjective complaints may sustain his burden of proof. *See Garbutt v. SAIF,* 297 Or 148, 151-52, 681 P2d 1149 (1984).

After the last arrangement of compensation on July 8, 1982, claimant found that his back pain made it increasingly difficult to drive a truck for long distances. That development coincides with Fax' opinion as early as December, 1980, that he should find other work, and it was the referee's reason for awarding 10 percent additional permanent disability by the July 8, 1982, order. When the employer denied the claim on August 18, 1982, the objective medical evidence was that there was no worsening. After the denial, Fax reported on September 8, 1982, that claimant "is essentially the same." We are not persuaded that claimant's subjective complaints of back pain after July 8, 1982, were the result of a worsening of his back condition. The evidence as a whole does not show that he was less able to work as a long haul truck driver after the last arrangement of compensation.

Although claimant failed to prove a worsening, he was entitled to a redetermination of the extent of his disability, because he completed the vocational retraining program. *See* ORS 656.268(5); *Hanna v. SAIF,* 65 Or App 649, 652, 672 P2d 67 (1983). He argues that he is entitled to 50 percent instead of the 20 percent awarded. We disagree. The 20 percent approved by the Board is within the range appropriate under the facts. *See Paine v. Widing Transportation,* 59 Or App 185, 191, 650 P2d 968 (1982); *Owen v. SAIF,* 33 Or App 385, 388, 576 P2d 821 (1978).

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Marion Schumaker Duckett, Claimant.

DUCKETT,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB 83-06180; A33686)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 22, 1986.

Vernon Cook, Gresham, argued the cause and filed the brief for petitioner.

Douglas F. Zier, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

PER CURIAM

Reversed and remanded with instructions to remand to the referee.

PER CURIAM

While her case was pending before the Workers' Compensation Board, claimant petitioned the Board to remand it to the referee for consideration of evidence discovered after the hearing that indicated conclusively, and for the first time, that the cause of her pain and disability was a herniated disc. ORS 656.295(6). The Board denied the petition; it did review the new evidence and concluded that it was relevant to an aggravation claim, which was not an issue then before it. SAIF concedes that remand was probably appropriate, *Bailey v. SAIF,* 296 Or 41, 622 P2d 333 (1983), but suggests that we may review the evidence in the first instance, because the record here has been supplemented. We believe that the claims process would be served better by remand to the referee for consideration of the new evidence and for clarification of the issues to be resolved.

Reversed and remanded with instructions to remand to the referee.[1]

[1] Claimant seeks an award of penalties and attorney fees. On SAIF's motion, those issues were stricken, because there is no basis for them. In view of our disposition, we do not address claimant's remaining assignments.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Jeanne M. Lorenzen, Claimant.

LORENZEN,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 84-01859; CA A37060)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 18, 1986.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief was Malagon & Associates, Eugene.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

PER CURIAM

Affirmed.

PER CURIAM

Claimant seeks review of a Workers' Compensation Board order reversing a referee's decision that claimant is entitled to reimbursement under ORS 656.245(1) for child care expenses incurred while she was hospitalized for treatment of her compensable condition. The Board decided that, because no physician connected claimant's need for child care services with recovery from her injuries, she had failed to prove that the child care services were compensable as "medical or other related services" under the statute.[1] We affirm, but for a different reason.

We are not persuaded that child care services are "other related services" within the meaning of the statute. The rule of statutory construction known as *ejusdem generis* leads us to the conclusion that the legislature did not intend to include those services, because they are not of the same kind or class as those services specifically enumerated in the statute. *See Skinner v. Keeley,* 47 Or App 751, 757, 615 P2d 382 (1980).

Affirmed.

[1] ORS 656.245(1) provides:

"For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires, including such medical services as may be required after a determination of permanent disability. *Such medical services shall include medical, surgical, hospital, nursing, ambulances and other related services,* and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services. The duty to provide such medical services continues for the life of the worker." (Emphasis supplied.)

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of David F. Barrett, Claimant.

BARRETT,
Respondent on reconsideration,
v.
D & H DRYWALL et al,
Petitioners on reconsideration.

(WCB 81-02757; CA A29349; SC S31782)

In Banc

On petitioners' petition for reconsideration of decision of Supreme Court filed November 26, 1985. 300 Or 325, 709 P2d 1083 (1985).*

Scott H. Terrall, of Meyers & Terrall, Portland, for petitioners on reconsideration.

No appearance contra for respondent on reconsideration.

H. Scott Plouse, of Cowling & Heysell, Medford, and Jerald P. Keene, of Roberts, Reinisch & Klor, Portland, filed a brief amicus curiae on behalf of Association of Workers' Compensation Defense Attorneys.

JONES, J.

Reconsideration allowed; former decision adhered to.

* On review from the Court of Appeals, 70 Or App 123, 688 P2d 130 (1984), 73 Or App 184, 609 P2d 498 (1985), on judicial review from an order of the Workers' Compensation Board.

JONES, J.

In *Barrett v. D & H Drywall,* 300 Or 325, 709 P2d 1083 (1985), we reversed a decision (on reconsideration) by the Court of Appeals, 73 Or App 184, 698 P2d 498 (1985). The employer and its insurer have filed a particularly vigorous and vehement petition for reconsideration. We allowed the Association of Workers' Compensation Defense Attorneys to file an *amicus curiae* brief in support of the petition for reconsideration, and that brief "strongly" urges us to disavow our decision and change our minds as did the Court of Appeals.

The petition for reconsideration and the Defense Attorneys' brief have convinced us not that our decision was wrong, but that it is misunderstood by petitioner and by *amicus.* We propose, therefore, only to restate the substance of our decision.

ORS 656.214(5) provides that the criterion for a rating of disability for permanent partial disability "shall be the permanent loss of earning capacity *due to* the compensable injury." (Emphasis added.) This worker had a preexisting disease, osteoarthritis, in the area of his body that was injured in the accident with which we are here concerned. We have

recognized that the Court of Appeals found as a fact that the disease was not worsened by the injury, 300 Or at 329 n 3, and we accepted that finding. Our decision does not require any award of compensation for that disease or for any disability that may have existed by reason thereof before the present compensable injury.

Apparently, a disease may produce symptoms although it has not worsened. *See Weller v. Union Carbide,* 288 Or 27, 602 P2d 259 (1979).[1] If, therefore, the accident described in *Barrett v. D & H Drywall,* 300 Or at 327 and 330, caused that disease to produce symptoms where none existed immediately prior to the accident, and those symptoms produced loss of earning capacity, then that loss of earning

capacity is "due to" the compensable injury, and the statute requires an award of compensation therefor.

[1] This court said in *Weller v. Union Carbide,* 288 Or 27, 30 n 2, 602 P2d 259 (1979):

> "We do not profess to understand how there can be a worsening of pain not produced by a concomitant worsening of the underlying pathological condition of the bodily tissue. * * *"

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of John A. Shoulders, Claimant,

SHOULDERS,
Respondent on Review,

v.

SAIF CORPORATION,
Petitioner on Review.

(WCB 80-06246; CA A31403; SC S31929)

In Banc*

Argued and submitted December 3, 1985.

On review from the Court of Appeals.**

Jeff Bennett, Assistant Attorney General, Salem, argued the cause for petitioner on review. With him on the on the petition were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Darrell E. Bewley, Assistant Attorney General, Salem.

James L. Edmunson, Eugene, argued the cause for respondent on review. With him on the response were Christopher D. Moore and Malagon & Associates, Eugene.

CAMPBELL, J.

The result of the Court of Appeals is affirmed. Reversed and remanded to the Workers' Compensation Board for determination of attorney fees.

* Justice Roberts retired February 7, 1986.

**On appeal from the Order on Review of the Workers' Compensation Board. 73 Or App 811, 700 P2d 299 (1985).

CAMPBELL, J.

In this workers' compensation case the issue is whether claimant is entitled to an award of attorney fees.

Claimant suffered a compensable injury and was granted 25 percent permanent partial disability for loss of use of his leg. Claimant developed phlebitis, tinnitus, vertigo and thrombophlebitis. SAIF denied claims for each condition, and claimant requested a hearing. The referee found that the four conditions were compensable consequences of the injury and awarded attorney fees.[1] SAIF sought review by the Workers' Compensation Board (Board). The Board affirmed the referee as to the phlebitis and thrombophlebitis and reversed as to the tinnitus and vertigo. The Board failed to award attorney fees for the Board review. Claimant appealed to the Court of Appeals, arguing that he was entitled to attorney fees for the Board review under ORS 656.382(2).

The Court of Appeals held that claimant was entitled to attorney fees for successfully defending at the Board level the referee's determination of compensability on the phlebitis and thrombophlebitis claims. 73 Or App 811, 815, 700 P2d 299 (1985). In reaching this conclusion, the court held that ORS 656.382 was not applicable and relied instead on ORS 656.386(1).

SAIF petitioned this court for review, arguing that ORS 656.386(1) does not justify an award of attorney fees in this case. Claimant asserts that the Court of Appeals' interpretation of ORS 656.386(1) was correct, and that ORS 656.382(2) would also support the award of attorney fees. We conclude that the Court of Appeals misconstrued both statutes; claimant is entitled to attorney fees under ORS 656.382(2), not under ORS 656.386(1).

ORS 656.382(2)

ORS 656.382(2) provides:

> "If a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer or insurer, and the referee, board or court finds that the *compensation awarded* to a claimant *should not be disallowed or reduced,* the employer or insurer shall be required to pay to the claimant or the attorney for the claimant a reasonable attorney fee in an amount set by the referee, board or the court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal." (Emphasis added.)

The Court of Appeals found this statute inapplicable to this case because the Board hearing related to "compensability" rather than "compensation." The court held that "a referee's

[1] This was not a claim for aggravation. By Determination Order of July 22, 1980 and January 25, 1982, claimant was awarded 25 percent permanent partial disability for loss of use of his leg. In a subsequent order, the referee did not increase the award of permanent partial disability for the knee injury, but did remand the claims for tinnitus, vertigo and phlebitis to SAIF for acceptance and further processing in accordance with ORS 656.268.

finding of compensability is not the same as an award of compensation, or benefits, as the term is defined by ORS 656.005(9)." 73 Or App at 811. This holding appears to depart from previous Court of Appeals' cases and may be incompatible with the language of the Workers' Compensation Act. *See Mt. Mazama Plywood v. Beattie,* 62 Or App 355, 661 P2d 109 (1983); *Bahler v. Mail-Well Envelope Co.,* 60 Or App 90, 652 P2d 875 (1982); and *Mobley v. SAIF,* 58 Or App 394, 648 P2d 1357 (1982).

ORS 656.382(2) provides for attorney fees when "the referee, board, or court finds that the compensation awarded to a claimant should not be disallowed or reduced." The term "compensation" is defined in ORS 656.005(9), and includes "all benefits, *including medical services,* provided for a compensable injury to a subject worker or the worker's beneficiaries by an insurer or self-insured employer * * *." (Emphasis added.) ORS 656.245 provides that: "For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions resulting from the injury * * *." Thus, when a claim is determined to be compensable, medical services must be provided and, under ORS 656.005(9), medical services are defined as compensation.[2]

Because compensation necessarily follows from a finding of compensability, ORS 656.382(2) is applicable to this case.

At oral argument SAIF agreed with claimant that the Court of Appeals erred in holding that ORS 656.382(2) was not applicable to this case.[3] However, SAIF further asserted that even if ORS 656.382(2) were applied, claimant is not entitled to attorney fees in this case because his award of compensation was reduced. We do not agree.

The referee had found claimant's vertigo, tinnitus, thrombophlebitis and phlebitis compensable. Under ORS 656.245 claimant would automatically be entitled to medical services for these compensable conditions. The Board affirmed the referee as to the phlebitis and thrombophlebitis but reversed as to the tinnitus and vertigo. Thus, medical services would not be awarded for these latter two conditions and therefore the overall compensation was reduced. However, each condition must be considered separately. Because the phlebitis and thrombophlebitis conditions were held to be compensable, compensation was not reduced in relation to them. Therefore, claimant is entitled to reasonable attorney fees for successfully defending against reduction of compensation for those two conditions. Claimant, however, is not

[2] ORS 656.313(4), relating to stay of payment of compensation to a claimant when an employer or insurer requests review or court appeal, provides that "notwithstanding ORS 656.005, for the purpose of this section, 'compensation' means benefits payable pursuant to ORS 656.204 to 656.208, 656.210 and 656.214 and does not include the payment of medical services." This statute, however, does not affect the general definition of compensation, which does include medical services.

[3] However, in a footnote in its brief to this court, SAIF asserts that the Court of Appeals was correct in holding that ORS 656.382 did not apply because no compensation had been awarded. SAIF cites *Forney v. Western States Plywood,* 297 Or 628, 686 P2d 1027 (1984), and asserts that ORS 656.382(2) applies when the primary issue is one of extent of compensation, whereas ORS 656.386(1) applies when the primary issue is one of compensability. However, *Forney* merely noted that when the only issue is amount of compensation, attorney fees are ordinarily recoverable under ORS 656.382(2) and not under ORS 656.386(1). The statement in *Forney* does not imply the reverse, that when the only issue is compensability, attorney fees are recoverable under ORS 656.386(1) and not under ORS 656.382(2)

entitled to attorney fees for time spent defending against reduction of compensation for tinnitus and vertigo.

ORS 656.386(1)

The Court of Appeals held that although ORS 656.382(2) was not applicable, ORS 656.386(1) authorized an award of attorney fees in this case. ORS 656.386(1) provides:

> "In all cases involving accidental injuries where a claimant finally prevails in an appeal to the Court of Appeals or petition for review to the Supreme Court from an order or decision denying the 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. * * *"

The first sentence of subsection (1) (the "judicial appeals clause") allows attorney fees in the appellate courts only if claimant prevails "from an order or decision denying the claim for compensation." As SAIF correctly contends, that clause creates three prerequisites for attorney fees:

1. Claimant must initiate the appeal, because neither an insurer nor an employer would appeal from an order or decision denying the claim for compensation;

2. The decision must be from an order or decision denying, rather than allowing, the claim for compensation; and

3. Claimant must finally prevail on the issue of compensation.

The second sentence of subsection (1) regulates attorney fees in administrative proceedings (the "administrative clause"). Although this sentence does not expressly repeat the requirements that a claimant appeal "from an order or decision denying the claim for compensation," SAIF contends that the three requirements applicable to judicial appeals apply with equal force to administrative appeals.[4] The

statute's language and historical development support this view.

The phrase "in such rejected cases," contained in the

[4] SAIF argues that the Court of Appeals' interpretation of ORS 656.386(1) is inconsistent with three of this court's opinions: *Forney v. Western States Plywood, supra, Cavins v. SAIF*, 272 Or 162, 536 P2d 426 (1975); and *Peterson v. Compensation Department*, 257 Or 369, 477 P2d 216 (1970). However, two of the cases, *Cavins* and *Forney*, involved interpretation of the judicial appeals clause rather than the administrative clause. *Peterson*, which involved the administrative clause, did not address the issue of whether the claimant, rather than the insurer, must appeal to receive attorney fees under ORS 656.386(1). Thus, although we conclude that the Court of Appeals' interpretation of ORS 656.386(1) is incorrect in this case, it is not inconsistent with our previous opinions.

However, the Court of Appeals' interpretation appears contrary to at least one of its own opinions. In *Korter v. EBI Companies, Inc.*, 46 Or App 43, 53, 610 P2d 312 (1980), the court held that ORS 656.386(1) was not applicable because the claimant did not finally prevail before the Board since the Board found his claim to be noncompensable. The court added, "Moreover, the appeal to the Board *was not based upon a denial of the claim by the referee.*" 46 Or App at 53 (emphasis added). Thus, in a situation where, as here, the review by the Board was not sought from a denial of the claim by the referee, the court in *Korter* indicated that ORS 656.386(1) was inapplicable.

administrative clause, logically refers back to the immediately preceding sentence regarding judicial appeals and incorporates the judicial clause requirement that an attorney fee will be allowed only where the claimant prevails on his or her appeal of an order or decision denying a compensation claim. Under this construction, attorney fees are available on the same terms at each level of administrative or judicial proceeding where a claimant has been forced to appeal (rather than defend an appeal by the employer or insurer, as here) from an order or decision denying a claim for compensation. In each case, the claimant must initiate the appeal and prevail on the compensability issue.

Under this construction, the Court of Appeals' award of attorney fees under the administrative clause cannot stand. Although claimant partially prevailed before the Board, he did not meet the other two prerequisites because (1) review was sought by the insurer, rather than by the claimant, and (2) it was from an order awarding, rather than denying, compensation.

Claimant agrees with SAIF that ORS 656.386(1) should be read to provide one standard for attorney fees under both the judicial and administrative clauses in an appeal from a denied claim. However, according to the claimant, the legislature intended to allow attorney fees whenever the claimant prevailed, regardless of who appealed.[5]

As we noted in a previous decision, "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 * * *." *Ohlig v. FMC Marine & Rail Equipment,* 291 Or 586, 598 n 5, 633 P2d 1279 (1981). The history of the statute assists in resolving this ambiguity.

The antecedent of ORS 656.386(1) was adopted in 1951[6] to allow

> "a reasonable attorney fee to be paid from the Industrial Accident Fund as an administrative expense to an injured workman who prevailed in an appeal to the circuit court from

[5] Claimant asserts that under ORS 656.301 claimants who successfully defended awards on appeal were allowed attorney fees. ORS 656.301 provided:

> "In case of an appeal by the State Accident Insurance Fund or employer from an adverse decision of the circuit court, if the circuit court is affirmed, the claimant shall be allowed attorney fees to be fixed by the court and to be paid by the party initiating appeal, in addition to the compensation."

ORS 656.301 was repealed in 1977.

Claimant argues that the legislature repealed ORS 656.301 with the understanding that attorney fees for defense of appeals by the insurer or employer from an *adverse administrative decision,* which, according to claimant, had previously been provided by ORS 656.301, would be encompassed within ORS 656.386(1). However, ORS 656.301 provided for attorney fees for defense of appeals by the insurer or employer from an *adverse decision of the circuit court,* not from general adverse administrative decisions. Even if ORS 656.301 were intended to be encompassed by 656.386(1) (which is not at all clear from the legislative history), it would necessarily have been incorporated into the judicial clause, not the administrative clause. However, the language of the judicial clause indicates that ORS 656.301 was not incorporated since a claimant can recover attorney fees under ORS 656.386(1) when appealing from a board order or judicial decision denying compensation, not when an insurer or employer appeals from an order or decision allowing compensation.

[6] Or Laws 1951, ch 330, § 2.

an order of the State Industrial Accident Commission rejecting his claim. The act provided for the payment of an attorney fee only in appeals from 'rejected claims' and expressly provided that '[i]n all other cases attorney fees shall continue to be paid from the claimant's award of compensation.' " *Peterson v. Compensation Department,* 257 Or 369, 372, 477 P2d 216 (1970).

The act did not include a provision for attorney fees at the administrative level until 1957 when the legislature added the second sentence of ORS 656.386(1). The statute, as amended, provided as follows:

"656.588 [renumbered ORS 656.386] (1) In all cases involving accidental injuries occurring on or after July 1, 1957, where a claimant prevails in an appeal to the circuit court *from a commission order rejecting his original claim for compensation,* the court shall allow a reasonable attorney's fee to the claimant's attorney. *In such rejected cases* where the claimant prevails in his appeal before the commission itself, then the commission shall allow a reasonable attorney's fee; * * *." Or Laws 1957, ch 558, § 1 (emphasis added).

Under the statutory procedure then in effect, the phrase "in such rejected cases" was clear and unambiguous.

Claims were rejected (or allowed) solely by the State Industrial Accident Commission, not by an employer or insurer. If the Commission denied a claim, a claimant would first request a rehearing by the Commission and, if still dissatisfied, appeal to the circuit court. Attorney fees were allowed for claimants whose claims had been initially rejected by the Commission but who prevailed either on administrative rehearing or judicial appeal.

In 1965, a major revision of the Workmen's Compensation Act eliminated the State Industrial Accident Commission and created the Workmen's Compensation Board. Under the new scheme, the employer or insurer (not an administrative agency) initially rejects or accepts a claim. A claimant may then obtain a hearing before a hearings officer, followed by review by the Board and then appeal to the courts. In 1965, ORS 656.386(1) was amended as follows:

"In all cases involving accidental injuries [occurring on or after July 1, 1957,] where a claimant prevails in an appeal to the circuit court from a [commission] *board* order [rejecting his original] *denying his* claim for compensation, the court shall allow a reasonable attorney's fee to the claimant's attorney. In such rejected cases where the claimant prevails *finally* in [his appeal before the commission] *a hearing before the hearing officer or in a review by the board* itself, then the [commission] *hearing officer or board* shall allow a reasonable attorney's fee * * *." Or Laws 1965, ch 285, § 42a (bracketed language deleted, italicized language added).[7]

These changes created the present ambiguity.

The phrase "from a commission order rejecting his original claim" in the first sentence was changed to "from a board order denying his claim." The second sentence, however, was not changed in a corresponding manner. The second

[7] In 1977, ORS 656.386(1) was amended to delete reference to the circuit court and to provide attorney fees where a claimant prevails in an appeal to the Court of Appeals. Or Laws 1977, ch 804, § 14. In 1983, the statute was again amended to provide for attorney fees where the claimant finally prevailed on a petition for review before the Supreme Court. Or Laws 1983, ch 568, § 2.

sentence still referred to "in such rejected cases" even though the language referring to rejection was eliminated from the first sentence.

The phrase "such rejected cases" might refer to all claims originally rejected by the insurer or employer, or to

rejected claims where the claimant sought review. Apparently the Court of Appeals followed the former interpretation; the court held that attorney fees could be awarded under ORS 656.386(1) even though the insurer, rather than the claimant, initiated board review. Under the judicial clause, however, the language of the statute indicates that a claimant only receives attorney fees if he initiates the appeal.

Thus, under the Court of Appeals' construction, two different standards are created: Under the administrative clause a claimant can receive attorney fees if the insurer, employer or claimant seeks review, while under the judicial clause a claimant can receive attorney fees under ORS 656.386(1) only when he appeals.

Both SAIF and claimant agree that ORS 656.386(1) should be read to provide one standard for attorney fees under both the administrative and judicial clauses. We conclude that under both clauses a claimant must initiate the review or appeal from an order or decision denying the claim. Claimant may not receive attorney fees under ORS 656.386(1) where, as in this case, the insurer seeks board review of a hearing officer's order that the claim be accepted.

The Court of Appeals' interpretation of ORS 656.386(1) would render ORS 656.382(2) largely superfluous. ORS 656.382(2) provides for fees to claimant if the insurer or employer appeals and compensation is not reduced or disallowed. If compensation is not reduced or disallowed, then claimant would have prevailed and could also receive attorney fees under the Court of Appeals interpretation of ORS 656.386(1). The portion of ORS 656.382(2) allowing attorney fees when an insurer requests review by the Board would thus serve no purpose. As we have previously indicated, a legislative act is not to be deemed meaningless. *Thompson v. IDS Life Ins. Co.*, 274 Or 649, 653-54, 549 P2d 510 (1976). If ORS 656.386(1) is interpreted as allowing attorney fees when an insurer requests review by the Board, then there would have been no reason for the legislature to enact that portion of ORS 656.382(2) which also allows for attorney fees when an insurer requests review by the Board.[8]

We conclude that ORS 656.386(1) does not allow an award of attorney fees where the insurer, rather than the claimant, initiates review by the Board from an order accepting the claim. Therefore, claimant is not entitled to attorney

[8] As we noted in *Bracke v. Baza'r*, 294 Or 483, 487, 658 P2d 1158 (1983),

> "During the testimony before legislative committees considering the 1965 revision, opponents of HB 1001 (the vehicle for revision) expressed fear that the adversarial position of the employer or SCD [State Compensation Department] * * * and the claimant * * * might result in the former pursuing appeals at each level for the purpose of wearing down or harassing claimants. The answer was to provide that where the employer or SCD initiated 'a request for hearing, request for review or court appeal' and the claimant successfully defended his award, the employer or SCD, as the case might be, would become liable for reasonable attorney fees in addition to the award of benefits. Or Laws 1965, ch 285, § 42(2). *That section became ORS 656.382(2)* * *." (Emphasis added; footnote omitted.)

fees under that statute. However, claimant is entitled to reasonable attorney fees under ORS 656.382(2) for successfully defending against reduction of compensation for two of his conditions.

The result of the Court of Appeals is affirmed. Reversed and remanded to the Workers' Compensation Board for determination of attorney fees.

IN THE SUPREME COURT OF THE STATE OF OREGON

WARM SPRINGS FOREST PRODUCTS INDUSTRIES,
Petitioner on Review,
v.
EMPLOYEE BENEFITS INSURANCE CO.,
Respondent on Review.

(TC No. A8010-05866; CA A24017; SC S32081)

On review the from Court of Appeals.*

Argued and submitted December 4, 1985.

Howard G. Arnett of Bend argued the cause for Petitioner on Review. With him on the petition were Dennis C. Karnopp, Ronald L. Marceau, and Johnson, Marceau, Karnopp and Petersen of Bend.

James N. Westwood of Portland argued the cause for Respondent on Review. With him on the response were Bruce A. Rubin, P. Conover Mickiewicz, and Miller, Nash, Yerke, Wiener & Hager of Portland.

Before Peterson, Chief Justice and Lent, Linde, Campbell, Carson and Jones, Justices.

PER CURIAM.

The decision of the Court of Appeals is affirmed.

Carson, J., filed a dissent.

* Appeal from Circuit Court, Multnomah County. James R. Ellis, Judge. 74 Or App 422, 703 P2d 1008 (1985).

PER CURIAM

In *Mountain Fir Lbr. Co. v. EBI Co.*, 296 Or 639, 679 P2d 296 (1984), we held that an insurer's oral promise to rebate part of the premium for workers' compensation coverage could not be enforced by the insured, because the promise was not "plainly expressed in the policy," as required by ORS 746.035.[1] We remanded the present case, in which the same insurer had made similar promises, to the Court of Appeals for consideration of a claim by the insured, an enterprise owned and operated by the Confederated Tribes of the Warm Springs

[1] ORS 746.035 provides:

"Except as otherwise expressly provided by the Insurance Code, no person shall permit, offer to make or make any contract of insurance, or agreement as to such contract, unless all agreements or understandings by way of inducement are plainly expressed in the policy issued thereon."

Reservation of Oregon, that the prohibition against rebates did not apply to its transactions with the insurer. *Warm Springs Forest Products Ind. v. EBI Co.*, 296 Or 708, 678 P2d 266 (1984).

Warm Springs Forest Products Industries (hereafter Warm Springs) maintained that the contract must be enforced under the Confederated Tribes' Indian law and under federal Indian law. The Court of Appeals rejected this claim. The court held that Warm Springs agreed that its contract with the insurer (EBI) would be governed by Oregon law by virtue of two provisions of the policy. Condition 1 of the policy calls for changes in "classifications, or rating plans" required "under any law regulating this insurance" or affecting "the benefits provided by the Workman's Compensation Law" to be stated in an endorsement to the policy. The court read this policy provision as referring to some system of law that regulates insurance classifications and rating plans as well as workers' compensation benefits, which in the context of this transaction could only mean Oregon laws. The second provision is an endorsement to the policy noting that "[i]t is unlawful in Oregon for an insurer to promise to pay policyholder dividends for any unexpired portion of the policy term or to misrepresent the conditions for dividend payments." The court held that the two provisions evidenced a choice of the contracting parties to have the insurance contract governed by Oregon law and also a consent by plaintiff,

"as required by Indian law principles," to the application of Oregon law. *Warm Springs Forest Products Ind. v. EBI Co.*, 74 Or App 422, 428, 703 P2d 1008 (1985).

We do not think this holding depends on parsing the precise terms of the two quoted provisions. The provisions show that the existence of Oregon law regulating compensation insurance policies was not an unknown or unforeseen circumstance, and it is far more plausible to infer from their inclusion that the parties expected Oregon law to apply to the entire policy than that they chose Oregon law for some of its clauses and Warm Springs law for other clauses.

Warm Springs contends that only the tribal council, the governing body of the Confederated Tribes, could consent to the application of the Oregon insurance code on the Warm Springs Indian Reservation, and that nothing in the record shows that the council approved this insurance contract entered by the management of Warm Springs and EBI. EBI responds that approval by the tribal council is irrelevant, because Warm Springs necessarily claimed authority to enter into the contract for workers' compensation insurance on which it was bringing this action, and such contracting authority would extend to agreeing to a choice of the law governing the contract.

Warm Springs denies that it had authority to agree to the application of Oregon law to this insurance contract, and it relies on elaborate *dicta* in the opinion of the Court of Appeals for the proposition that without such a contractual choice of law, the rebate agreement "might well be enforceable." 74 Or App at 431.

These *dicta* assume that the Confederated Tribes have adopted some system of contract law that differs from Oregon contract law and that would sanction insurance contracts that would be illegal in Oregon. The assumption is not necessarily correct. EBI points to a provision of the tribal code that, at the relevant time, stated:

> "*Law Applicable in Civil Actions.*
>
> "In all civil cases, the Tribal Court shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department and any ordinances or customs of the Tribes not prohibited by such Federal laws.

> "Where any doubt arises as to the customs and usages of the Tribes the Court shall request the advice of not less than two impartial counsellors familiar with these customs and usages.
>
> "Any matters that are not covered by this Code, the traditional customs and usages of the Tribe, or by applicable Federal laws and Regulations, shall be decided by the Court according to the laws of the State of Oregon."

Warm Springs responds that this provision states what law shall be applied in cases within the jurisdiction of the tribal court, and that the court's civil jurisdiction is limited to controversies between Indians involving no more than $3,000. The tribal code indeed stated what law should be applied in the tribal court in those cases that would come before it, but we are not persuaded that the substantive rules adopted in the tribal code for civil "matters" were to apply exclusively to transactions or claims of $3,000 or less. It seems wholly anomalous to maintain that the Confederated Tribes would adopt Oregon law (in the absence of contrary provisions of federal or tribal law) to be applied between members of the tribes in the tribes' own court and exclude the application of Oregon law in substantively identical matters when they are brought before an Oregon court, as in this case.

Justice Carson's dissenting opinion sets out in greater detail the reasons why an Oregon court may have to undertake an examination of Indian tribal laws and customs that have the effect of law. The general principles are not disputed. However, Warm Springs is in no position to insist that the circuit court or the appellate courts must seek out and take judicial notice of all possible sources of laws or customs of the Confederated Tribes in order to determine whether or not these hypothetical laws or customs would enforce this insurance contract or deny Warm Springs authority to consent to the application of Oregon law. A court may take judicial notice of the "decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States" (as well as of "foreign nations," in case tribal governments were not deemed an "other jurisdiction of the United States"), OEC 202, but a party cannot demand that a court take notice of undocumented law when the party does not supply the court with the necessary information. OEC 201(d). In this case, Warm

Springs referred to no tribal "custom or usage" and was unable, in oral argument, to specify any developed body of

contract law under which parties should enter into and perform, and Oregon courts should enforce, such commercial or insurance contracts as the contract on which Warm Springs brings this action.

EBI does not dispute that Indian tribes have authority to make laws for persons, property, and transactions on their reservations and that various state taxes and regulations do not apply on Indian reservations. But Warm Springs' argument assumes that the prohibition of rebates by insurance companies is a state law "regulating" the Indian enterprise and that the law of insurance contracts without that prohibition is not such state law. It postulates that there is some difference between common law and statutory law that makes one but not the other applicable to transactions with Indians. The argument does not specify the "common law" of any jurisdiction nor whether "common law" includes or excludes doctrines and remedies of equity such as, for instance, specific performance, reformation, or estoppel. Warm Springs does not explain how this theory would apply to transactions governed by the Uniform Commercial Code (ORS chapters 71 to 79), the unfair trade practice law (ORS 646.605 to 646.652), or the products liability law (ORS 30.900 to 30.925), many of which a member of the Confederated Tribes might have occasion to invoke.

Warm Springs' argument comes down to a contention that it could not validly agree to such a choice of Oregon law because Oregon's law "has the effect of invalidating the rebate agreement, the main reason plaintiff bought the policy," and that "a contractual choice to apply foreign law which is contrary to the fundamental public policy of the place where the contract is made and performed will not be given effect," citing Restatement, Second, Conflict of Laws § 187(2)(b) (1971). In essence, Warm Springs maintains that it could choose (and enforce in this action) Oregon rules governing insurance contracts to the extent that they protect its interests but could not agree to those rules that proved unfavorable to itself.

We do not believe that Warm Springs' agreement to a choice of Oregon law contravenes the "fundamental public

policy" of the Confederated Tribes. It is not contrary to the policy expressed in the tribal code's reference to Oregon law in the absence of governing federal law or Indian written or customary law. To the contrary, we doubt that the Confederated Tribes, which engage in many substantial business transactions with the world outside the reservation, would believe that they would be best served by adopting a public policy that would cast doubt not only on the sources, nature and rules of law governing those business transactions, but even on the ability of tribal enterprises to agree to a choice of the applicable law. We think it is as likely that the tribes would want to be able, and their members to be able, to invoke provisions of Oregon law that are designed to protect consumers and other contracting parties against risks such as, in this instance, the risk of inadequately secure insurance. In any event, Warm Springs presents nothing to show such a "fundamental public policy" invalidating its agreement to a choice of

Oregon insurance law beyond the assertion that it might not have chosen EBI's insurance policy if it had known that EBI's promised premium rebate was unenforceable.

For these reasons, we affirm the decision of the Court of Appeals and the judgment of the circuit court.

CARSON, J., dissenting.

The majority holds that the written insurance contract evidenced a choice by the parties to have Oregon law apply to all aspects of the transaction. I do not believe that this conclusion can be reached from the record before us and the procedural posture of this case. However, if the majority is correct on that point, Warm Springs law would not apply to this case, and it is neither necessary for the court to consider what the applicable law of Warm Springs is, nor appropriate to reach conclusions about that issue, the status of which largely was undeveloped by the parties. Further, I disagree with the conclusions the majority reaches on that issue.

Perhaps the majority's conclusions would be correct had this case been fully tried, a factual record developed, and findings made on the disputed issues of fact. The majority does not indicate that the question before us is whether motions to strike material allegations of the complaint, and to dismiss the claims from which those allegations are to be stricken, were properly granted. The majority opinion at least

implicitly relies on assumptions regarding some disputed issues of fact which we may not resolve when considering such motions.

I. THE PROCEDURAL SETTING

Plaintiff (WSFP) did not initially purport to raise its claims under anything other than Oregon law. WSFP alleged that defendant (EBI) represented that it would retain only 22 percent of WSFP's premiums, but in fact retained over 32 percent in 1976-77 and over 39 percent in 1977-78. WSFP claimed that the representation was fraudulent and that WSFP was entitled to damages for premium overcharges. WSFP's rebate claim paralleled those made by several Oregon employers to whom EBI allegedly had made similar representations.

As it did in the litigation with other employers, EBI moved, pursuant to ORCP 21 E., for an order striking the paragraph of WSFP's first amended complaint which alleged the rebate agreement. The basis for the motion was that the rebate agreement would be illegal under ORS 746.035, and unenforceable. The trial court granted the motion but gave WSFP 10 days to plead further.

WSFP filed a second amended complaint, changing the allegation concerning the rebate agreement by adding the emphasized language:

> "In connection with the sales proposal to induce plaintiff to purchase insurance from defendant, defendant by letter dated January 22, 1976, *and delivered to plaintiff at Warm Springs, Oregon,* and by written proposal dated May 30, 1976 *and presented to plaintiff at Warm Springs, Oregon,* represented that for an enterprise with the same risk and premium

> level as plaintiff, defendant would retain 22% of the gross annual premiums, when in fact the percentage of plaintiff's gross annual premium retained by defendant for the period July 1, 1976 to June 30, 1977 was 32.4% and for the period July 1, 1977 to June 30, 1978 was 39.7%."

WSFP also added claims that the written insurance contract should be reformed to include the oral rebate agreement, and that WSFP should be awarded damages for breach of the contract as reformed.

EBI moved to strike WSFP's fraud claim in the

second amended complaint on the ground that WSFP had failed to obey the order granting the first motion to strike. EBI also moved to dismiss (for failure to state ultimate facts sufficient to constitute a claim) WSFP's claims for reformation and breach of contract. Alternatively, EBI moved to strike all allegations involving the rebate agreement on the ground they were "sham, frivolous and irrelevant."

EBI maintained that the claims relied on the same alleged rebate agreement which the court, in granting the earlier motion, implicitly already had found unenforceable under Oregon law. WSFP responded that its theory was that Warm Springs law rather than Oregon law should apply to the transaction. EBI argued that Oregon law should apply and that WSFP had not cited "federal or Indian law * * * to suggest that rebates are permitted." WSFP replied that no prohibition of premium rebate agreements "exists in the common law or on the Warm Springs Indian Reservation. Consequently, Oregon state law and Warm Springs tribal law are in direct conflict."

The trial court ultimately disposed of EBI's motions by ordering the second amended complaint "amended by interlineation" to indicate that "Warm Springs, Oregon," is "within the exterior boundaries of the Warm Springs Indian Reservation." It then ordered stricken all allegations referring to the rebate agreement. The court added that "to the extent not stricken * * *, plaintiff's claims [other claims, not at issue in this appeal] are dismissed without prejudice," implying that the claims from which allegations had been stricken were dismissed with prejudice. In effect, the order and final judgment dismissed the claims on the grounds that, without the stricken allegations concerning the rebate agreement, there was nothing left of the fraud, reformation and breach of contract claims.

II. MERITS OF EBI'S MOTIONS

Once WSFP indicated that the allegations in its second amended complaint were not merely repetitions of claims already rejected under Oregon law but instead were attempts to state claims under Warm Springs law, the allegations could be stricken if they were "sham, frivolous, [or] irrelevant, * * *." ORCP 21 E. The allegations certainly could not have met all three grounds, as EBI charged, for this court

has said that "sham" and "frivolous" have two mutually

exclusive meanings.[1] EBI argued not that the allegations were "sham" or untrue, but that they were "frivolous" or "irrelevant" in the sense that even if they were true, the law would not recognize claims for relief based upon those allegations.

Thus, in substance, the basis for what EBI called "motions to strike" was the argument that WSFP's second amended complaint failed to state ultimate facts sufficient to constitute claims for relief. *See* ORCP 21 A.(8). This court frequently has criticized the use of "motions to strike" for this purpose,[2] but when they are, in substance, motions to dismiss for failure to state sufficient ultimate facts, we have treated them as such; we take all well-pleaded facts alleged in the complaint as true for purposes of resolving the legal issues. *See Oksenholt v. Lederle Laboratories,* 294 Or 213, 215, 656 P2d 293 (1982) (under pre-ORCP law, treating such a motion to strike as though it were a demurrer); *Harris v. Northwest Natural Gas Company,* 284 Or 571, 573, 588 P2d 18 (1978) (same); *Reliable Credit Assn. v. Credithrift of Amer.,* 280 Or 233, 235, 570 P2d 379 (1977) ("the well-pleaded allegations of the complaint are taken as being true").

Because *Mountain Fir Lbr. Co. v. EBI Co.,* 296 Or 639, 679 P2d 296 (1984), established that no claims such as WSFP's can be recovered upon under Oregon law, WSFP's complaint could have stated ultimate facts sufficient to constitute a claim for relief, if at all, only under the law of Warm Springs. The complaint failed to state sufficient ultimate facts even under Warm Springs law if either (A) Warm Springs law could not apply to the transaction, even assuming all well-pleaded facts in WSFP's favor, as a matter of law; or (B) under Warm Springs law, like Oregon law, the rebate agreement was unenforceable. If either were the case here, the allegations concerning the rebate agreement were properly stricken from

the complaint, because they could not support a claim for relief.

A. *Complaint's Sufficiency to Allege Applicability of Warm Springs Law.*

A complaint states facts sufficient to constitute a claim for relief if it contains allegations which permit the introduction of evidence which will satisfy the elements of that claim. *Adams v. Oregon State Police,* 289 Or 233, 241, 611 P2d 1153 (1980). Here, WSFP has pleaded allegations of fact sufficient to permit the introduction of evidence that Warm Springs law could apply to any of its claims.

Two of WSFP's claims, those for reformation and for breach of contract, are contractual. As to contractual claims, we have indicated that "the public policy of Oregon should prevail and the law of Oregon should be applied" unless the

[1]It is incorrect to move to strike on grounds that an allegation is "sham and frivolous," because no allegation can be both "sham" ("good in form but false in fact; * * * a pretense because it is not pleaded in good faith") and "frivolous" ("true in its allegations, [but] totally insufficient in substance"). *Andrysek v. Andrysek,* 280 Or 61, 69 n 8, 569 P2d 615 (1977). We have suggested that trial courts refuse to consider motions to strike alleging that material is both sham and frivolous. *Wash. Squ. v. First Lady Beauty Salons,* 290 Or 753, 756 n 4, 625 P2d 1311 (1981).

[2]*See, e.g., Harris v. Northwest Natural Gas Company,* 284 Or 571, 573 n 1, 588 P2d 18 (1978); *Klerk v. Teletronix, Inc.,* 244 Or 10, 12, 415 P2d 510 (1966).

interests of the other jurisdiction are "clearly more important than" Oregon's. *Lilienthal v. Kaufman,* 239 Or 1, 16, 395 P2d 543 (1964).

In this case, WSFP has pleaded ultimate facts which would permit the introduction of evidence that Warm Springs has a "clearly more important" interest than does Oregon in having its law apply. The complaint alleges generally that WSFP is a division of Warm Springs with its place of business on the reservation, and specifically that it was on the reservation that EBI made, and WSFP received, the rebate proposal. These allegations would allow WSFP to introduce evidence from which one could conclude that Warm Springs has an overriding interest in having its own law govern the conduct of foreign businesses which come onto the reservation, or initiate contact with Warm Springs, for the purpose of making representations that may induce Warm Springs divisions or enterprises to contract with those businesses rather than others. Thus, Warm Springs law could apply to WSFP's claims.

WSFP also seeks damages in tort for alleged fraud in the representations concerning rebates. This court has looked to the Restatement (Second) Conflicts of Law to resolve conflicts of law issues in tort actions. *Casey v. Manson Constr. Co.,* 247 Or 274, 278-80, 287-92, 428 P2d 898 (1967). Section 148 of the Restatement addresses the torts of fraud and negligent misrepresentation, stating that:

> "(2) When the plaintiff's action in reliance took place in whole or in part in a state other than that where the false representations were made, the forum will consider such of the following contacts, among others, as may be present in the particular case in determining the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties:
>
> "(a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
>
> "(b) the place where the plaintiff received the representations,
>
> "(c) the place where the defendant made the representations,
>
> "(d) the domicil, residence, nationality, place of incorporation and place of business of the parties,
>
> "(e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
>
> "(f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant."

The well-pleaded allegations of the complaint indicate that at least four of the six Restatement criteria favor applying Warm Springs law to determine whether WSFP's fraud claim is actionable. WSFP's complaint alleged that: WSFP received EBI's representations on the reservation, *see* Restatement, criterion (b), *supra;* EBI made the representations on the reservation, criterion (c), *supra;* WSFP is a division of the Warm Springs Tribe with its place of business on the reservation, criterion (d), *supra;* and the facility EBI

insured for workers' compensation coverage was WSFP's manufacturing operation located on the reservation, criterion (e), *supra.* Thus, Warm Springs law could apply to WSFP's fraud claim.

The majority, however, agrees with the Court of Appeals' majority that Warm Springs law does not apply to the transaction. *Ante,* 300 Or at ___ (Slip Op at 2). I disagree for two reasons.

First, because the complaint sufficiently pleads facts to allow the introduction of evidence that Warm Springs law

applies, no court can say that the rebate allegation is "frivolous" or "irrelevant," or that the complaint fails to state ultimate facts sufficient to constitute a claim, unless it can say as a matter of law that under *Warm Springs law* the contract evidenced a choice of law. Regardless of whether the written language would constitute a choice of law under Oregon law, it cannot be said that the parties chose Oregon law unless the language would have the same effect under Warm Springs law. There is no indication that Warm Springs law resolves contractual choice of law problems in the same manner as does Oregon law.

Second, the provisions upon which the majority relies to find a contractual choice of law are too ambiguous to demonstrate that, as a matter of Oregon law, WSFP consented to the application of Oregon's anti-rebate statute. Setting aside the question of what, under Warm Springs law, constitutes a choice of foreign law, and assuming with the majority that WSFP's authority to enter into an insurance contract included the authority to consent (without express tribal council approval) to the application of Oregon law, *ante,* 300 Or at ___ (Slip Op at 3), I am convinced that the ambiguities in the contract present a factual dispute about the parties' choice of law that we are in no position to resolve in reviewing the granting of these motions.

The first provision, Condition 1 of the policy, provides:

> "* * * [I]f any change in classifications, or rating plans is or becomes applicable to this policy under *any law regulating this insurance* or because of any amendments effecting [sic] the benefits provided by the Workmen's Compensation Law, such change with the effective date thereof shall be stated in an endorsement issued to form a part of this policy." (Emphasis supplied.)

The phrase "any law regulating this insurance" could refer to tribal law. As the dissent in the Court of Appeals noted:

> "The references in that provision to 'any law regulating this insurance' are not a statement that there is any such law. They could refer to a future insurance code which the tribes might adopt as easily as to the present, but otherwise inapplicable, Oregon code. Nothing in this provision can be a decision by the tribe that the Oregon Insurance Code applies to the policy." 74 Or App at 436-37 (Rossman, J., dissenting).

The other provision upon which the majority relies provides that:

"IT IS AGREED THAT THE PARTICIPATING PROVISION OF THE CONDITIONS OF THIS POLICY ARE [*sic*] HEREBY AMENDED TO READ AS FOLLOWS:

"EXCEPT AS PROVIDED, THIS POLICY SHALL PARTICIPATE IN PROFITS AS APPORTIONED BY THE BOARD OF DIRECTORS.

"IT IS *UNLAWFUL IN OREGON* FOR AN INSURER TO PROMISE TO PAY POLICYHOLDER DIVIDENDS FOR ANY UNEXPIRED PORTION OF THE POLICY TERM OR TO MISREPRESENT THE CONDITIONS FOR DIVIDEND PAYMENTS. DIVIDENDS WILL BE DUE AND PAYABLE ONLY FOR A POLICY PERIOD THAT HAS EXPIRED, AND ONLY IF DECLARED BY AND UNDER CONDITIONS PRESCRIBED BY THE BOARD OF DIRECTORS OF THE INSURER." (Emphasis supplied.)

This policy provision is susceptible to at least two interpretations: that Oregon law was adopted or that the policy language merely gives information about Oregon law. Nothing in the provision, however, makes Oregon law applicable when it would not otherwise apply. Moreover, as the Court of Appeals' dissent noted, policy dividends from general company profits are not the same as the rebates on policy premiums at issue here, and if they were, a declaration of Oregon law is not an adoption of Oregon law. 74 Or App at 437.

After asserting that the holding in this case does not depend upon "parsing the precise terms" of these provisions, the majority concludes that "it is far more plausible to infer from their inclusion" that the parties expected Oregon law to apply to the entire policy, because the provisions show that the existence of Oregon insurance law was "not an unknown or unforeseen circumstance." *Ante,* 300 Or at ___ (Slip Op at 2). If the majority's conclusion depends upon its view of the most "plausible inference" about what the parties in fact expected when they made the contract, and the majority is unwilling to rely solely on the assertion that the words of the written agreement unambiguously express those expectations, then the parties' evidence about negotiations and other matters not appearing within the four corners of the contract should also be considered.

However, in considering EBI's motions, it was not the trial court's role to take evidence and to resolve factual disputes; its role was only to decide whether, under any set of facts, WSFP might be able to prove, given its allegations and the language of the written contract, there could be a claim for relief under Warm Springs law. The majority should not now, by resolving in the moving party's favor a disputed factual issue regarding the parties' expectations, assume a different role.

The circumstances under which these ambiguous provisions were drafted are unknowable on a motion directed to the pleadings without a factual record. Where extrinsic evidence is needed to clarify the meaning of a contract provision, an action involving that contract cannot ordinarily be terminated on demurrer (the predecessor of today's motion to dismiss for failure to state ultimate facts sufficient to constitute a claim for relief). *Union Bond v. M & M Wood*

Working, 242 Or 451, 456, 410 P2d 224 (1966). Moreover, if it is proper for the court to resolve the ambiguities in the written insurance contract at this procedural stage, we should construe those ambiguities in favor of the policy holder (WSFP) rather than the author of the document. *See Wallace Co. v. State F.M. Auto. Ins. Co.*, 220 Or 520, 525, 349 P2d 789 (1960).

I cannot agree with the majority that, as a matter of law, the contract demonstrates a choice of Oregon law so as to warrant granting EBI's motions. If the majority so holds, however, Warm Springs law does not apply and there is no need for the majority, *ante*, 300 Or at ___ (Slip Op at 3), to discuss whether the agreement would be enforceable under that law. Although I conclude that Warm Springs law could apply and therefore that the motions should not be resolved on contractual choice of law grounds, the court's result might rest on the alternative ground that even if Warm Springs law applied, it would not allow recovery under WSFP's theories. It is necessary, therefore, to explain why I do not believe we can uphold the granting of the motion on that alternative ground.

B. *Enforceability of Agreement Under Warm Springs Law.*

WSFP relies not, as the majority asserts, on *dicta* in the Court of Appeals' opinion, *ante*, 300 Or at ___ (Slip Op at 3), but on the straightforward claim that Warm Springs would

apply common law contract principles in this case. The parties agree, without presenting authority, that under common law principles, an insurance rebate agreement made with the familiar formalities necessary to establish a binding contract would be enforceable, absent a provision — like Oregon's statute — voiding such agreements as contrary to public policy. WSFP's claim, therefore, does not require one to assume that Warm Springs had "adopted some system of *contract* law that differs from Oregon *contract* law," *ante*, 300 Or at ___ (Slip Op at 3) (emphasis added); it only requires that Warm Springs has some law of enforceable agreements which is like the common law about which the parties agree and has not been specifically modified by a statute like ORS 746.035. EBI, the moving party, never has denied that such Warm Springs law exists, but until the case reached this court for the second time simply maintained that WSFP had failed to show affirmatively that Warm Springs law would resolve this case differently from the resolution under Oregon's statute.

I agree with the majority that we should look to the tribal code provision on "*Law Applicable in Civil Actions*" to which EBI has directed our attention. It would be "wholly anomalous," *ante*, 300 Or at ___ (Slip Op at 4), for Oregon courts dealing with questions of Warm Springs law to ignore the tribal code choice-of-law provision because the money involved exceeded the tribal court's jurisdictional amount. We would have nothing to go on without that provision.

The tribal code provision says that only matters which "are not covered" by federal laws and regulations, the tribal code, or "the traditional customs and usages of the Tribes" shall be decided according to Oregon law. *Ante*, 300 Or

at ___ (Slip Op at 3).[3] The majority doubts that those

"customs and usages" cover this case because WSFP did not supply the "necessary information" for the circuit court or this court to take judicial notice of them. *Id* at 5.

As EBI did not even present its tribal code argument to the circuit court, and offered nothing to counter WSFP's claim that Warm Springs would follow common law principles, I would not fault WSFP for failing to supply the information at that stage. In oral argument before this court, WSFP's lawyer asserted that "traditional customs and usages" in this context amounted to common law contract principles. EBI offered nothing to the contrary.

If this case is to be resolved based on what one or the other party failed to offer in support of its position, I would resolve it against EBI, which moved to dismiss the complaint but failed even to try to refute WSFP's claim that "traditional customs and usages" would allow enforcement of rebate agreements. If WSFP failed "to *specify* any developed body of contract law," to support its claim, *ante,* 300 Or at ___ (Slip Op Op at 5) (emphasis added), that was only because EBI conceded that common law contract principles would make the rebate agreement enforceable absent the contrary statute. I would also treat EBI's silence on the meaning of "customs and usages" as a concession that the phrase means what WSFP asserts it means.

We do not ordinarily resolve legal issues, on which our opinion might serve as precedent, based on what one party or the other has conceded. However, when we are determining whether a motion should be granted, the moving party's failure to give any reason why the other party's plausible interpretation of critical language might be wrong is reason enough to deny the motion. I would reverse the granting of EBI's motions because EBI has not indicated why WSFP cannot possibly recover under Warm Springs law.

Even if EBI had no burden of going forward with legal argument to support its motions, I would hold that the motions should not have been granted.

At common law, courts treated questions of foreign law like questions of "fact" and required the party relying on that law to prove it like any other "fact," because it was less

accessible to judges than was domestic law. E. Cleary, *McCormick on Evidence* 938, § 335 (3d ed 1984); L. Kirkpatrick,

[3]The Code has since been amended to delete the ultimate resort to Oregon law:

"(1) In all civil cases, the Tribal Court shall apply applicable laws of the United States, regulations of the Interior Department and written laws or ordinances of the Confederated Tribes.

"(2) Where necessary, the Court shall apply the laws of traditional custom and usage as is generally accepted by the Tribes. Where there is doubt as to custom or traditional laws, the Court shall obtain the advice of at least two impartial tribal elders who are familiar with the custom and usages.

"(3) The laws of any state are not binding upon the Tribal Court, but may be used as guidelines for establishment of a tribal common law." Tribal Law and Order Code § 201.015 (1982).

Oregon Evidence 50 (1982). If that approach were still in force, the uncertainty concerning Warm Springs law would be a disputed question of fact. Although WSFP ultimately would bear the burden of "proving" Warm Springs law at trial, this court could not resolve that fact dispute on these motions, and would have to remand to the trial court for a finding.

The Oregon Evidence Code, however, now provides for categories of "law judicially noticed." OEC 202. The leading commentator on our evidence code maintains that:

> "The trend has been steadily away from requiring law to be pleaded and proven to the jury as an issue of fact. Judicial notice of law is the term used to indicate that these requirements will not be imposed. Thus, the primary significance of Rule 202 is to eliminate for the laws listed therein any requirement of pleading or proof to the jury. The determination of the listed laws is exclusively for the court." Kirkpatrick, *supra*, at 50.

The text of the rule supports Kirkpatrick's view that despite the rule's use of the term "judicial notice," questions about the matters referred to in OEC 202 are to be treated as legal ones for the court. For example, there is no reason to regard disputes over "[t]he decisional, constitutional and public statutory law of Oregon," OEC 202(1), as questions of fact.

The laws of Indian nations should be included within these formerly factual matters which are now subject to judicial notice, even though they are not specifically mentioned. They could be encompassed in "law of * * * foreign nations," OEC 202(6), unless the legislature had in mind the decision in *Cherokee Nation v. Georgia*, 30 US (5 Peters) 1, 17, 8 L Ed 1 (1831) (Indian nations are not "foreign" but "domestic dependent" nations), when it enacted the OEC. Moreover, Kirkpatrick argues persuasively that

> "Rule 202 should be interpreted as listing only those laws for which judicial notice is *mandatory* if the court is furnished with the necessary information. Because of the difficulty of proving law to a jury, the court in an appropriate case should take judicial notice of other laws as well." Kirkpatrick at 50 (emphasis added).

I conclude that Warm Springs law ought to be subject

to judicial notice by the trial courts or by this court. *See* OEC 101(1) (OEC applies to all Oregon courts except small claims courts); OEC 201(c), (d) (court "may" take judicial notice whether requested to or not, and "shall" take judicial notice if a party so requests and supplies necessary information). The question of which court should take that notice, and based upon what information, is one of judicial policy. Here, the determination of Warm Springs law requires an interpretation of the "traditional customs and usages" of the tribes, and if there arises any doubt about these, a court should request the advice of at least two "impartial counsellors." Because it may ultimately require something that at least closely resembles the taking of witness testimony, I believe that this is an inquiry more suited to the usual tasks and resources of trial courts than to the resources of this court. Even undertaking that inquiry ourselves, however, would be preferable to affirming the dismissal of a complaint on grounds that the nonmoving party, who did offer an explanation of "customs and usages," has not rebutted the moving party's silence on that issue.

Nothing in WSFP's arguments or in the approach I would take "postulates that there is some difference between common law and statutory law that makes one but not the other applicable to transactions with Indians." *Ante,* 300 Or at ___ (Slip Op at 5). If "traditional customs and usages" do indeed provide the basis for a "law of insurance contracts without [the Oregon statutory] prohibition," *Id,* there is no occasion for Warm Springs to turn to either statutes or caselaw "of the State of Oregon." *See ante,* 300 Or at ___ (Slip Op at 3-4). If customs and usages offer no answer, Oregon law would apply whether it originated from judicial decisions or from acts of the legislature. Whether or not the hypothetical transactions of which the majority speaks, *ante,* 300 Or at ___ (Slip Op at 6), would be governed by Oregon commercial, trade practices, or products liability statutes would depend on whether the tribe has "customs and usages" that allow it to resolve such disputes without turning to Oregon law. If there exist no such "customs and usages," Oregon statutes and court decisions would have the same effect as in a case decided under Oregon law. *But see* n 3, *supra.*

Until we are better-informed about "traditional customs and usages" of the Confederated Tribes, I would not

speculate about how the tribes "believe that they would be best served," *ante,* 300 Or at ___ (Slip Op at 7), in their deliberations about whether to conform their commercial law to Oregon's. The majority's views about how the tribe should decide that question of public policy are particularly regrettable because they are unnecessary. If the majority is convinced that WSFP consented to have Oregon law apply, there is no need to consider what Warm Springs law is, let alone what (in the opinion of this court developed without any evidence on the issue) it ought to be.

Because the written contract did not establish as a matter of law that Oregon law had to apply, and because "traditional customs and usages" under Warm Springs law may make the rebate agreement enforceable, I believe there was no basis for granting the motions to strike and to dismiss. Therefore, I respectfully dissent and would reverse the circuit court and the Court of Appeals.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Charles Wattenbarger, Claimant.

WATTENBARGER,
Petitioner on Review,

v.

BOISE CASCADE CORPORATION,
Respondent on Review.

(TC 135,549; CA A32736; SC S32364)

On review from the Court of Appeals.*

Argued and submitted April 3, 1986.

J. Michael Alexander, Salem, argued the cause for petitioner on review. With him on the petition was Burt, Swanson, Lathen, Alexander & McCann, Salem.

Allan Muir, Portland, argued the cause for respondent on review. With him on the response was Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

J. David Kryger, Albany, filed an *amicus curiae* brief for Oregon Trial Lawyers Association. With him on the brief were Emmons, Kyle, Kropp, Kryger & Alexander, Albany, and Edward J. Harri, Salem.

LINDE, J.

The decision of the Court of Appeals is reversed and the case is remanded to the circuit court for further proceedings.

* Appeal from Circuit Court, Marion County. Honorable Dale Jacobs, Judge. 76 Or App 125, 708 P2d 375 (1985).

LINDE, J.

Claimant prevailed on his employer's appeal of a referee's order to the Workers' Compensation Board and was awarded $800 as a "reasonable attorney fee."[1] Procedures for fixing attorney fees in workers' compensation cases are set out in ORS 656.388 as follows:

> "(1) No claim for legal services or for any other services rendered before a referee or the board of the Court of Appeals or Supreme Court shall be valid unless approved by the referee or board, or if proceedings on appeal from the order of the board are had before any court, unless approved by such court. In cases in which a claimant finally prevails after remand from the Supreme Court, Court of Appeals or board, then the referee, board or appellate court shall approve or allow a reasonable attorney fee for services before every prior forum.
>
> "(2) If an attorney and the referee or board or appellate court cannot agree upon the amount of the fee, each forthwith shall submit a written statement of the services rendered to

[1] Claimant cited ORS 656.386 and the employer noted that the correct citation for successfully resisting an employer's appeal is ORS 656.382, but both sections use the same formula of "reasonable" attorney fees.

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.

"(3) Any claim so approved shall, in the manner and to extent fixed by the referee, board or court, be a lien upon compensation.

"(4) 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."

Being dissatisfied with the award of attorney fees, claimant's appellate counsel first sought reconsideration by the Board and then submitted a written statement (captioned "petition for attorney's fees") to the Circuit Court for Marion County. The petition asserted that counsel spent 15 hours in preparing claimant's brief for the Board, that counsel's usual hourly rate was approximately $80, and that this rate should be multiplied by a "risk factor" because counsel's fee was contingent upon

success. The petition suggested that a fee of $2,000 was warranted.

The employer responded that the referee and the Board correctly had followed the Board's rules on attorney fees, set out in OAR 438-47-000 through 438-47-095, and particularly OAR 438-47-010(2), which states that the amount of a reasonable attorney fee "shall be based on the efforts of the attorney and the results obtained." The employer maintained that the rule excludes a "contingency" factor unrelated to the efforts expended and the results obtained in the individual case. Multiplying the hourly rate by the number of hours worked, the circuit court increased claimant's attorney fee to $1,200 but rejected the request to multiply the usual hourly rate by a risk factor. The Court of Appeals affirmed the circuit court's order.

Apparently the Court of Appeals assumed that the Board's rule binds not only the Board but also the courts. The circuit court stated that it could not see any basis in law to allow the court to apply a contingency factor in determining the attorney fee in this case. The Court of Appeals stated:

"* * * ORS 656.388(4) delegates to the Board the power and duty to establish a suggested schedule of fees for attorneys representing workers in workers' compensation cases. The Board has established a schedule by rule. * * *"

To hold that the "suggested schedule of fees" binds the courts overstates the legislative delegation to the Board. A "suggested schedule" implies that the addressee is expected to exercise some judgment. It is not a term legislators would choose if they meant a Board rule to be legally binding on a court that is empowered, in the same section, to reexamine the fee.[2] Certainly the Board has authority to apply its criteria for

[2] Admittedly the quality of drafting in ORS 656.388 is thrown into some doubt by the provision of subsection (2) that, if "an attorney and the referee or board or appellate court cannot agree upon the amount of the fee, each shall submit a written statement of the services rendered to the presiding judge of the circuit court" for determination. The apparent implication that an appellate court, not an opposing party, first engages in negotiations to "agree" with claimant's counsel on the amount of attorney fees and, failing agreement, should submit a "statement of services rendered" (presumably by the attorney) to the circuit court is unusual, to say the least.

attorney fees in proceedings before referees and the Board itself, but with respect to courts, the legislature has delegated to the Board only authority to suggest criteria. Although the

fact that the legislature did so entitles the Board's rule to some consideration also in the courts, the fee that ORS 656.388(2) directs the circuit court to "determine" is the "reasonable attorney fee" referred to in subsection (1) and in ORS 656.382 and 656.386.

As already stated, the circuit court believed that in determining the attorney fee it could not give any consideration to the fact that the fee was contingent upon success. It found that an award at counsel's hourly rate for the full 15 hours spent on the appeal was a reasonable fee. The court might have reached the same conclusion in any event, but its oral remarks leave no doubt that it thought itself constrained by law to exclude any consideration of risk. We therefore conclude that the court should have another opportunity to consider the question without that constraint.

We do not imply that the award was erroneous and could not be reaffirmed on remand. Claimant argues for recognizing that the contingent nature of attorney fees in all workers' compensation claims justifies a "multiplier" in representing claimants generally, without regard to the difficulties and the probabilities of success in the individual case. A court may take such difficulties and probabilities into account in determining a reasonable fee, but we do not hold that the statute as a matter of law requires every employer who unsuccessfully resists a compensation claim to pay fees reflecting claimant's counsel's uncompensated work on another claimant's unsuccessful claim. The statute does not support a general "multiplier" for the statistical risk, but it does not foreclose a court from allowing a fee exceeding the attorney's usual hourly rate when the court finds that, in the specific case, success is sufficiently in doubt and the risk that the services will go uncompensated is so high that a higher attorney fee is reasonable.

We hold only that the statute does not restrict a court's award of attorney fees to determining time and effort expended and result obtained, excluding any consideration of the degree of difficulty or risk, in the particular case, that the attorney's best efforts would go entirely uncompensated.[3]

Respondent argues that there is no statutory authority for taking this risk into account, but the general authority

[3] Contrary to counsel's comments in the circuit court, fee agreements with a claimant to pay counsel regardless of success are not barred by statute but only by Board rule. OAR 438-47-010 allows attorney fees only under a fee agreement and only for successful representation of a claim. OAR 438-47-020 to 438-47-070 set various limits stated in dollars and in percentages of an award achieving various objectives of the claimant. OAR 438-47-040, 438-47-045, 438-47-055, and 438-47-060 cover appeals to the courts as well as administrative hearings. OAR 438-47-085 states that charges for legal services are "unenforceable and invalid" unless approved under the rules. *Amicus curiae* Oregon Trial Lawyers Association mentions analogous claims evaluation guidelines stated in OAR 436-30-001 *et seq* (originally adopted as 436-65-600 *et seq*) for the proposition that "circumstances of the individual case must predominate and the guidelines will be used only to the extent that their intrinsic persuasiveness assists the court in its independent assessment function," *citing generally, Harwell v. Argonaut Insurance Co.*, 296 Or 505, 678 P2d 1202 (1984).

to determine a "reasonable attorney fee" suffices to allow even though it does not require doing so. It may be, as respondent says, that letting circuit courts diverge from the Board's stated criteria for attorney fees will cause claimant's lawyers routinely to seek higher fees in circuit courts and will lead to varying and inconsistent results depending on individual judges' views of risk factors in contingent attorney fees. It also may be that courts will decline the invitation regularly to second-guess the Board in cases of ordinary difficulty and probability of success, or the Court of Appeals may further refine criteria for "reasonable" fees. In any event, the specter of unwelcome and inconsistent circuit court adjudications over attorney fees does not permit this court to turn what ORS 656.388(4) calls a "suggested schedule of fees" into a mandatory rule. Only the Legislative Assembly can decide whether to do that.

The decision of the Court of Appeals is reversed and the case is remanded to the circuit court for further proceedings.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Katherine E. Casteel, Claimant.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner on Review,

v.

CASTEEL,
Respondent on Review.

(WCB Nos. 82-3575 and 82-3576; CA A31893; SC S32080)

In Banc

On review from the Court of Appeals.*

Argued and submitted December 3, 1985.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for petitioner on review. With him on the brief were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Donna Parton Garaventa, Assistant Attorney General, Salem.

Diana Craine, Portland, argued the cause for respondent on review. With her on the brief were Robert K. Udziela, Pozzi, Wilson, Atchison, O'Leary and Conboy, Portland.

PER CURIAM

Decision of the Court of Appeals is vacated and the case is remanded to the Workers' Compensation Board for reconsideration.

* Judicial Review of the Order of the Workers' Compensation Board. 74 Or App 566, 703 P2d 1039.

PER CURIAM

The Court of Appeals stated the issue in this case as follows:

> "Claimant compensably injured her back and hip. A referee awarded permanent total disability. SAIF requested Board review, and the Board reduced the award to 10 percent unscheduled permanent partial disability. Claimant requested review by this court, and we modified the Board's order and granted claimant an award of 50 percent unscheduled permanent partial disability."

SAIF v. Casteel, 74 Or App 566, 568, 703 P2d 1039 (1985). The Court of Appeals held that SAIF's payments preceding the court's ultimate award of 50 percent permanent partial disability benefits did not count toward that award by virtue of ORS 656.313, which provides that when compensation is disallowed or reduced on review or appeal, "the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal."[1] We allowed SAIF's petition for review to examine whether payments made under an award of permanent disability benefits are credited toward the sum due under such an award even if the degrees of permanent disability, and therefore the total sum due, are reduced on appeal.[2]

The facts in this case, however, do not cleanly present that issue. Claimant had suffered a compensable back injury in October 1976 and in June 1978 had fractured a hip while working for the same employer, for which she filed a new claim

that was heard together with an aggravation claim for the previous back injury. The referee awarded claimant permanent total disability benefits for the hip claim, and SAIF made payments under that award while pursuing *de novo* review by the Workers' Compensation Board. The Board reversed the award and affirmed the determination order closing the hip claim. Instead, the Board awarded claimant "10% unscheduled partial disability for her worsened back condition." At this point, it appears that ORS 656.313(1) no longer obligated SAIF to pay permanent total disability benefits for the hip injury but only 10 percent disability benefits under the Board's award for the back injury. The Court of Appeals agreed with the Board that "there was an aggravation of the

[1] ORS 656.313 provides:

"(1) Filing by an employer or the insurer of a request for review or court appeal shall not stay payment of compensation to a claimant.

"(2) If the board or court subsequently orders that compensation to the claimant should not have been allowed or should have been awarded in a lesser amount than awarded, the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal.

"* * * * *

"(4) Notwithstanding ORS 656.005, for the purpose of this section, 'compensation' means benefits payable pursuant to the provisions of ORS 656.204 to 656.210 and 656.214 and does not include the payment of medical services."

[2] Permanent partial disability is compensated on a statutory schedule of benefits, ORS 656.214(2), or by "degree" of "loss of earning capacity due to the compensable injury," ORS 656.214(5). For the different character of total and partial disability benefits, *see Cutright v. Weyerhaeuser Co.*, 299 Or 290, 702 P2d 403 (1985).

back condition" but modified the award to 50 percent disability. *Casteel v. SAIF*, 55 Or App 474, 477, 638 P2d 1165 (1982).

SAIF points out that the referee, the Board, and the Court of Appeals decided this case on a stipulation that SAIF's payments had been made on a single claim, and it asks us to pronounce an interpretation of ORS 656.313 as if that were the fact. Referees, agencies, and other tribunals often must judge between specific parties on facts to which they stipulate, but an appellate court should not pronounce a rule that has importance beyond the particular litigants when the record shows the undisputed facts to be contrary to the stipulation.

We considered dismissing the petition for review as having been improvidently allowed, but that would let the decision of the Court of Appeals stand as a precedent though it may be incorrect. We therefore conclude that the better course is to vacate the decision of the Court of Appeals and remand the case to the Board for reconsideration of the actual character of the claims and the payments at issue.

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