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On April 7 claimant's attorney again requested the Fund to submit the claim to Evaluation for a reclassification; still no action was taken by the Fund.

Claimant asked the Referee in her closing arguments prior to the issuance of his order, to reclassify her claim as disabling and to award her compensation for temporary total disability as provided by law. The Referee declined to do this, apparently under the belief that he had no authority to make a re-determination of claims initially classified as non-disabling.

In the instant case, the Fund had adequate knowledge that there was time loss suffered by claimant as a result of her injury. Dr. Gill related her symptoms to her work and Dr. Harpole stated that claimant was losing time every day during the period she received physical therapy. These two reports alone should have put the Fund on the alert. The failure of the Fund to take action for many months was certainly to the prejudice of claimant. The Fund has the duty by statute to process claimant's claim. Fortunately, one of the doctors from whom claimant was seeking medical assistance recommended that claimant retain counsel to assist her in obtaining vocational rehabilitation services. Had she not done so it is quite probable that this matter would never have come to a head and claimant would never have been given her full rights. As soon as claimant's attorney took her case it became quite apparent that the Fund was not properly processing her claim.

The Fund takes the position that it is the responsibility of claimant to submit the matter to the Evaluation Division for reclassification. Although it is reasonable to believe that an attorney who specializes in Workers' Compensation cases would know exactly how and when to submit a claim to Evaluation and what information to furnish Evaluation to enable it to make a determination this is not true with respect to most, if not all, workers. Generally, a worker has no idea of how a claim is processed nor is there any reason why he should have such knowledge. It was the intent of the law when initially drafted, and still remains so, that a claimant need merely object to the Fund and then it becomes the Fund's duty to continue the processing.

The Board concludes that the Fund, after being advised of claimant's loss of time from work as a result of her injury and requested to reclassify her claim as disabling, was obligated to pay claimant compensation from August 25, 1977, the date of Dr. Harpole's report, and until her claim is properly processed and closed pursuant to the provisions of ORS 656.268. It's unreasonable delay to process her claim properly justifies the assessment of a penalty and payment to claimant's attorney of a reasonable attorney's fee.

ORDER

The order of the Referee, dated September 18, 1978, as amended on October 25, 1978, is reversed.

Claimant's claim, identified as SAIF Claim No. HD 240311, is hereby remanded to the State Accident Insurance Fund to be accepted as a disabling industrial injury and for the payment of compensation, as provided by law, commencing on August 25, 1977 and until the claim is closed pursuant to the provisions of ORS 656.268.

Claimant is awarded, pursuant to the provisions of ORS 656.262(8), additional compensation equal to 25% of the compensation awarded claimant by the preceding paragraph and claimant's attorney is awarded as a reasonable attorney's fee the sum of $1,000, payable by the State Accident Insurance Fund.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation awarded claimant as a result of this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-4237 APRIL 17, 1979

CHARLES R. SMITH, CLAIMANT
Evohl F. Malagon & Assoc., Claimant's Attys.
Merten & Saltveit, Defense Atty.
Order

On March 21, 1979 the Board entered its Order on Review in the above entitled matter. On April 9, 1979 the Board received from claimant, by and through his attorney, a motion to reconsider this Order on Review, stating that it was the position of claimant that "insofar as this Opinion is based upon the position that 'Claimant's refusal to attend the Callahan Center, the Claimant's loss of wage earning capacity is merely speculative', it is incorrect".

The motion for reconsideration states it would appear that the Board is indicating that the only way loss of earning capacity can be determined is through the Callahan Center of the Workers' Compensation Department.

This assumption on the part of the claimant's attorney is erroneous. The Board found, after de novo review of the record, that the award granted by the Referee was greater than that deserved by claimant based on several factors, one of which was his refusal to attend the Callahan Center. However, the refusal on the part of claimant to attend the Callahan Center, by and of itself, was not determinative of claimant's loss of wage earning capacity.

ORDER

The motion to reconsider the Board's Order on Review entered in the above entitled matter on March 21, 1979 which was received by the claimant on April 9, 1979 is hereby denied.

SAIF CLAIM NO. A 758573 APRIL 17, 1979

LLOYD C. TRUMP, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 22, 1978 the Board received a request from claimant to exercise its own motion jurisdiction and reopen his claim for an injury sustained on September 30, 1959. Claimant stated that the medical records were on file at the LaGrande Clinic and that his doctor was Richard Holecek.

On Septemer 25, 1975 the Board advised claimant to have his doctor provide it with a medical report commenting on his findings as to whether claimant's condition arose out of his industrial injury and had become aggravated. The Board also asked claimant who was his employer and who was the employer's carrier at the time of the 1959 injury.

On October 4, 1978 the claimant replied, stating he had requested Dr. Holecek's office to provide the Board with medical reports. He stated he had been employed by Western Stud Mills, Inc., whose carrier was the State Industrial Accident Commission. The claimant also enclosed a copy of the closing order, dated July 23, 1962, which had granted claimant an award of permanent partial disability equivalent to 20% loss of function of the left leg.

As of October 17, 1978 no reports had been received from Dr. Holecek; later it was learned that the reports had been sent to the State Accident Insurance Fund instead of the Board. The Board asked that such reports be duplicated and sent directly to the Board.

On October 24, 1978, after receiving the medical documentation from Dr. Holecek, the Board advised the Fund of claimant's request for own motion relief.

On October 31, 1978 the Fund responded, stating that it had determined that claimant had suffered two or more injuries to his left leg subsequent to his 1959 injury, therefore, there was some question as to the Fund's responsibility. The Fund made arrangements for claimant to be evaluated by a vascular surgeon for further opinion. Upon receipt of his report it would make further response to claimant's request.

On March 21, 1979 Dr. Kenneth C. Wilhelmi advised the Fund that he had examined claimant on December 1, 1978 to determine whether his current phlebitis problems were related to, or a result of, his post-surgical phlebitis following an industrial accident of September 30, 1959. The Fund had asked his opinion of whether or not the current problems were a result of the intervening traumas to the legs while working for Boise Cascade Company and of the cause or etiology of the current phlebitis difficulties.

On March 21, 1979 Dr. Wilhelmi stated he did not feel claimant had totally recovered from his thrombophlebitis but had been left with a post-phlebitic syndrome by virtue of an obliterated venous and tissue stasis leading to easy infection and breakdown from minimal trauma, delaying healing, ulceration, etc. He felt that the many intervening infections and ulcerations from mild traumas to the leg while working for Boise Cascade were symptomatic of, but not causally related to, the underlying post-phlebitic syndrome.

On March 28, 1979 the Fund provided the Board with a copy of Dr. Wilhelmi's report and stated that it would not oppose reopening of the claim should the Board find the medical opinion expressed by Dr. Wilhelmi justified it.

The Board, based on the opinion expressed by Dr. Wilhelmi in his report which quite fully relates claimant's medical history from the time of his original September 1959 injury to date, concludes that claimant's present condition is causally related to his 1959 industrial injury and represents a worsening thereof.

ORDER

Claimant's claim for an industrial injury sustained on September 30, 1959 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date Dr. Holecek advised claimant to cease working because of his present problems, and until the claim is closed pursuant to the provisions of ORS 656.278.

ROBERT L. LOGERWELL, CLAIMANT
Dennis Skarstad, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the order of the Referee which denied claimant's claim for a new injury on November 19, 1977.

On November 19, 1977 the employer reopened claimant's claim as an aggravation of an old injury. Claimant contends that he suffered a new injury.

Claimant has worked for the present employer for over 26 years. He suffered an industrial injury on February 9, 1974 while working as a pot man. He was using a long wooden pole to reach into one of the furnaces and suffered a dislocation of his left shoulder. Surgery was performed on February 18, 1974 and claimant returned to work on May 6, 1974.

Since claimant recovered from the 1974 surgery and prior to the November 19, 1977 incident, claimant has had approximately six episodes involving his left shoulder, e.g., "catching" or partial dislocation of the left shoulder, followed by a brief period of pain and numbness. After each episode claimant was able to resume his activities.

Claimant's claim for the 1974 industrial injury was closed by a Determination Order dated August 6, 1974 whereby claimant received 16° for 5% unscheduled left shoulder disability. Claimant was dissatisfied and requested a hearing. After the hearing the Referee found that although claimant had been able to return to work on May 6, 1974 he had had continuing problems with his shoulder, mainly shoulder dislocations. He increased claimant's award to 48° for 15% unscheduled left shoulder disability.

On November 19 claimant, while on the job, again dislocated his shoulder. His foreman assisted in placing it in position. Claimant testified that he was using a 12-14 foot wooden pole to "break the circuit" at the bottom of one of the pots and as he was pushing the pole under the carbon at the bottom of the pot his left shoulder dislocated.

After the shoulder was relocated claimant was sent home and he was subsequently seen by Dr. Patton who told him to immobilize the arm and put it in a sling. Claimant returned to work on January 4, 1978 and has worked steadily since.

Claimant testifies that he has more pain in his left shoulder and is required to take considerable aspirin. He distinguishes the 1977 dislocation from the others in that he had always been able to resume work before the last dislocation but now he does not feel that he has the same use of his shoulder that he had before November 1977. He also testified that this was the first time he had a complete dislocation.

At the prior hearing claimant had testified that he had had complete dislocations after the 1974 surgery.

Dr. Heusch, on February 2, 1978, reported that he felt claimant was medically stationary and there had been no significant change from his previous condition. It was his opinion that claimant's primary problem was a degenerative condition of both shoulders which would continue to cause claimant discomfort with any strenuous activity.

On May 16 Dr. Heusch reported it was his opinion, based upon claimant's medical history since the surgery, that the injury of November 19, 1979 was an aggravation of his previous condition. Yet on July 6, 1978 Dr. Heusch stated that claimant "had a disability of the left shoulder pre-existing to November 19, 1977 that pre-exposed [sic] him to have further problem with regards to the left shoulder. However, notwithstanding that fact, he did recieve [sic] a new injury to the shoulder on November 19, 1977."

The Referee found that claimant was subject to recurrent left shoulder dislocations which were not necessarily brought on by work activity. Sometimes he would dislocate his shoulder by rolling over in bed; once he dislocated it shooting pool. In the instant case claimant was either picking up a pole or using a pole at work when he dislocated his shoulder.

The Referee found claimant was prone to have recurrent dislocations both at home and at work which were often brought on with minimal physical activity. He concluded that it was not appropriate to find that after each recurrence, brought on with only minimal activity, that a new period of aggravation rights should be commenced by construing such recurrence as a new injury.

In Minnesota Mining and Manufacturing Company v. SAIF, 27 Or App 747, the Court stated that if the second injury takes the form of merely 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.

The Referee concluded that claimant had failed to meet his burden of proving that he had sustained a new injury on November 19, 1977; that the incident itself was merely a recurrence which did not even slightly contribute to the causation of claimant's disabling condition.

The Board, on de novo review, affirms the conclusion reached by the Referee. The contradictory opinions expressed by Dr. Heusch are unexplained but the medical evidence is sufficient to indicate clearly that the incident of November 19, 1977 was an aggravation of the 1974 injury; one of the many which claimant had had following his 1974 surgery.

ORDER

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

WCB CASE NO. 77-7056 APRIL 18, 1979

NORMAN C. NEELY, CLAIMANT
Allan H. Coons, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the order of the Referee which affirmed the Determination Order of December 20, 1977 which had granted claimant compensation equal to 35% unscheduled low back disability. Claimant contends the award was inadequate.

Claimant, a 31-year-old truck driver, filed an 801 on April 2, 1976 for an injury to his right upper abdomen sustained on March 30, 1976 while putting tarps on his trailer. On January 20, 1976 claimant had had hernia repair surgery and returned to work on March 8, 1976. He quit his employment on March 30 due to abdominal pain.

Claimant had had a back injury on January 2, 1968 while working in the woods. He received no award for permanent partial disability by the Determination Order which he never appealed.

In October 1976 claimant was examined by Dr. Davis who diagnosed chronic lumbosacral strain, related to his occupation, and depressive neurosis. He felt claimant had never completely recovered from his original back injury in 1968. Claimant's treatment was conservative and he was hospitalized for traction.

On January 7, 1977 Dr. Hockey, upon examination, found claimant very tremulous; he seemed to have self-induced spasms, going through quite a ritual taking off his clothes in such a way as to prove he could not move his back. On January 22 Dr. Davis reported claimant had been given all diagnostic treatment and a referral to the Disability Prevention Division was recommended.

In May 1977 Dr. Van Osdel evaluated claimant. During the examination claimant moved stiffly around the room with jerky trembling motions of a bizarre manner with tremor and jerking greater when claimant tried to perform any moving act. The psychological evaluation revealed moderate depressive reaction. It was felt claimant could not return to his regular occupation. Claimant's tremor was not hysterical in nature but was a disturbance of coordination and quite unusual.

In June 1977 claimant was hospitalized for a diagnostic workup. Dr. Mundall diagnosed chronic low back pain, etiology unknown. On September 30, 1977 Dr. Mundall found claimant's condition stationary.

On November 7, 1977 a Determination Order granted claimant 112° for 35% unscheduled disability of the low back.

On February 14, 1978 claimant was hospitalized for a myelogram; it was normal. On June 5, 1978 claimant was rehospitalized. He had back pain but Dr. Carter felt, after many tests, that claimant had no significant underlying organic disease. It was his opinion that claimant had primarily functional findings and he recommended a psychiatric consultation.

On June 23, 1978 Dr. Snyder, a psychiatrist, evaluated claimant. His diagnosis was depressive neurosis and psychophysiological reaction; he said claimant needed psychological supervision.

On June 25, 1978 claimant had another psychological evaluation by Dr. Holland, who reported claimant spent most of every day watching television. Claimant said he obtained the services of an attorney who was to get him 100% disability to enable him to receive payments the rest of his life. It was found claimant had a conscious motivation to receive a larger settlement which supplied a need to be maximally impaired. Claimant was psychiatrically stationary.

The Referee found that there never should have been an award granted claimant for a low back condition resulting from the March 1976 injury; any back problems claimant might have would relate to the 1968 injury. However, he affirmed the Determination Order.

The Board, on de novo review, finds no evidence of any relationship between the injury of March 1976 which was to the right upper abdomen and claimant's back problems.

The Board agrees with the Referee that the Determination Order of December 20, 1977 is erroneous but, in addition, finds no medical evidence that claimant suffered permanent partial disability as a result of his March 30, 1976 injury.

ORDER

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

The Determination Order of December 20, 1977 is amended by deleting therefrom the award of compensation equal to 112° for 35% unscheduled low back disability. The remainder of the Determination Order is affirmed.

WCB CASE NO. 78-3115 APRIL 18, 1979

SUSAN F. WITHROW, CLAIMANT
Richard Carlson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which granted claimant an award equal to 45° for 30% loss of the right forearm.

Claimant, who was 40 years old at the time, experienced pain and swelling in her right hand on March 26, 1977 while using a hammer. She was first seen by Dr. Wade who diagnosed an acute tenosynovitis. Claimant returned to work on April 7, but had a recurrence of the swelling and pain.

Between June and September 1976 claimant was seen by Dr. Schwartz, an orthopedist, who was at a loss to explain her symptoms and referred her to Dr. Gill, also an orthopedist.

In November 1976 Dr. Gill noted PIP joint flexion contractures of the long, ring and small fingers associated with slight MP joint hypertension. He put claimant on physical therapy but was not able to diagnose the condition.

Claimant saw Dr. Gill again in March 1977 and her condition was essentially the same as when he had seen her in November.

In March 1977 claimant was enrolled at Callahan Center. They diagnosed tenosynovitis, chronic, by history, resolved; mild ulnar neuropathy with beginning deformity of the MP and PIP joints of the middle, ring and small fingers, right with decreased ulnar nerve sensation. They also found obesity, hypertension, and moderate anxiety.

Claimant was evaluated by a psychologist who found that she had some depression. She was vocationally disturbed although not personally disturbed. It was recommended that claimant be put in a training program.

In June 1977 Dr. Gill stated his opinion that claimant's disability was primarily psychological and minimally organic. Two months later claimant started a vocational rehabilitation program training to become a receptionist, however, she dropped out after approximately one week because her hand would swell and cause her discomfort because of the typing and 10-key machine training. Subsequently, her services were terminated because claimant claimed she could not continue because her hand and arm were in constant pain and she also suffered from a leg condition and could not stand on her feet too long.

Claimant has a high school diploma, she is married and has three children. Claimant did not work between 1960 and the time she went to work for the present employer which was in the latter part of 1975. Claimant has had no problems with either her right hand or arm before the injury. She testified that now her hand swells with any activity and she has pain in the fingers which progresses up to the elbow. She states that her grip is not like it was before the injury. Writing causes pain to such extent that she is unable to even write her checks; she just signs them. She is unable to lift her hand over her head without discomfort and many household duties cause her problems because of the weakness of her grip.

The Referee found that there was objective medical evidence of disability as well as subjective complaints but that the diagnosis of claimant's condition was uncertain. Dr. Gill thought psychological disability might exist but the psychological evaluation did not reveal that claimant's right forearm symptoms were caused or increased by her emotional condition.

The Referee concluded that the problems to which claimant testified actually existed and there was a reasonable basis to conclude from the medical and lay evidence that her condition is the result of her industrial injury.

He found claimant to be a credible witness and, based upon the medical and lay evidence, found that claimant had suffered permanent disability to her right hand and arm which entitled her to an award equal to 30% of the maximum for loss of the right forearm.

The Board, on de novo review, finds that claimant has suffered a substantial loss of grip in her right hand and, as a result thereof, she has lost considerable function of that scheduled member of her body.

The Board concludes that claimant, primarily because of the loss of grip, has sustained 40% loss of her right forearm and therefore the award granted by the Referee should be increased by 10%.

ORDER

The order of the Referee, dated September 26, 1978, is modified.

Claimant is awarded 60° of a maximum of 150° for 40% loss of the right forearm. This award is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted claimant by this order, payable out of said increased compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-5283 APRIL 18, 1979

DONALD E. WOODMAN, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Jaqua & Wheatley, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of June 5, 1978 granting claimant awards for scheduled disabilities. Claimant contends he also is entitled to an award for unscheduled left shoulder and back disability.

Claimant is a millwright with Georgia-Pacific Corporation and on October 26, 1974 his left arm was caught between a chip pit truck unloading platform and resting beams. Dr. Cookson diagnosed total destruction of the left upper extremity. Claimant's left arm was amputated 4 inches below the shoulder.

Claimant underwent physical rehabilitation with intensive training in the use of his prosthetic device. In November 1974 claimant had to undergo surgery for open debridement. In February 1975 Dr. Specht found edema of the stump.

On March 3, 1976 claimant was hospitalized for resection of neuromas of the stump. This eased claimant's phantom pain and the pain from pressure on the stump. Claimant hadn't been able to wear the prosthesis because of neuromas.

On December 6, 1976 Dr. Post released claimant for regular work and claimant returned to his millwright job. In June 1977 claimant went through the Pain Clinic.

On November 16, 1977 Dr. Post examined claimant for pain in the shoulder area which was aggravated by the use of the prosthesis. Claimant had tenderness in his back over the left posterior iliac area. Claimant's condition was stationary. Claimant had impairment from painful neuromas and spinal problems to which the imbalance posed by absence of the left arm contributed.

On June 5, 1978 a Determination Order granted 192° for 100% loss of the left arm; 1.5° for 2.5% loss of hearing in the left ear and 8.4° for 14% loss of hearing in the right ear.

Dr. Post re-examined claimant on August 4, 1978 and found the muscle atrophy in the left upper back to be associated with loss of the limb since the muscles in that area are associated with limb function. The "bad nerves" in the left shoulder relate to claimant's chronic neuromas. Dr. Post felt that this was claimant's single most significant symptom which he continues to have. He thought claimant's shoulder and back problems were related to his injury.

Claimant has a high school education. Claimant testified he has trouble working at his welding bench because he is unable to brace himself with his left arm and must use his back.

The Referee found that no medical evidence was in the record to support a finding that claimant had any permanent partial disability in the back and shoulder area and affirmed the Determination Order.

The Board, on de novo review, finds the medical report of Dr. Post quite clearly relates claimant's upper back and shoulder problems to the industrial injury of October 1974. The Board concludes that claimant is entitled to an award of 15% unscheduled upper back disability in addition to the awards he received by the Determination Order of June 5, 1978.

ORDER

The order of the Referee, dated November 7, 1978, is modified.

Claimant is hereby granted an award of 48° for 15% unscheduled upper back disability. This award is in addition to the awards previously received by claimant for his October 26, 1974 industrial injury.

Claimant's attorney is hereby granted as a reasonable attorney fee the sum equal to 25% of the compensation granted by this order, payable out of said compensation as paid, to a maximum of $3,000.

WCB CASE NO. 77-432 APRIL 19, 1979

STEVE BERGER, CLAIMANT
Grant, Ferguson & Carter, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

The claimant seeks review by the Board of the Referee's order which affirmed the denial by the Fund on December 23, 1976 of claimant's claim for aggravation.

Claimant, a tree planter, suffered a compensable injury on December 14, 1974 to his lower back. His claim was accepted by the Fund as non-disabling inasmuch as claimant only lost one day from work.

Claimant continued working for the employer until about January 1976 and he had minimal back problems during that period. The summer of 1976 claimant, after returning from Maryland where he visited his father who was ill, found a job at Flagstaff, Arizona, working in a pizza parlor. He suffered a back injury while moving pans of dough and as a result received six or seven chiropractic treatments. The evidence of the type of claim that claimant filed in Arizona was somewhat vague, however, the insurance company for the claimant's employer in Flagstaff apparently paid for all of the treatment costs. Claimant testified he was badly "stoved-up" as a result of the Flagstaff incident and could barely walk. Subsequently, claimant returned to Ashland, Oregon. He had pain in his left leg and in his back.

On September 22, 1976 claimant was seen by Dr. Charles, a naturopath and a chiropractor, who commenced treatments which gave claimant some relief. He diagnosed a chronic intervertebral disc syndrome with severe myofascitis and he related claimant's present problem to his injury of December 14, 1974. He stated it was very common for such injuries to cause slow deterioration without much symptomatic disturbance for some time afterwards. He described claimant's present condition as a typical case of post-traumatic disc deterioration.

On December 23, 1976 the Fund denied responsibility for claimant's present condition, stating that claimant had suffered an independent intervening injury while living and working in Arizona and his present condition was the result of that injury.

Dr. Matthews examined claimant on January 6, 1977. Based on the history taken from claimant, Dr. Matthews reported that claimant had had no injury since 1977 which would explain his present symptoms. The Referee found nothing in Dr. Matthews' report which indicated that claimant had informed Dr. Matthews about the Flagstaff episode in the summer of 1976. Dr. Matthews did refer to the initial chiropractic treatments in 1974 which were successful and to the x-rays taken by Dr. Charles in September 1976. It was Dr. Matthews' impression that claimant had degenerative disc disorder in the lower lumbar spine. There was evidence of nerve root impingement on the left side, probably at L4-5.

Dr. Matthews, in referring to claimant's condition in the fall of 1976 when he started receiving treatment from Dr. Charles, stated that the claimant apparently had a definite episode of back pain about two years ago (1974) from which he never fully recovered although the symptoms were relatively mild for about a year. He felt this suggested that claimant had had one ongoing episode. Claimant's basic problem was a congenital tendency towards disc deterioration and this, in Dr. Matthews' opinion, may have been worsened to some extent by the industrial injury of 1974. The present symptomatology possibly was also related to that industrial injury but again, in large part, was due to the pre-existing disc degeneration.

Claimant's injury sustained on December 14, 1974 had been accepted as a non-disabling injury. Has claimant's condition worsened and, if so, was it the result of the December 14, 1974 injury?

The Referee relied upon the Massachusetts-Michigan rule which provides that in successive injury cases full liability is placed upon the carrier covering the risk at the time of the most recent injurious exposure which bears a causal relationship to the disability. He found that although the evidence was not the best, it was sufficient to justify a finding that claimant suffered a new injury in Arizona which caused claimant's present back condition.

The December 14, 1974 injury had been accepted as a non-disabling injury and claimant had continued to work and to travel. He was working in Arizona when he suffered another injury for which he received treatment in that state. The Referee

was not fully informed as to whether or not he was under compensation in Arizona but he found that didn't make any difference. He quoted the following from the Massachusetts-Michigan rule: " . . . if the second injury contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition. This is consistent with the general principal of the compensability of the aggravation of a pre-existing condition".

The Referee concluded that despite the testimony of Dr. Charles and Dr. Matthews claimant had failed to establish by a preponderance of the evidence that the industrial injury of December 14, 1974 was a material contributing cause to the development of claimant's symptoms in late 1976 when he returned to Oregon. He further concluded that the intervening incident in Arizona was the likely cause of the present symptoms which developed after he returned from Arizona and that the Arizona injury contributed independently to the back problem.

The majority of the Board, on de novo review, finds no evidence that claimant suffered any injury in Arizona which contributed one iota to claimant's present condition. Claimant contends that he had to lift 150 pounds while working in Arizona; there is no evidence to sustain this contention. The only evidence relating to the Arizona incident indicates that claimant had some back problems while working there for which he received chiropractic treatment. It is not even certain that claimant filed a claim in Arizona for any injury.

Based upon the medical opinions expressed by Dr. Matthews and Dr. Charles, the majority of the Board finds that claimant's present condition is a direct result of his December 14, 1974 injury and represents a worsening of that condition since the last award or arrangement of compensation granted claimant for such injury. His claim for aggravation should have been accepted.

ORDER

The order of the Referee, dated June 23, 1978, is reversed.

Claimant's claim is remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on September 22, 1976, the date claimant commenced receiving treatment from Dr. Charles, and until closed pursuant to the provisions of ORS 656.268, less any time worked.

Claimant's attorney is awarded as a reasonable attorney's fee for his services both before the Referee at hearing and at Board review which resulted in the setting aside of the Fund's denial of claimant's claim for aggravation the sum of $1,000, payable by the State Accident Insurance Fund.

WCB CASE NO. 78-2573 APRIL 19, 1979

PAUL M. BLOOM, CLAIMANT
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the denial dated June 15, 1978 of claimant's claim for aggravation; however, the request for penalties and attorney's fees for untimely payment of compensation for temporary total disability was not granted.

Claimant, who is 39 years old, has worked for Multnomah County as director of the Metropolitan Youth Commission for approximately seven years. He terminated his position in July 1977. His main functions were administrative and included counseling juvenile delinquents but claimant did, on occasions, help in the lifting of heavy bundles or boxes of printed material. Claimant alleges that he sustained sacroiliac and/or lumbosacral strains in October 1975, June 1976 and December 1976 while doing such lifting. He filed claims for the October 1975 and December 1976 incidents.

Claimant's principle treating physician, Dr. Motz, treated claimant at various times between November 10, 1975 and February 28, 1978. Claimant also received treatment from Dr. Sirounian in 1978. Dr. Motz is a general practitioner osteopathic physician and Dr. Sirounian is an orthopedic specialist osteopathic physician.

Claimant contended that his injury of December 1976 should be reclassified from non-disabling to disabling and in March 1978 a hearing was held on that issue. The Referee, after a hearing, found claimant had not complied with the procedure for requesting reclassification and therefore denied his request on March 29, 1978.

On April 4, 1978 a request for hearing was made concerning the aggravation claim of the October 18, 1975 industrial injury. On the same day a letter was received by the Fund from Dr. Motz, stating claimant's condition had been aggravated as a result of his compensable injury of October 18, 1975 and he was presently totally disabled and under active treatment and has been since November 15, 1975. She asked the Fund to reopen the claim and verified time loss as of November 15, 1975 and continuing.

On the following day Dr. Motz wrote the Fund an almost identical letter which stated claimant had been under active treatment since November 15, 1977 rather than 1975 and verified time loss as of November 15, 1977.

On May 10, 1978 the Fund wrote to claimant's attorney, stating it had advised Dr. Motz that if she felt claimant's claim should be reopened for aggravation she should supply the Fund with the necessary narrative report containing her objective physical findings and her opinion of how the current problems related to the original industrial injury.

On May 30, 1978 Dr. Motz responded to the Fund with a two-page letter report which contained a complete history of claimant's case. Dr. Motz believed this all to be an exacerbation of claimant's original injury, that claimant had been working since that time and had been coming to see her when the pain would, as claimant stated, get out of hand and he would need more therapy. However, claimant had never been completely and totally well as far as his back was concerned since October 18, 1975, the date of the original injury.

On June 15, 1978 the Fund denied claimant's request to reclassify his October 18, 1975 industrial injury from nondisabling to disabling due to an aggravation of his low back condition.

The Referee stated, after hearing and observing claimant, that he had little faith in claimant's credibility. It was interesting to note, according to the Referee, that after each of the industrial incidents of October 1975, June 1976 and December 1976 claimant sustained no time loss. According to the Referee's order of March 29, 1978 claimant was forced to leave his job in July 1977 because of "politics". It wasn't until November or December 1977 that claimant was unable to get out of bed because of severe back pains. The Referee who conducted the original hearing did not feel that claimant's symptomatology at that time was the result of the incident of December 1976 and his order was never appealed.

The Referee found that claimant was now attempting to causally connect his late 1977 symptomatology with the industrial injury of October 18, 1975. The Referee did not believe claimant and he was unable to give much weight to the statements of Dr. Motz. The other medical report, which was furnished by Dr. Logan, an orthopedic physician, didn't even mention the industrial incident of June 1976. Dr. Logan's conclusions were based entirely on the history given him by claimant and inasmuch as claimant was found to be lacking in credibility by the Referee he accordingly gave little weight to Dr. Logan's report.

With regard to claimant's contention that he was entitled to penalties and attorney's fees because he did not receive compensation for temporary total disability within 14 days of the time a claim of aggravation was submitted on his behalf, the Referee did not construe the reports from Dr. Motz dated April 4, 1978 and April 5, 1978 as sufficient to support a claim of aggravation. The two-page narrative report from Dr. Motz was received by the Fund on June 5 and the denial was mailed 10 days later, therefore, the Referee concluded claimant was not entitled to penalties and attorney's fees.

The Board, on de novo review, agrees with the Referee's affirmance of the denial but finds that the letters addressed to the Fund by Dr. Motz under date of April 4 and April 5, 1978 were sufficient medical verification of claimant's inability to work resulting from his worsened condition, therefore, the Fund should have commenced payment of compensation within 14 days after April 4, 1978 and continued to pay such compensation until the date of their denial on June 15, 1978 of his claim for aggravation. Also claimant should be awarded additional compensation in the nature of a penalty for the Fund's unreasonable delay in making payment of compensation due claimant. The Fund must also pay claimant's attorney an attorney's fee. Jones v. Emanuel Hospital, 280 Or 147.

ORDER

The order of the Referee, dated October 9, 1978, is modified.

The denial by the Fund of claimant's claim for aggravation, dated June 15, 1978, is affirmed; however, claimant is awarded interim compensation from April 4, 1978, the date of Dr. Motz's first letter to the Fund, and until June 15, 1978, the date the Fund denied claimant's claim.

Claimant is awarded additional compensation equal to 15% of the compensation due him from April 4, 1978 to June 15, 1978 as a penalty for the Fund's failure to timely pay compensation.

Claimant's attorney is awarded an attorney's fee of $250, payable by the State Accident Insurance Fund.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board a sum equal to 25% of the compensation which claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 78-5341 APRIL 19, 1979

GERALD E. HUNTLEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith &
Hallmark, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which granted claimant compensation equal to 160° for 50% unscheduled low back disability.

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

ORDER

The order of the Referee, dated October 12, 1978, is affirmed.

Claimant's attonrey is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the carrier.

ROGER D. BRAWAND, CLAIMANT
Roscoe C. Nelson, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which found that claimant had sustained his burden of proving a compensable injury and directed the Fund to accept his claim and pay him compensation to which he was entitled by law.

Claimant was a trustee at Rocky Butte Jail on May 13, 1977 when he accidentally spilled boiling water on his left foot while working in the kitchen. He filed a claim which was denied by the Fund because claimant's name did not appear on a list of inmates to be covered by the Fund.

ORS 656.041(4), as it read at the time of the injury, required a city or county to furnish the Fund with a list of the names of inmates performing authorized employment and to notify the Fund of any changes in such list. The notification was to be by mail addressed to the Fund and only those inmates whose names appear on the list prior to their personal accidental injury or who are named in a notification of a change in the list were entitled to benefits under the Workers' Compensation Act.

Does the absence of claimant's name from the list at the time of the May 13, 1977 accidental injury bar him from coverage?

The evidence indicates that the original request for coverage by Multnomah County for the inmates at Rocky Butte Jail was no longer a part of their records because of the extended length of time such coverage had been in effect. However, they did, from time to time, furnish the Fund with additions and deletions from the list. The evidence indicates that on a list dated April 15, 1977 claimant's name was listed under the column designated as "deletions". A list dated May 26, 1977 also lists the claimant's name under the "deletions" column. (NOTE: The Referee's order refers to a "Thomas Zane Brawand", however, it is Thomas Zane Gann and his name is listed in the "deletions" column just above claimant's name.)

The Referee concluded that the appearance of claimant's name on the list in the "deletions" column was compatible only with a written recognition of an intent to have claimant covered as an inmate. He concluded that this was strong evidence of an intent to cover claimant as an inmate and could not be defeated by an apparent clerical error. The Referee evidently treated the appearance of claimant's name on the list as being placed erroneously in the wrong column but nevertheless concluded that even though it was listed under "deletions" rather than "additions" it was sufficient compliance with the statutory directive that inmates' names must appear on a list to effectuate coverage.

The Board, on de novo review, finds no evidence to indicate whether claimant's name was properly placed under the "deletions" column or whether an error had been made and claimant's name should have been placed under the "additions" column. Neither party saw fit to furnish the Board with briefs.

The Board feels that claimant's name obviously had been on a list prior to his injury, otherwise it would not have been necessary to delete his name from the May 26, 1977 list. His name had been deleted on April 15, 1977; it must have been added thereafter and stayed on such list until May 26, 1977.

The Board concludes that claimant's name had been furnished to the Fund prior thereto and that claimant was entitled to the benefits of the provisions of ORS 656.001 to 656.794.

The Board agrees with the conclusion reached by the Referee that the denial by the Fund was improper.

ORDER

The order of the Referee, dated October 27, 1978, is affirmed.

Inasmuch as a brief was not submitted in behalf of claimant, claimant's attorney is not entitled to any attorney's fee for his services at Board review.

SAIF CLAIM NO. YC 43861 APRIL 20, 1979

WILLIAM N. BUSBY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to both knees on October 18, 1966 when he was struck by a log. The June 29, 1967 Determination Order granted claimant time loss benefits from October 18, 1966 through June 7, 1967 and compensation for 25% loss of the right leg and 10% loss of the left leg. These awards were affirmed both by a Referee and the Board in subsequent orders.

The circuit court, on January 6, 1969, increased the awards of compensation to 45% loss of the right leg and 20% loss of the left leg.

On April 30, 1970 a right knee arthrotomy was performed. After a hearing, an order dated June 11, 1970 remanded the claim to the Fund for payment of compensation from March 8, 1970. The January 19, 1971 Determination Order granted claimant additional time loss benefits and additional compensation equal to 33° for loss of the right leg.

Claimant underwent an osteotomy of the tibia and fibula of the right knee on September 1, 1977. On November 30, 1978 Dr. Groth, after performing a closing examination, indicated claimant's range of motion was 5° of hyperextension to 135° flexion, bilaterally, with decrease of sensation anteriorly down to the ankle. The doctor felt claimant's condition was stationary.

On December 13, 1978 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional compensation for time loss from August 31, 1977, the date he entered the hospital, through February 7, 1978. Apparently claimant returned to work on February 8, 1978.

The Board concurs in this recommendation.

Claimant is hereby granted compensation for temporary total disability from August 31, 1977 through February 7, 1978, less time worked. The record before the Board indicates that this has already been paid to claimant.

WCB CASE NO. 77-3635 APRIL 20, 1979
WCB CASE NO. 78-4375

GABE E. DE LAUGHTER, CLAIMANT
Douglas S. Hess, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the Determination Orders of May 23, 1977 and May 4, 1978. The first order had granted claimant 22.5° for 15% loss of the left leg; the second, after referral to Vocational Rehabilitation, allowed no further award for permanent disability.

Claimant suffered a compensable injury on April 2, 1976 when he slipped and fell in the cooler of a cafe. He worked the following day but the next day requested the owner to call in a substitute for him as he was ill.

Claimant had planned a vacation to Oklahoma City on Monday. The injury had been on the preceeding Friday. On Monday he appeared at the job and accompanied a substitute employee to a warehouse to teach her how to obtain supplies. Claimant lifted a 25-pound sack of sugar and felt a sharp pain in the scrotum area. He did not work anymore that day but he did fly to Oklahoma City. Upon his arrival he needed assistance to alight from the plane.

Instead of staying two weeks in Oklahoma City as he had planned claimant returned to Portland where he was seen by Dr. Brown on April 19, 1976. The diagnosis was acute lumbar strain, although claimant disputes this. Dr. Brown saw claimant about 13 times and then sent him to Dr. Skeeters, a urologist, who performed a left hydrocelectomy. At the time claimant was hospitalized for this surgery, it was discovered that he had diabetes and he was put on oral medication therefor. He lost approximately 40 pounds during the treatment.

In June 1976 claimant was seen by Dr. McNeill, an orthopedic surgeon, who diagnosed sacroiliac joint strain and traumatic trochanteric bursitis. He gave claimant some injections which apparently did not improve claimant's condition. Later Dr. McNeill stated claimant's condition was stationary but he thought claimant would have difficulty returning to his former occupation; he suggested retraining. In August 1976 claimant was examined by Dr. Rich, a neurologist, who felt claimant had a sacroiliac or hip joint disease rather than a disc protrusion.

Dr. Halferty examined claimant in January 1977 while he was at the Callahan Center. There was also a psychologist's report which was not very encouraging. In the discharge summary of the Center it was concluded that claimant should be placed in a sheltered workshop; claimant's stay at the Center was not particularly successful primarily because he did not like the program and did not wish to continue.

Claimant later returned on his own to see Dr. Skeeters who referred him to Dr. Stolzberg. In March 1977 Dr. Stolzberg recommended a myelogram but claimant refused. During April 1977 Dr. Kiest concurred with Dr. Halferty and recommended that the claim be closed. He felt claimant's symptoms were genuine but essentially non-treatable. The Referee was uncertain as to whether this statement by Dr. Kiest referred to claimant's diabetic condition, claimant's refusal to undergo a myelogram or for another reason. Dr. Kiest found persistent left trochanteric bursitis and minimal degenerative arthritis of the left hip. He believed that claimant had a mild permanent impairment involving his low back and left hip. The claim was closed by a Determination Order dated May 23, 1977.

In September 1977 Dr. Macfarlane examined claimant and found organic impotency, secondary to diabetes. He sent claimant to Dr. Wilson, a neurologist, who found peripheral polyneuropathy, probably secondary to his diabetes mellitus; impotence, cause undetermined, chronic left buttock pain, probably related to arthritis of the hip; and hysterical sensory deficit.

The Referee found that all of claimant's work-related problems had been adequately compensated for by the Determination Orders; his added problems as indicated by the findings made by Dr. Macfarlane, were not medically related to his industrial injury.

The medical evidence did not justify a finding that claimant suffered a compensable injury to his low back. He found that claimant denied that his problems were anywhere but in his left hip. The Referee, relying on Principals of Disability Evaluation: William Cauthorn Smith, 1959, Page 120, stated that the hip joint lies with the leg radical and is to be related in terms of the leg.

The Board, on de novo review, agrees that the hip joint must be rated as a scheduled injury. However, the Board finds ample evidence in the record to support a conclusion that claimant has a substantial physical impairment in his low back and sacrum, as well as in the trochanteric area of his hip. The Determination Orders issued in this claim did not recognize any injury to claimant's low back but awarded 22.5° for 15% loss of the left leg, a scheduled injury.

The evidence relating to claimant's future loss of wage earning capacity resulting from his low back and pelvic disability is rather sparse, therefore, it is exceedingly difficult to determine just how much this unscheduled disability will affect claimant's earning capacity. Dr. Kiest felt that claimant had a mild permanent impairment involving his low back and left hip. Most of the medical evidence deals with the left hip and left leg problems and inasmuch as the hip has been correctly construed to be in the scheduled area, the Board concludes that claimant's loss of wage earning capacity is minimal.

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

ORDER

The order of the Referee, dated October 24, 1978, is modified to the extent that claimant is awarded in addition to the awards he has received as a result of the Determination Orders dated May 23, 1977 and May 4, 1978, 32° of a maximum of 320° for unscheduled low back and pelvic disability. In all other respects the Referee's order is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation claimant has been awarded by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-5144 APRIL 20, 1979

KATHRYN HUNSAKER, CLAIMANT
Blackhurst, Hornecker, Hassen & Brian,
Claimant's Attys.
Collins, Velure & Heysell, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of that portion of the order of the Referee which granted her 64° for 20% unscheduled right shoulder and neck disability. Claimant contends that award is inadequate.

On February 11, 1978 claimant sustained a compensable injury to her right shoulder when she bumped it on the Raimann table. She subsequently developed right shoulder and neck pain with intermittent numbness and tingling of her right hand.

On April 4, 1978 Dr. James diagnosed costoclavicular thoracic outlet syndrome and hospitalized claimant for conservative care.

By June 1978 Dr. Maukonen found muscle spasms of claimant's shoulder and numbness of the third, fourth and fifth fingers of her right hand. The doctor felt claimant should avoid all heavy activities requiring the use of her hands and arms. Subsequently, he recommended retraining.

A Determination Order of July 11, 1978 granted claimant an award of compensation equal to 32° for 10% loss of the right arm.

Claimant has a 10th grade education and her past work experience has been as a car hop and waitress. Claimant's employer, Boise Cascade, terminated her on July 14, 1978.

At the hearing the parties agreed that the employer had failed to pay claimant $74.04 which was owing from the Determination Order of July 11, 1978.

The Referee found that the Evaluation Division correctly evaluated the loss function of claimant's right arm. However, he found that claimant was entitled to an award for her right shoulder and neck disability as measured by her loss of wage earning capacity.

He granted claimant an award of compensation equal to 64° for 20% neck and right shoulder disability, ordered the employer to pay claimant the $74.04 plus 6% interest from the date of the Determination Order.

The Board, on de novo review, finds that awards granted by the Referee were justified. However, the Board finds claimant is entitled to additional compensation equal to 10% of the $74.04 as a penalty for the employer's failure to timely pay claimant compensation due her based upon the award made by the Determination Order of July 11, 1978. The Workers' Compensation Act does not provide for the charging of interest on unpaid compensation. The 6% interest assessed by the Referee from the date of the Determination Order must be set aside.

ORDER

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

The employer is ordered to pay claimant a sum equal to 10% of $74.04 as a penalty for its failure to comply with the Determination Order of July 11, 1978. This is in lieu of the 6% interest assessed by the order of the Referee which is affirmed in all other respects.

WCB CASE NO. 77-2221 APRIL 20, 1979

ALLEN L. KERR, CLAIMANT
Beddoe & Hamilton, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the order of the Referee which granted claimant 48° for 15% unscheduled head disability in addition to the awards he received for 100° for 100% loss of the right eye by the Determination Order of April 1, 1977.

Claimant, 52 years of age, was a truck driver for Crater Lake Potato. On September 26, 1974 the truck he was driving crashed and claimant suffered a head injury. Since his accident claimant's visual acuity has worsened, although he had received no direct injury to his eye as a result of the accident.

By November 1974 claimant's vision became blurry and on November 20 Dr. Graham diagnosed angle recession glaucoma, right eye, caused by trauma to face and head. Dr. Graham released claimant to his regular work on December 17, 1974.

Claimant's eye problems continued and on April 10, 1975 Dr. Graham performed surgery.
Claimant was again released to work on September 26, 1975. On December 11, 1975 Dr. Graham did repeat surgery.

Claimant continued to have intraocular tension in February 1976 which was increasing with corneal edema. Upon examination on April 6, 1976 Dr. Graham found claimant's right eye deteriorating. On April 6, 1976 a cyclocryothermy was performed to reduce this tension. There was no improvement.

On October 15, 1976 Dr. Weisel examined claimant and found the right eye blind with swelling and blisters on the cornea. Claimant did not want the eye removed even though he was having pain and discomfort. The doctor felt claimant would continue to have a painful cornea.

On February 22, 1977 Dr. Graham found claimant's right eye was painful.

A Determination Order of April 1, 1977 granted 100° for 100% loss of vision of the right eye.

Claimant testified at the hearing that ever since this injury he has suffered from eye pain, headaches and dizziness. Claimant is now employed pumping gas at a service station.

The Referee found claimant was a credible witness. He found that claimant had suffered both a scheduled injury and an unscheduled one because of the headaches and dizzy spells whi affected his wage earning capacity. He concluded claimant was entitled to 48° for 15% unscheduled head disability.

The Board, on de novo review, finds there is no convincing evidence that claimant has sustained any loss of wage earning capacity. Dr. Graham, in his closing examination, found no disabling pain. There is no medical evidence which establishes a causal relationship between the headaches and dizziness and the industrial injury.

The Board concludes claimant is not entitled to any awarc for unscheduled disability.

ORDER

The order of the Referee, dated November 14, 1978, is hereby reversed.

The Determination Order, dated April 1, 1977, is reinstated.

WCB CASE NO. 78-5807 APRIL 20, 1979

TERRY L. PECK, CLAIMANT
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant requests review by the Board of the order of the Referee which affirmed the Determination Order of July 14, 1978. Claimant contends he is entitled to a greater award.

Claimant, 29 years of age, was employed as an orderly and on November 11,1976 was pulling a 300-pound patient on to a bed when he felt a "lightning pain" in his stomach. He continued to work for one month with increasing pain and eventually losing control of his bowels.

On November 16, 1976 claimant was examined by Dr. Motz, D.O., who diagnosed a rectal muscle spasm with possible rectal prolapse. X-rays revealed considerable spasms of descending colon. Dr. Motz recommended claimant cease heavy lifting.

On May 20, 1977 Dr. Pasquesi's examination revealed claimant's problems were visceral claimant had some type of chronic problem which should be evaluated by a proper specialist.

On June 16, 1977 Dr. Motz reported claimant had suffered a rectal prolapse when lifting at work and should now be retrained for a job which did not require lifting or going up and down stairs.

On August 22, 1977 Dr. Van Sickle, a specialist in gastroenterology, diagnosed chronic irritable colon syndrome. He felt that although lifting might have caused mild exacerbation, the distress was not disabling.

Subsequently, Dr. Van Sickle reported a diagnosis of functional bowel distress; claimant would be able to perform modified work and he didn't feel there would be permanent disability.

On March 20, 1978 Dr. Van Sickle, after re-examining claimant, diagnosed irritable colon and internal hemorrhoids; there was no prolapse. He concluded claimant's distress was not related to the November 1976 injury. Sedentary work would be best for the claimant because of the discomfort claimant experienced on lifting.

The July 14, 1978 Determination Order granted to claimant time loss only.

Claimant is presently going to school and the Vocational Rehabilitation Division is assisting him.

The Referee, based upon the evidence, found that claimant had suffered no permanent disability as a result of the November 11, 1976 injury.

The Board, on de novo review, affirms the conclusion reached by the Referee but bases its conclusion on claimant's failure of proof that he was entitled to any permanent disability.

ORDER

The order of the Referee, dated December 4, 1978, is affirmed.

CLAIM NO. YA 877355 APRIL 20, 1979

BOB WILLIAM READE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On March 28, 1979 the Board entered its Own Motion Determination in the above entitled matter. It has been brought to the attention of the Board that an error in the order should be corrected. On page 2 of said order, in the first full paragraph, "55.5°" should be changed to read "60.5°". The same correction should be made in the paragraph under the "Order" portion.

IT IS SO ORDERED.

WCB CASE NO. 77-5291 APRIL 20, 1979

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

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the order of the Referee which granted claimant an additional award of compensation equal to 80°, giving claimant a total of 160° for 50% unscheduled low back disability.

Claimant suffered a compensable injury on November 9, 1971 to his low back. This injury was superimposed on anomalies in the low back which had been previously fused because of an earlier non-industrial accident. The claim was accepted, closed and reopened and reclosed several times.

The claimant contended that he had suffered a new injury in August 1974 which had been treated by the insurer as an off-the-job injury. He also contends that he is entitled to vocational rehabilitation services under the 1973 Act, penalties and attorney's fees, and that he is entitled to permanent total disability or, in the alternative, a substantial increase in his award for permanent partial disability.

The Referee found that claimant had failed to prove that he had suffered a new injury in 1974, therefore, there was no issue with respect to his entitlement to vocational rehabilitation services, penalties and attorney's fees. The Referee did, however, grant claimant an additional 80°, giving him a total of 160° for his low back disability.

The Referee found that claimant made many attempts to resume working for the employer but both he and Dr. Chapman agreed that claimant was no longer able to do any of the jobs which his employer was able to make available to him without risking reinjury. The claimant was in need of vocational rehabilitation and is presently under consideration for this type of service by a Vocational Rehabilitation Division counselor.

Despite all of claimant's problems, in the spring of 1977 he returned to work in the logging industry driving cat and skidding logs to a landing site. He was involved in another industrial injury, however, it didn't involve his back.

On February 10, 1978 Dr. Chapman reported that claimant was virtually free of all back pain. In 1974 Dr. Robinson had examined claimant; he saw him again on May 3, 1978 and found claimant's condition had obviously worsened in the interval. He noticed that claimant was taking too much Tylenol #4. He felt claimant should undergo a fusion to stabilize L4. Claimant has already had one fusion and had been discouraged from further surgery by Dr. Colletti. In Dr. Robinson's opinion claimant's disability is 60%.

Claimant has a high school education, he has average intelligence and he has mechanical aptitude and experience. He also has had experience in logging and carpentry and does not appear to be greatly handicapped by emotional factors.

As previously stated, claimant contends that he suffered a new injury in 1974 although it apparently was treated as an aggravation by the carrier and he was paid compensation therefor. The claimant described a lifting injury in August 1974 but the Referee found no claim had been filed for that incident and when considered against the background of his present claim which involves a series of exacerbations of an unsound back in relation to lifting and/or twisting, the Referee concluded that the event was in the nature of an aggravation rather than a new compensable injury.

The Referee found that a hearing had been held with respect to claimant's present claim in August 1975. At that time claimant was represented by an attorney who now says that he just learned of the 1974 incident and how it had been handled, however, the fact remains that claimant knew of the incident at the time of the hearing. The Referee assumed that had claimant been ignored or uncompensated in August 1974 he would have advised his attorney in time to litigate the matter at the prior hearing.

The Referee concluded that claimant had failed to prove that he was entitled to the reclassification sought and he also had failed to prove that he was entitled to penalties and attorney's fees.

The Referee concluded that Dr. Robinson had evaluated claimant's disability at 60% and he felt that evaluation was reasonable for claimant but he felt he must concede that at least 10% of that disability was attributable to the old, non-industrial fusion. Therefore, he found that claimant was entitled to compensation equal to 50% (60% minus 10%) and added the additional 80°.

The Board, on de novo review, finds that the medical evidence indicates that claimant has suffered a greater loss of wage earning capacity as a result of his industrial injuries than is represented by the award equal to 50% of the maximum allowable by law for such unscheduled disability. Based upon claimant's work background, his education, age, and potential for retraining, the Board concludes that claimant should be awarded 240° for 75% unscheduled low back disability.

The Board disagrees with the Referee's deduction of 10% from Dr. Robinson's evaluation of claimant's disability. The rating of disability is an administrative function, however, many doctors do rate unscheduled disability based on the whole man and set forth their rating in their medical reports. The Board, as the administrative agency, has the right to give as much weight to such rating as it feels it is entitled to. In this case, the claimant suffered an unscheduled disability and under the provisions of ORS 656.214(5) his disability must be determined by the extent of the disability compared to the worker before such injury and without such disability. Consideration may be given to the effect of a pre-existing disability in the unscheduled area to the extent that such pre-existing disability bears on the loss of wage earning capacity evident at the time and prior to the second unscheduled injury, however, a mathematical formula or, as in this case, simple subtraction, is the wrong method to use.

ORDER

The order of the Referee, dated July 28, 1978, is modified.

Claimant is awarded 240° of a maximum of 320° for 75% unscheduled low back disability. This award is in lieu of the award made by the order of the Referee which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation awarded by the Board's Order on Review, payable from that additional compensation as paid, not to exceed $3,000.

WCB CASE NO. 77-3212 APRIL 23, 1979

JUNE ANDERSEN, CLAIMANT
Duncan & Walter, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted her compensation equal to 80° for 25% unscheduled low back disability.

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

ORDER

The order of the Referee, dated July 24, 1978, is affirmed.

WCB CASE NO. 76-5761 APRIL 23, 1979

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

On April 20, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on August 21, 1969. On May 13, 1977 the Board referred claimant's request to its Hearings Division with instructions to hold a hearing and determine whether claimant's present condition is related to the August 1969 injury and, if so, whether his condition has worsened since the last award or arrangement of compensation granted in May 1970.

The Referee assigned to the hearing was advised by the Fund's counsel prior to the hearing that he was of the opinion that the matter had been previously dismissed. Claimant's attorney also indicated that he thought the matter had been dismissed in connection with another case. The Referee made several unsuccessful attempts to locate claimant before the date of the hearing. On the date of the hearing claimant failed to appear and his whereabouts is presently unknown.

Based upon these facts, the Board concludes that claimant's request for own motion relief must, at this time, be dismissed without prejudice.

ORDER

Claimant's request for own motion relief in connection with his August 1969 industrial injury is hereby dismissed without prejudice.

WCB CASE NO. 77-711 APRIL 23, 1979

DENNIS BERLINER, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Newhouse, Foss, Whitty & Roess,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of that portion of the Referee's order which remanded part of claimant's back condition to the carrier for acceptance and payment of compensation but failed to find the whole back condition was compensable.

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

ORDER

The order of the Referee, dated November 18, 1977, and the January 9, 1978 reinstatement thereof, are affirmed.

CLAIM NO. 46-41-126 APRIL 23, 1979

EVERETT M. CHETWOOD, CLAIMANT
Own Motion Determination

Claimant, a 56-year-old shipping/receiving clerk employed by Borden Chemical, suffered a compensable injury to his low back on March 29, 1972 while lifting hose and cleaning valves. His claim was first closed by a Determination Order dated October 30, 1972 whereby claimant was awarded 48° for 15% unscheduled low back disability and 7.5° for 5% loss of the left leg.

After his claim had been reopened it was closed by a Second Determination Order dated July 3, 1974 which granted claimant additional compensation for temporary total disability. Still later, the claim was again reopened and it was closed by a Third Determination Order dated May 25, 1978 whereby claimant was granted an additional 64° for 20% unscheduled low back disability and an additional 15° for 10% loss of his leg. This was the date of claimant's last award and arrangement of compensation.

In October 1978 claimant was hospitalized for a lumbar laminectomy. The insurer voluntarily reopened the claim with time loss compensation to commence on the date of claimant's hospitalization. On March 26, 1979 both Dr. Serbu and Dr. Franklin felt claimant's condition was stationary and recommended the claim be closed.

Claimant is now 63 years old, he operates intellectually at least at the high school graduate level and his early work history consists of lumbering and his more recent work background is that of a shipping/receiving clerk, a job which is classified as medium type work. Dr. Franklin is of the opinion that claimant is permanently and totally disabled, but Dr. Serbu feels that claimant is capable of doing light work and says he is not permanently and totally disabled. The medical evidence indicates, without question, that claimant has left lumbar radiculopathy and that it is necessary for him to frequently change position in order to function. His degenerative arthritic changes appear naturally progressive.

On April 5, 1979 the employer, by and through its carrier, requested a determination of claimant's present condition and the Evaluation Division of the Workers' Compensation Department recommended that the Board close the claim with additional compensation for temporary total disability from October 12, 1978 through March 26, 1979 and additional compensation for permanent partial disability equal to 64° for unscheduled low back disability.

The recommended additional compensation would give claimant a total of 176 degrees for 55% unscheduled disability and his prior awards which represent 22.5 percent for 15% loss of the left leg remain undisturbed.

The Board concurs in the recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from October 12, 1978 through March 26, 1979 and compensation equal to 64° for 20% unscheduled low back disability. These awards are in addition to any and all awards claimant may have received prior to the entry of this order which relate to his industrial injury sustained on March 29, 1972.

SAIF CLAIM NO. A 999130 APRIL 23, 1979

WILLIAM H. HARRINGTON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 12, 1963 claimant suffered a compensable injury to his back and ribs when he fell from a bridge structure while in the employ of the State Highway Department. Claimant's claim was accepted and closed and claimant's aggravation rights with respect to said injury have expired.

The Fund was requested to reopen claimant's claim for this industrial injury by his employer, the State Highway Department. The request was made by filing with the Fund an 801 claim dated August 1, 1978. The Fund furnished the Board with the 801 claim and also medical reports from Dr. Chen Tsai, Dr. K. Clair Anderson, and the physicians at the Orthopaedic Consultants who examined claimant on January 22, 1979. The Fund advised the Board that it would not oppose the reopening of the claim if the Board concluded that the medical evidence which the Fund had supplied it justified such reopening.

The report from Dr. Tsai indicated he had seen claimant in a neurosurgical consultation on December 17, 1970 for evaluation of low back pain and at that time diagnosed chronic lumbosacral strain. On June 23, 1972 Dr. Anderson took over the care of claimant and indicated that claimant's condition was then medically stationary and that the claim could be closed. There is no documentation as to the claim closure, however, there are chart notes from Dr. Anderson in 1972 and again in 1978. On October 27, 1978 Dr. Anderson advised the Fund that he was unable to "distinguish natural progression of degenerative disc disease with that which is secondary to an injury. It is not unusual for degenerative disc disease to develop following a traumatic injury and may show increased progression over that which one might expect normally because of the superimposed trauma".

The three doctors at the Orthopaedic Consultants, Dr. Rankin, Dr. Noell, and Dr. Wilson, based upon the entirely negative back history of claimant prior to his 18-foot fall which occurred on June 12, 1963, concluded that there was a causal relationship between claimant's current condition and his June 12, 1963 industrial injury.

Based upon the medical information furnished to it by the Fund, the Board concludes that there is justification for reopening claimant's claim for his 1963 injury.

ORDER

Claimant's claim for an injury sustained on June 12, 1963 while in the employ of the State Highway Department is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on August 1, 1978, the date the claim was sent in by the employer, and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

WCB CASE NO. 78-3188 APRIL 23, 1979

OLE LARSON, CLAIMANT
Cash R. Perrine, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order of December 2, 1977 which granted claimant 16° for 5% unscheduled low back disability.

Claimant suffered a compensable injury to his back on August 13, 1975; at that time he was a 55-year-old logger. He was first seen by Dr. Ray N. Miller on September 16, 1975 who, after examining claimant, found no paraspinous muscle spasm but did find decreased movement in the lumbosacral area of the back. X-rays showed degenerative disc disease changes throughout the lumbosacral area. Dr. Miller recommended bed rest which seemed to improve claimant's condition. Later a recurring back and leg pain caused claimant to be hospitalized.

Claimant's medical history indicates that approximately eight years prior to the 1975 injury he had had an episode of low back pain from which he had recovered and returned to work, wearing a lumbosacral corset. Claimant did well until a few years later when he re-injured his back lifting a boat. Once again his symptoms lasted only a short period of time and he lost no time from work. He remained essentially asymptomatic from that episode until the incident of August 13, 1975.

Dr. Miller diagnosed degenerative lumbar disc disease with probably acute herniated disc at L5-S1 level on the left or L5 level. A laminectomy was performed on October 7, 1975.

Dr. Miller continued to treat claimant and claimant made a good recovery. Dr. Miller said claimant would be able to return to modified work on April 5, 1976; on June 17, 1976 he was symptom-free and had returned to work as a timber faller. Dr. Miller found him to be medically stationary with no residuals as a result of the injury and subsequent surgery.

The claim was closed by a Determination Order dated July 12, 1976 which awarded claimant compensation for temporary total disability only.

On January 4, 1977 claimant was again seen by Dr. Miller; at that time claimant was complaining of recurrent pain in the low back which was diagnosed as lumbosacral strain. On February 1, 1977 claimant returned to work and Dr. Miller stated he found no evidence of permanent disability. Claimant had degenerative lumbar disc disease and the nature of his work was heavy, therefore, there was a possibility that he would have difficulty in the future.

The claim was again closed by a Second Determination Order dated December 2, 1977 which awarded additional compensation for temporary total disability and granted claimant an award of compensation equal to 16° for 5% unscheduled low back disability.

Claimant has a ninth grade education, he has worked as a farmer but his basic occupation has been that of a timber faller. He served slightly more than three years in World War II as a radio operator in the Marine Corps.

The Referee found the evidence indicated claimant had been a hard, energetic worker but that at the present time after a full day's work he needed substantial rest. This was not necessary prior to his injury of August 13, 1975.

The evidence indicates that claimant is still fairly active on off-the-job activities. Although he has not water skied since his accident, he has no difficulty dancing and finds that walking helps his condition. He is bothered by prolonged sitting or riding in an automobile. At the present time he is working at his old job. Before he was injured he used a heavy chain saw but now he is forced to use a smaller saw which weighs approximately 23 pounds. He rides to work in a crummy over rough terrain and sometimes he drives the crummy home; when he does this he is paid extra.

The Referee found that claimant had returned to a job which he had held prior to his industrial injury and presently worked a heavy schedule. Claimant has some pain and discomfort and should be admired for his efforts to return to the work force in a productive capacity; however, no allowance can be made in compensation awards for pain or suffering unless it is disabling.

The Referee concluded the evidence indicated that claimant had lost some reserve physical capacity, to-wit: he is unable to do the things after a day's work that he formerly did. However, claimant is able to do his job satisfactorily and he has been awarded 16° for 5% of the maximum for his low back disability and, in the opinion of the Referee, that award was consistent with his minimal impairment. He, therefore, affirmed the Determination Order.

The Board, on de novo review, agrees that claimant has lost some reserve physical capacity but, unlike the Referee, does not feel that this loss is solely confined to inability to do off-the-job activities which he formerly was able to do. There are many things that claimant now cannot do at work that he was able to do prior to his industrial injury. Claimant testified that prior to his industrial injury he was a top producer and now he is either at or near the bottom in production. This decrease in production obviously is because claimant is no longer able to operate a heavy chain saw and must use a smaller one because of the weight. The use of the smaller saw decreases his income because claimant is paid by footage and a faller cannot cut as much timber using a small saw as he can with a regular saw.

Based on the foregoing, the Board concludes that claimant has lost some reserve capacity insofar as it affects his earning ability and that he has not been adequately compensated therefor by an award of 5% of the maximum. The Board concludes that claimant is entitled to 48° for 15% of the maximum for his unscheduled low back disability.

ORDER

The order of the Referee, dated September 18, 1978, is modified.

Claimant is awarded 48° out of a maximum of 320° for 15% unscheduled low back disability.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Board a sum equal to 25% of the additional compensation granted claimant by the Board's order, payable out of said compensation as paid, not to exceed $3,000.

SAIF CLAIM NO. PB 94443 APRIL 23, 1979

LINCOLN H. PENCE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 12, 1979 the Board received a request from claimant, by and through his attorney, to reopen his claim for an industrial injury sustained on November 9, 1964 which caused a fractured left tibia and fibula. The claim was accepted and closed on July 12, 1965 with an award equal to 15% loss of function of the left foot. On June 19, 1974 claimant was granted an additional award of compensation equal to 55% loss of use of his left foot. Claimant's aggravation rights have expired.

On January 5, 1977 an Own Motion Determination granted claimant additional compensation for temporary total disability only. The claim was reopened and on December 11, 1978 closed by another Own Motion Determination which awarded claimant additional compensation for temporary total disability only.

In support of his request to again reopen the claim, claimant's attorney submitted a report from Dr. D.A. Ross, dated January 22, 1979, which indicated that claimant had infection of the left leg. Dr. Ross stated claimant had been bothered for at least eight years with chronic thrombophlebitis and ulceration involving this left leg which was the result of the industrial injury of November 9, 1964.

The Fund furnished the Board with a copy of Dr. Ross' report and stated that it would not oppose the reopening of the claim if the Board was of the opinion that Dr. Ross' report was sufficient.

The Board concludes, after reviewing the previous medical information in the file together with Dr. Ross' most recent report of January 22, 1979, that the claimant's claim should be reopened. Claimant has already received awards of compensation totalling 70% loss function of the left foot and the last award of compensation for temporary total disability was from June 18, 1977 through November 6, 1978.

The Board concludes that claimant's compensation for temporary total disability should commence as of the date the claimant was hospitalized by Dr. Ross. The Board has not received information with respect to the exact date the claimant was hospitalized but has been advised that claimant was in the hospital for approximately nine days.

ORDER

Claimant's claim for an industrial injury sustained on November 9, 1964 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date after November 6, 1978 that Dr. Ross hospitalized claimant for treatment for his lower left leg and until the claim is again closed pursuant to the provisions of ORS 656.278, less any time worked.

FRANK D. RAINES, CLAIMANT
Kirkpatrick & Howe, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right leg on March 6, 1972 when he slipped on some oil. He received chiropractic care initially. A laminectomy was later performed by Dr. Misko. The claim was closed on December 26, 1972 with an award of 48° for 15% unscheduled neck disability and 15° for 10% loss of the right leg.

Claimant was 61 years old at the time of his injury and had approximately 30 years experience in his profession as a tool and die maker. As a child he had polio which left a tremendous residual disability in the left leg; however, claimant felt his right leg was all right prior to the 1972 injury.

On March 29, 1974, after a hearing, the Referee found that claimant's right leg condition was due to the 1972 injury and granted claimant compensation equal to 90° for 60% loss of function. The unscheduled disability award remained the same.

Claimant, on August 14, 1978, requested reopening of his claim due to aggravation. A Board's Own Motion Order, dated September 12, 1978, ordered time loss to be paid from March 8, 1978 until closed pursuant to ORS 656.278.

Since this reopening claimant has undergone therapy on the right leg but his leg condition is now poorer than at the time of the March 29, 1974 order. The Orthopaedic Consultants, on February 13, 1979, felt the disability to the neck due to the injury was mild and the right knee was rated as mildly-moderate but minimal due to the injury.

On March 26, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant have further therapy for the right leg under the provisions of ORS 656.245. They felt he had been adequately compensated for his disabilities. They recommended time loss benefits be paid from March 8, 1978 through February 13, 1979, the date claimant was found to be medically stationary by the Orthopaedic Consultants.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 8, 1978 through February 13, 1979, less time worked.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of September 12, 1978.

SAIF CLAIM NO. KA 963813 APRIL 23, 1979

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

Claimant suffered a compensable injury to his left leg in a logging accident on November 9, 1962. After several surgeries, Dr. Platner recommended that claimant be compensated for 50% permanent partial disability. Apparently, the file has been purged, but the Fund indicates that an order dated October 31, 1966 granted claimant compensation for 50% of the left leg.

The claim was reopened in 1967 upon the recommendation of Dr. Compton that claimant have more surgery. The claim was closed on June 24, 1968 with no additional compensation for permanent disability. Claimant has suffered from time to time and has been paid time loss benefits numerous times between December 1970 and March 1978.

The claim was last reopened on June 5, 1978 for further benefits. On February 1, 1979 Dr. Beals indicated that claimant was doing somewhat better by "babying" his leg and his condition was stable. On March 13, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted time loss from June 5, 1978 through August 23, 1978 and from September 8, 1978 through February 1, 1979 with additional compensation equal to 25% loss of the left leg. This would give claimant a total award for 75% loss of the left leg.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from June 5, 1978 through August 23, 1978 and September 8, 1978 through February 1, 1979, less time worked.

Claimant is also granted compensation equal to 37.5° for 25% loss of the left leg. These awards are in addition to any and all previous awards granted to claimant for his November 9, 1962 industrial injury.

CLAIM NO. WB 161566 APRIL 24, 1979

RICHARD CUMMINS, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 8, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an industrial injury sustained on December 3, 1965. The Fund opposed claimant's request on the basis that his recent back treatment was necessitated by a spinal fusion he had undergone in 1962 rather than the 1965 industrial injury.

An order of the Board, dated May 26, 1978, referred claimant's request to its Hearings Division with instructions to hold a hearing and determine whether claimant's present condition was related to his 1965 injury and, if so, if it represented a worsening since the date of the last award or arrangement of compensation which claimant received for that injury.

A hearing was held on December 4, 1978 by Referee Danner who recommended that claimant's request for own motion relief be denied. The Board, after fully considering the transcript, the medical evidence and the Referee's recommendation, hereby affirms and adopts the findings of fact as set forth by the Referee in his recommendation, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

Claimant's request for own motion relief in connection with his injury of December 3, 1965 is hereby denied.

WCB CASE NO. 78-1798 APRIL 24, 1979

LILA DERKSEN, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the Fund's denial of her claim for compensation for a lipectomy done on November 3, 1977.

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

ORDER

The order of the Referee, dated December 5, 1978, is affirmed.

WCB CASE NO. 77-7521 APRIL 27, 1979

FORREST ADAMS, CLAIMANT
John Stone, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the Determination Order dated April 28, 1978 which had made no increase of award of compensation for permanent partial disability over the initial Determination Order dated October 25, 1977. The first Determination Order had awarded claimant 48° for 15% unscheduled low back disability. Claimant contends he is permanently and totally disabled.

Claimant is 43 years old, he has a formal education consisting of two years of high school, a GED and 40-50 college credits in liberal arts. He served three years in the army and his work background has been in heavy manual labor, for the last 18 years with the present employer.

On January 11, 1974 claimant sustained a compensable injury to his low back while swinging a sledge hammer. He was treated by Dr. Edwards, an orthopedic surgeon, who diagnosed an acute lumbar strain. Dr. Edwards also noticed there had been a long history of low back complaints which had led to operations on the lumbar spine. The last surgery was a fusion L3 to L5 which was performed in February 1970. Apparently claimant had no problem after his recovery from that surgery although he had been advised against returning to strenuous work because of his chronic low back disability.

X-rays taken indicated a psuedoarthrosis at L4-5 level and the re-fusion was performed in August 1974. Claimant was advised not to return to work which required stooping, twisting, bending or to do any type of vigorous manual labor. The medical opinion was that there would be a moderate degree of residual disability.

Dr. Harwood, medical consultant for the Fund, examined claimant in July 1977 and stated the subjective symptoms and complains were not corroborated by the objective findings. It was his opinion that claimant had a definite functional overlay.

Claimant was referred to the Northwest Pain Center in May 1977. Dr. Seres, upon claimant's discharge, stated that there was significant disability with respect to the low back with residual capacity for light to moderate work activity. He found motivation to be a significant factor. The psychologist who examined claimant while he was at the Pain Center indicated that claimant's participation was, at best, marginal and he had a tendency towards overuse of alcohol.

In May 1978 Dr. Tiley released claimant for a job with the employer as a field data and measurement man, a job which was described as involving mostly light-type work.

In August 1978 Dr. Welch examined claimant and was of the opinion that claimant could return to work but should avoid excessive bending, lifting, etc.

Claimant had been referred by the Vocational Rehabilitation Division to a community college for insurance training but he stated he could not complete the course because of interruptions due to medical treatment; furthermore, he was physically unable to sit for long periods of time as required. Later he completed a sales training course but was unable to find employment. He has applied for two sales jobs without success. He has also applied at the State Employment Office and the Department of Labor for work with equally poor results. Claimant testified that after his first injury in 1965 and which required a fusion he returned to manual labor although he was advised not to because he felt he could earn more money at that type of work.

The Referee found that claimant has not held a full time job since his injury and, based upon the medical evidence, concluded that claimant suffered from a chronic low back condition superimposed upon a pre-existing low back disease which resulted in increased permanent impairment. Because of his industrial injury the Referee found that claimant has been permanently excluded from a portion of the heavy manual labor market but concluded that the award of 48° which represents 15% of the maximum adequately compensated claimant for the decrease in his wage earning capacity. He affirmed the Determination Order.

The Board, on de novo review, finds that claimant prior to his injury was a crew foreman with a gas company and that he cannot, because of the residuals of his industrial injury, return to this type of work. Although it appears that claimant lacks complete motivation, nevertheless, after considering the medical evidence and the evidence that claimant has had to change the type of work which he was able to do and do well prior to his injury and must now take work which pays him considerably less and curtails his potential for advancement, the Board concludes that claimant is entitled to an award of compensation equal to 80° which represents 25% of the maximum for his unscheduled disability.

ORDER

The order of the Referee, dated September 28, 1978, is modified.

Claimant is awarded 80° of a maximum of 320° for 25% unscheduled low back disability. This award is in lieu of the award made by the Referee in his order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in connection with this Board review a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 77-6265 APRIL 27, 1979

ALFRED E. BERCOT, CLAIMANT
William G. Whitney, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of his claim for an aggravation of his June 15, 1971 industrial injury.

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

ORDER

The orders of the Referee, dated June 22, 1978 and September 14, 1978, are affirmed.

WCB CASE NO. 78-3798 APRIL 27, 1979

HERBERT S. BOLTON, CLAIMANT
Green & Griswold, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which found claimant to be permanently and totally disabled as a result of his December 5, 1974 industrial injury.

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

ORDER

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

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

WCB CASE NO. 78-779 APRIL 27, 1979

SUZANNE BOYTER, CLAIMANT
Coons & Anderson, Claimant's Atty.
Samuel Hall, Jr., Claimant's Atty.
Collins, Velure, Heysell, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which approved the denial of claimant's claim by the employer and its carrier.

Claimant, a 26-year-old Raimann operator, alleged that a herniated low back disc which had been surgically removed on January 13, 1978 arose out of and in the course of her employment. On December 19, 1977 she alleged she slipped on a scrap of wood while pushing a load of veneer. She signed a claim form on December 30, 1977 and the claim was denied on January 11, 1978.

The alleged incident was unwitnessed although there were four co-workers in a position to view claimant during the course of her work on December 19 and all of them testified they did not see claimant slip and fall or otherwise sustain any injury on that date.

Some six to eight weeks prior to this incident claimant had been involved in a physical altercation with another woman at the County Palace Saloon. One of the witnesses to this female brawl testified that claimant told her that she had injured her neck and back as a result thereof. Another testified claimant had complained of shoulder pain following the fight.

Claimant worked full shifts on December 19, 20 and 21, 1977 and did not seek medical attention until December 22 when she was seen by Dr. Streitz who recorded low back pain three days previous, without incident of injury or work trauma. He stated that at the time he saw claimant on December 22 she was in significant distress. On January 11, 1978 Dr. Streitz reported that claimant stated she recalled falling on something while pushing lumber in a cart on December 19, 1977 at 4:00 p.m.

Although two of the co-workers did not personally like claimant none of the four who testified had any apparent stake in the outcome of claimant's claim. The Referee found no expert medical opinion in the record causally connecting a slipping incident on December 19, 1977 with the herniated disc, considering the intervening work without observable symptoms.

He concluded that claimant had not proved by the preponderance of the evidence that the herniated disc was materially caused by a slip at work on December 19, 1977.

The Board, on de novo review, concurs with the conclusion reached by the Referee. The evidence indicates that each of the four co-workers who testified was at a work station where he or she could clearly observe the actions of claimant; none had any reason to testify adversely to claimant although, admittedly, two of the four did not like her personally.

On December 22, 1977 claimant visited her dentist's office and the dental assistant testified that she was present when claimant stepped into the dentist's chair without assistance nor did she appear to be in any particular pain. Contrary to claimant's contention that she experienced back pain from December 19 through December 21, her co-workers consistently stated that claimant did not refer to being in any pain on the days following the alleged incident of December 19. One of the witnesses testified that she took coffee breaks with claimant during the three days following December 19 and at no time did claimant make any complaints about her back. This testimony is bolstered by the testimony of other co-workers, one of whom stated that claimant, in leaving work on December 21, was in an ebulient mood and was "just kind of bouncy and swinging around".

With regard to the altercation in the saloon the testimony is not only abundant but it is consistent that claimant made numerous complaints of neck and shoulder pain following the fight. There is no explanation of claimant's failure to timely report her alleged injury of December 19. Claimant admitted that she was aware of prominently posted signs concerning the importance of reporting industrial injuries.

The burden is upon claimant to establish that her injuries were attributable to an industrial injury; claimant failed to establish, by a preponderance of the evidence, that her herniated disc was materially caused by her having slipped and fallen while at work on December 19, 1977. The Referee correctly affirmed the denial of her claim.

ORDER

The order of the Referee, dated September 29, 1978, is affirmed.

SAIF CLAIM NO. C 57291 APRIL 27, 1979

KENNETH O. BRANDON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on January 21, 1967 when he suffered a whiplash injury as a result of an automobile accident while working for the Oregon State Police. A laminectomy was performed on May 16, 1967 and his claim was first closed on October 10, 1967 with an award equal to 48° for 15% unscheduled disability.

Apparently claimant received no treatment until September 27, 1976 when he was seen for left shoulder bicipital tendinitis. In November 1976 claimant complained of neck problems. On March 1, 1977 authorization to do an anterior cervical fusion at C5-C6 on March 10, 1977 was requested. Because claimant's aggravation rights had expired and also because its file indicated intervening incidents, the Fund refused to reopen claimant's claim. Claimant requested a hearing. The Referee found claimant's aggravation rights have expired but he found the surgery was related to claimant's 1967 injury and ordered the Fund to pay for any medical expenses under ORS 656.245 from September 7, 1976 forward. This order was affirmed by the Board.

On September 15, 1978 claimant requested the Board to exercise its own motion jurisdiction and reopen his claim. This was done by an order dated December 6, 1978 which remanded the claim to the Fund for payment of compensation commencing September 27, 1976.

A medical report of Dr. Bert's, dated January 24, 1979, indicates that claimant was then only capable of light to light-moderate work with no lifting over 30 pounds, no frequent stooping and bending and no prolonged sitting.

Claimant went to work on October 1, 1978 for Gold Coast Security performing a job which is apparently a modification of his original career goal.

On March 27, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional temporary total disability compensation from September 27, 1976 through September 30, 1978, less time worked, and an additional award of compensation equal to 64° for 20% unscheduled disability for a total of 35%.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 27, 1976 through September 30, 1978, less time worked, and compensation equal to 64° for 20% unscheduled permanent partial disability. These awards are in addition to all awards previously granted claimant for his January 21, 1967 industrial injury.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for permanent disability granted by this order, payable out of said compensation as paid, not to exceed $3,000. Claimant's attorney has already been given an attorney's fee for obtaining the award of compensation for temporary total disability granted by the Own Motion Order of December 6, 1978.

WCB CASE NO. 78-1679 APRIL 27, 1979
WCB CASE NO. 78-1504

STEPHEN BUFORD, CLAIMANT
Stephen C. Yates, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Cheney & Kelley, Employer's Attys.

Reviewed by Board Members Wilson, Phillips and McCallister.

The employer seeks Board review of the order of the Referee which affirmed the denial of claimant's claim by the State Accident Insurance Fund and remanded claimant's claim for aggravation to the employer to be accepted and for the payment of compensation, as provided by law, until claim closure.

Claimant suffered a compensable injury to his back on September 7, 1977 while employed by Edward Hines Lumber Company, hereinafter referred to as Hines. The claim was accepted and, after conservative treatment by Dr. Zurflueh, it was closed by a Determination Order dated November 25, 1977 which granted claimant compensation only for time loss.

Claimant ceased working for Hines on October 16 and commencing working for the Friendly Street Garage in Eugene, hereinafter referred to as Friendly, where he did some light lifting. Claimant denies that he had any new back problems while working for Friendly but that his back seemed to get worse and caused him difficulty.

Because of his back problems claimant filed a claim for aggravation with Hines, contending that his present problems were the result of his September 1977 injury. Hines denied the claim on January 17, 1978.

The Fund furnished Workers' Compensation coverage for Friendly and although claimant did not submit a claim to it for any industrial injury a claim form (801) was submitted by Friendly. This claim stated that claimant was hurt at home and not on the job. On January 31, 1978 the Fund issued a denial. Claimant did not request a hearing on this denial, stating that he had never filed a claim against Friendly.

Hines contended that after claimant terminated his employment with them there were at least two events which caused additional symptoms in claimant; his lifting efforts while working for Friendly and an incident which occurred on or about December 10, 1977 when claimant was lifting a calf.

Dr. Stainsby, upon being deposed, expressed his opinion that claimant's problems were related to his original injury while working for Hines although he did feel that the lifting at Friendly could cause an acceleration of the symptoms as could the lifting of the calf.

Claimant testified that the last two days he worked for Friendly the shop was moved to a new location but he was not involved in the moving.

The Referee concluded that there was no evidence that the Fund had any responsibility for claimant's present condition; there was no medical evidence nor lay evidence to justify a finding that any traumatic incident occurred while claimant was in the employ of Friendly. Claimant's testimony was that his back bothered him continuously since the September 1977 injury.

Claimant ultimately submitted to back surgery performed by Dr. Stainsby. Dr. Stainsby stated that the surgery would have been required regardless of the events in which Hines alleged the claimant was involved after leaving his employment with them.

The Referee, having found no evidence that the Fund was responsible for claimant's condition, affirmed its denial and stated that the issue raised by the Fund as to whether claimant had shown good cause for failure to appeal the denial within 60 days was, therefore, moot.

The Referee, relying heavily on the opinions expressed by Dr. Stainsby, who eventually became claimant's treating physician, found that claimant had suffered an aggravation of his September 7, 1977 injury while in the employ of Hines. Dr. Stainsby, in his deposition, indicated that in his opinion claimant's condition was a classic herniated disc syndrome.

The Referee concluded that the claimant was a credible witness who testified that he had had back problems since the initial injury in September 1977 and that nothing traumatic had occurred while he was employed by Friendly which could have accounted for these back problems. Claimant testified that with respect to the calf lifting incident all he did was to hold the tail of the calf and two other people lifted the animal which weighed approximately 150 pounds. Based on the foregoing, the Referee remanded claimant's aggravation claim to Hines for acceptance.

The majority of the Board, on de novo review, agrees with the findings and conclusions of the Referee. Dr. Stainsby's deposition, taken in its entirety, indicates clearly that the cause of claimant's surgery was his injury on September 7, 1977 while working for Hines. According to Dr. Stainsby, once this injury occurred there was no way to avoid the ultimate necessity for surgery; any activity of any kind would produce symptoms but regardless of what activities claimant engaged in the progression was going to occur and, ultimately, surgery would be required.

The majority of the Board finds no evidence of any intervening independent event, either in the nature of an industrial injury, or a non-industrial accident, which would break the chain of the progressive worsening of claimant's condition since the date he was originally injured on September 7, 1977.

ORDER

The order of the Referee, dated December 1, 1978, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to $150, payable by the employer, Edward Hines Lumber Company.

Board Member McCallister dissents as follows:

I agree with the majority regarding the Fund's denial.

I disagree with the majority regarding the Hines Lumber Company denial. I would reverse the Referee and reinstate the Hines' denial.

In this case the claimant has sustained a non-industrial intervening injury.

The claimant sustained a compensable injury to his low back at Hines Lumber Company on September 2, 1977. Dr. Zurflueh diagnosed "lumbar strain and discogenic spondylosis L5-S1". Claimant was returned to his regular job without limitations and without permanent impairment.

The claimant subsequently terminated his employment at Hines Lumber Company. He moved to Eugene where he secured employment with Friendly Street Garage. He worked without time loss or medical treatment through December 9, 1977.

On December 10, 1977 the claimant, while at home, "hurt his back lifting a calf". This fact was reported to the claimant's employer December 12, 1977 when his wife called to advise the claimant would not be able to come to work. At the hearing the claimant testified that his condition continued to worsen after this calf lifting incident and he had to seek medical attention.

Claimant was examined by Dr. Bond December 14, 1977. He advised Dr. Bond that on December 10, 1977 at 5:00 p.m. he "bent over to lift" "at home" and experienced "lower back pain". Dr. Bond diagnosed "acute lumbar strain with hip deformity to the right" (underlining for emphasis).

Dr. Stainsby, in his deposition, testified after the Hines' injury claimant experienced no leg pain. He further testified claimant's disc was extruded around the time claimant's leg pain appeared. Claimant had leg pain after the December 10, 1977 incident at home.

There are material differences between the Hines Lumber Company injury and the calf lifting injury. In the Hines injury the symptoms of diminished reflex was on the left; claimant had recovered from that injury as is indicated by his application for employment at Friendly Street Garage and previously by medical reports submitted by Dr. Zurflueh. The home injury, on the other hand, was acute, the referred pain was on the right, it became materially worse in a comparatively short time span resulting in disability and the need for surgery.

The December 10, 1977 injury was what brought the claimant to surgery; the September 2, 1977 injury at Hines was at best a remote cause. The material worsening of the claimant's condition arose out of the last injurious exposure and but for that fact it is speculative as to whether he would ever have required surgery or would ever have again become disabled.

The Hines Lumber Company's denial should be reinstated.

WCB CASE NO. 77-2689 APRIL 27, 1979

JUNE B. ELLIS, CLAIMANT
Alex Christy, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant requests review by the Board of the order of the Referee which denied claimant's claim. Claimant contends she is entitled to temporary total disability compensation from February 15, 1977, when compensation was terminated by the Second Determination Order, to November 4, 1977, when her claim was reopened for vocational rehabilitation.

Claimant was employed as a greenhouse worker. On November 13, 1974 she sustained a compensable back and right leg injury as the result of a fall. The claim was initially closed by a Determination Order dated March 3, 1975 which granted claimant compensation for temporary total disability from November 14, 1974 through December 4, 1974, less time worked.

On June 29, 1976 a denial of claimant's claim of aggravation was made and, on August 24, a hearing was held at the request of claimant on this issue. By a stipulation approved on October 8, 1976 claimant's claim was reopened with time loss commencing May 12, 1976 and the request for hearing was dismissed.

Claimant's family doctor, Dr. Pitman, referred claimant to Dr. Nash who, on June 28, 1976, diagnosed cervical myofascial injury, carpal tunnel syndrome, right. On June 30, 1976 claimant was hospitalized and underwent a myelogram which revealed L4-5 filling defect and bilateral filling defect L1-2. No surgery was recommended.

Dr. Nash continued treating claimant with physical therapy and found her precluded from her regular occupation. By letter of December 20, 1977 Dr. Nash found claimant had "achieved maximal medical benefits". The claim was again closed by a Second Determination Order which granted claimant compensation for time loss from May 12, 1976, per the stipulation, through February 15, 1977 and an award of 32° for 10% unscheduled disability.

Claimant came under the care of Dr. Manley in June 1977 and in his report of August 18, 1977 Dr. Manley indicated claimant had progressed fairly well until June 1977 when her problems increased in the intrathoracic area. By July claimant was experiencing headaches with shoulder pain. Dr. Manley started claimant on an active program of physical therapy. By October 1977 claimant's condition had improved and vocational rehabilitation was recommended.

On November 4, 1977 claimant was placed in an authorized program of vocational rehabilitation and her claim was reopened.

On May 1, 1978 Dr. Manley reported that when he first had seen claimant on August 11, 1977 she was totally disabled on a temporary basis.

On July 18, 1978 Dr. Pitman reported that to the best of his knowledge claimant was not capable of gainful employment from February 15, 1977 through August 11, 1977.

The Referee found claimant's condition was medically stationary on December 20, 1976, the date of Dr. Nash's report, and that she had been awarded almost two months more temporary total disability compensation than that to which she was entitled. He found claimant's claims should be disallowed.

The Board, on de novo review, finds claimant's condition was medically stationary on December 20, 1976, however, she was not entitled to compensation for temporary total disability between that date and August 11, 1977 when Dr. Manley found claimant was temporarily and totally disabled. Claimant is entitled to compensation for temporary total disability from August 11, 1977 to November 4, 1977, the date her claim was reopened for vocational rehabilitation.

ORDER

The order of the Referee, dated November 13, 1978, is modified.

Claimant is hereby granted compensation for temporary total disability from August 11, 1977 through November 4, 1977.

The State Accident Insurance Fund is hereby allowed to offset any overpayment of temporary total disability granted by the Determination Order against the compensation for temporary total disability granted by this order.

Claimant's attorney is hereby granted, as a reasonable attorney's fee, 25% of the increased compensation granted by this order, payable out of said increased compensation as paid, to a maximum of $750.

WCB CASE NO. 77-5791 APRIL 27, 1979

PETRA F. LACKEY, CLAIMANT
Fredrickson, Weisensee & Cox,
Claimant's Attys.
Don Swink, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks Board review of the Referee's order which granted claimant compensation for permanent total disability resulting from an industrial injury suffered on January 10, 1977.

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

ORDER

The order of the Referee, dated July 24, 1978, is affirmed.

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

WCB CASE NO. 78-3979 APRIL 27, 1979

WILLIAM LEAD II, CLAIMANT
David W. James, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Insurer's Attys.
Order of Dismissal

A request for review was received by the Board on January 5, 1979 from the employer seeking review of the Referee's order entered in the above entitled matter.

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

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

WCB CASE NO. 78-4836 APRIL 27, 1979

MAY GRACE MEISNER, CLAIMANT
Tom Hanlon, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Employer
Cross-appealed by Claimant

Reviewed by Board Members Wilson and McCallister.

The employer requests review by the Board of the order of the Referee which awarded claimant 64° for 20% unscheduled low back and hip disability.

Claimant cross-appeals, contending no Order on Review should be issued until the examination of claimant by the Orthopaedic Consultants as requested by Dr. Harris has been completed. She contends the issuance of an Order on Review would foreclose her aggravation rights.

Claimant, 56 years of age, was employed as a crab shell picker on December 12, 1977 when she slipped on a wet floor and fell, landing on her back. Dr. McCallig diagnosed acute contusion and sprain of the lumbar and thoracic areas. Examination by Dr. McCallig on December 27 revealed no objective findings for claimant's complaints.

An examination of claimant by Dr. Harris on January 9, 1978 showed range of motion to be 90° flexion with claimant touching her toes without difficulty; full extension and lateral bending without significant pain. Dr. Harris recommended a corset and physical therapy. Hopefully, he could then convince claimant to return to work.

On March 10, 1978 Dr. McVay examined claimant and diagnosed contusion, thoraco-lumbar spine, resolved and ischial tuberosity bursitis, bilateral. Claimant did have degenerative arthritis not related to the December 1977 injury but due to her age. Claimant had no permanent residuals from the injury.

On March 22, 1978 Dr. Harris released claimant for work but stated she must avoid repeated stooping or heavy lifting.

On May 4, 1978 a Determination Order granted claimant time loss benefits only.

On October 8, 1978 Dr. McCallig reported claimant had quit her job in July and by August 16 had recovered almost completely. Claimant's condition was not stationary at that time but there would be no permanent impairment.

On October 9, 1978 Dr. McCallig indicated the injury of December 12, 1977 was, at the present time, not the cause of claimant's inability to resume her occupation. He indicated symptoms referrable to her fall did not last longer than several months after the initial injury. The injury itself caused only a temporary flare-up of her arthritic condition.

Claimant testified at the hearing that since she quit working she hasn't been able to do anything. Claimant has an eighth grade education; her past work experience consists of working as a child's governess, a welder's helper in the shipyards, a dishwasher and a waitress.

The Referee doubted claimant's credibility but felt she had sustained some loss of wage earning capacity as a result of her industrial injury and he granted her an award of compensation equal to 64° for 20% unscheduled disability.

The Board, on de novo review, based on the medical evidence before it, finds that claimant has sustained no permanent partial disability. Therefore, the Determination Order of May 4, 1978 is reinstated and the issue raised by claimant's cross-appeal becomes moot.

ORDER

The order of the Referee, dated October 19, 1978, is reversed.

The Determination Order, dated May 4, 1978, is affirmed.

WCB CASE NO. 78-5261 APRIL 27, 1979

MARIE K. NEELY, CLAIMANT
Rask & Hefferin, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which awarded her 160° for 50% unscheduled low back disability. Claimant contends she is entitled to a larger award for her disability.

Claimant, who was 65 years old at the time of the injury, was employed in the housekeeping department at Providence Hospital when she injured her low back on November 28, 1977. Dr. Wade treated claimant conservatively until February 13, 1978 when he found her to be medically stationary.

On April 25, 1978 claimant was examined by the physicians at Orthopaedic Consultants and her impairment was rated as mildly moderate insofar as it relates to the industrial injury.

On June 20, 1978 a Determination Order closed claimant's claim with an award of compensation for temporary total disability from November 28, 1977 through February 13, 1978 and compensation equal to 112° for 35% unscheduled low back disability.

Claimant testified that, in accordance with plans that she had made prior to her injury, she had retired in January 1978, but she stated she had intended and had arranged to work part time, on call, in the housekeeping department filling in for regular employees who were ill or on vacation, etc. She felt she would probably be called to work two or three shifts a week. The Referee found no reason to doubt claimant's testimony; he found her to be a credible witness.

Claimant has completed eight grades of school and attended night school for two winters to learn secretarial skills. The Referee found no evidence to indicate her intelligence or her adaptability were less than average.

Claimant testified she still had constant low back pain which affected her legs; at times it was worse than at other times, and she is unable to walk for any great distance or for any length of time. She stated that standing, sitting or driving a car aggravated her symptoms and that lifting would increase her pain. Also, if claimant bends over, she has difficulty straightening up.

The Orthopaedic Consultants were of the opinion claimant could not return to the activities required by her work prior to the injury. They evaluated her loss of function as mildly moderate with all of said loss of function related to her industrial injury.

The Referee concluded that claimant's earning capacity had been reduced 50% by her compensable injury. He found that all of her subjective symptomatology as well as her testimony at the hearing were fully supported by objective medical findings.

The Board, on de novo review, finds that claimant has voluntarily retired from the labor market. There are many jobs of a light nature which claimant is physically able to do if she wants to do them. The evidence indicates that at the time of the hearing claimant had discontinued treatment for her back, she had had no treatment since February 1978, almost nine months prior to the hearing. In February 1978 her treating physician reported that claimant had improved and that she was able to ambulate; also, she was able to do most of her work at home and that she would show slow improvement in her symptoms. The medical evidence reveals that claimant's obesity obviously is interfering with her recovery.

In this case, the medical evidence consists of the report of Dr. Wade and the physicians at the Orthopaedic Consultants. The rating of the latter has already been mentioned. Dr. Wade did not express an opinion on extent of disability but his final diagnosis was acute lumbar sprain with no disc involvement with no need for surgery.

Claimant admittedly had made a decision prior to her injury to retire on January 1, 1978. The only job in which she was interested subsequent to her retirement was the part time "fill-in" employment at her old job. She showed no interest in any other jobs and made no attempt after her injury to determine if she could do any jobs which were within her physical and mental capacity to do.

The Board concludes that claimant was adequately compensated for her loss of wage earning capacity as a result of the industrial injury by the award of 112° which represents 35% of the maximum allowable for unscheduled disability.

ORDER

The order of the Referee, dated November 15, 1978, is reversed.

The Determination Order, dated June 20, 1978, is reinstated in its entirety.

WCB CASE NO. 78-1744 APRIL 27, 1979

WILLIAM H. PATTERSON, CLAIMANT
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation to which he is entitled. Penalties and attorney's fees were assessed against the Fund.

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

ORDER

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

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $400, payable by the Fund.

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

Entered at Salem, Oregon and copies mailed to:

William Patterson, 222 NE 126th Ave., Portland, OR 97230
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Attorneys, One SW Columb
Portland, OR 97258
Rural Fire Protection District No. 10, P.O. Box 16368, Portland, OR 972
State Accident Insurance Fund, Claims Div., Salem, OR 97312
SAIF, Legal Services, 400 SE High, Salem, OR 97312

Board Member Robert L. McCallister dissents as follows:

I disagree with the opinion of the majority. I would reverse the Referee and reinstate the Fund's denial.

The key to the issue of compensability in this case is found in the definition of an occupational disease.

> "[ORS] 656.802(1) As used in ORS 656.802 to 656.824, 'occupational disease' means:
>
> "(a) 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" (Underlying for emphasis).

There is overwhelming evidence in this case that the factors which contributed to the claimant's "mental state" are not distinguishable from factors he was ordinarily subjected to outside the course and scope of his employment. Certainly the "work pressures" which claimant preceived are but one piece in a complex puzzle. If the "work pressure" was significantly different to permit a clear distinction which would isolate it from those pressures he was ordinarily subject or exposed to, then this case might be compensable. But the claimant has not shown that to be the case. Personal inadequacies, and the results thereof, in our complex society are not unique to the work place nor to this claimant. The pressures to which the claimant asserts he adversely reacted are no different from exposures the public (society) at large are subjected on a random basis determined by one's circumstances at a given time or period of time. The work relationship then becomes nothing more than coincidental. The exposure(s) are but different in character not in substance.

In this case, the claimant's reaction to his total environmental pressures were found to be "acute anxiety disorder with depressive elements" most likely the result of the claimant's reaction to his life status due to his "chronic obsessive compulsive personality". The record reflects pressures outside the work environment materially contributed to his situation.

Dr. Colbach, in his report of December 6, 1977 states:

> "He perceives his department as not being supportive enough to him. He has knocked himself out for them, and he doesn't think they care enough. Thus his symptoms. Does this make his symptomatology work related? I don't know if I can really answer that. He certainly has not been exposed to any particular stress. He has taken on a great number of burdens within the department, usually by choice. He might not be having these symptoms at this time if his superiors within the department had paid more attention to this man's own particular psychological needs" (underlying for emphasis).

We must examine whether the employment under circumstances of "no particular stress" and assumption of a great number of burdens, "usually by choice" as well as other "perceived pressures" set in motion forces which create a sufficiently unique "job climate" to produce a compensable psychological disease. In so doing, the "job climate" should be one, in terms of psychological stress, to which the claimant would not be subjected or exposed outside the course and scope of his employment; that is, "during a period of actual employment". In this case, the claimant fails to do so, excpet perhaps to point out the untoward results which may occur when this claimant's situation is analyzed in light of the Peter Principle.

The claimant's psychological stresses on the job, when compared to stresses off the job, though different in character cannot be said to differ in substance. To assign special significance to work stress (if it exists) when non-work stresses are pre-existing and equally in evidence would be to indulge a natural inference where none exists.

I find the claimant has not met his burden of proof that any work stress to which he may have been exposed was sufficient to support compensability under ORS 656.802(1).

I would reverse the Referee and reinstate the Fund's denial.

WCB CASE NO. 78-3522 APRIL 27, 1979

MARVIN B. PHELPS, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Galton, Popick & Scott, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which granted claimant an award equal to 32° for 10% unscheduled low back disability.

Claimant was employed as a package delivery driver by United Parcel Service when a prior low back injury became symptomatic. His family doctor referred him to Dr. Bachhuber and subsequently he was given conservative treatment and/or examined by several other physicians.

Claimant was later enrolled at Callahan Center after his claim had been closed and claimant had requested a hearing thereon. The claim was closed on May 1, 1978 with an award of compensation for temporary total disability only.

The initial request for hearing was filed by one law firm and later claimant changed attorneys and was actually represented at the hearing by the second law firm. The first firm filed a statutory lien for attorney's fees for 25% of any additional compensation granted in excess of the Determination Order of May 1, 1978, therefore, this became an additional issue before the Referee.

After his injury of December 27, 1977 claimant returned to work for the same employer as a pick-up and delivery driver on August 28, 1978. Claimant is 34 years old and has completed approximately one year of college. He has been employed by the present employer since he was 21 and has had very little experience in other types of work. The Referee found that there was very little evidence of claimant's aptitude but that his intellectual ability had been estimated to be high-average.

Claimant testified that he had been unable to rest well since his injury and he had to change positions while in bed approximately every 15 minutes. He states that he takes pain medication about twice a week, however, he is active with the Boy Scouts and this activity takes up about 10-20 hours of his time each month. Claimant also works part time as an emergency medical technician for the fire department but he testified he did not lift over 30 pounds and that if he maintained one position too long he had pain.

Claimant was examined by the physicians at the Orthopaedic Consultants who rated his total loss of function of the back as it existed at the time of the examination as mildly moderate and, as due to the injury, as mild. Claimant contends he is entitled to an award for mildly moderate disability on the basis that the award must include prior conditions but the employer contends that it is only responsible for the mild disability resulting from the industrial injury.

The Referee accepted the contention advanced by the employer and, based upon the evidence, found claimant was entitled to an award of 32° for 10% unscheduled low back disability as a result of his industrial injury.

On the second issue relating to the payment of attorney's fees, the Referee was of the opinion that each attorney was entitled to 25% of the increased compensation obtained by his efforts and in the present case there wasn't any evidence that claimant's first attorney obtained any benefit for claimant nor performed any service other than to request a hearing. He concluded that because a request for hearing was not an automatic guarantee of increased compensation and because attorney's fees could be awarded only out of increased compensation which the attorney was instrumental in obtaining that the entire attorney's fee in this case should be awarded to the second law firm.

The Board, on de novo review, finds that claimant received some help from Callahan Center and that although he has returned to work he does not, nor is he able to, run a regular schedule such as he did prior to his industrial injury. The Board also notes that claimant does not wear his back brace nor does he use his stimulator. The evidence indicates that the claimant has a strong psychosomatic overlay. Medical evidence also indicates that claimant has back problems but no radiculopathy. He is unable to do any work which would require repetitive lifting, stooping, bending, twisting, etc.

Based upon the report of the physicians at Orthopaedic Consultants the Board finds that claimant is unable to return to his old job but he can do light type work and, at the present time, is doing such work. Dr. Harris concurred in the opinion expressed by the physicians at the Orthopaedic Consultants.

The report from Dr. Quan received after the issuance of the Determination Order indicated that claimant's psychological problems were not work-related.

The Board finds, based upon the medical evidence and the lay testimony relating to claimant's restricted work activity, that claimant is entitled to an award equal to 64° for 20% unscheduled disability to adequately compensate himself for the loss of wage earning capacity resulting from his industrial injury.

The Board agrees with the Referee that the first law firm performed no services which benefited claimant; the request for hearing did not guarantee claimant would receive compensation. The second law firm tried the case and as a result of their efforts obtained compensation for claimant.

ORDER

The order of the Referee, dated October 10, 1978, is modified.

Claimant is awarded 64° of a maximum of 320° for 20% unscheduled low back disability. This award is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

Claimant's attorney, Brian L. Welch, is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation granted claimant by this order, payable out of said additional compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-4702 APRIL 27, 1979

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

Reviewed by Board Members Phillips and McCallister.

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

Claimant, 57 years of age, was an ironworker for Mercer Industries and on March 17, 1977 sustained a compensable low back injury when lifting a re-bar. Claimant saw no doctor until April 5, 1977. Diagnosis was acute lumbosacral strain. X-rays revealed degenerative disc changes at L4-5, moderate to marked degenerative osteoarthritis, scoliosis. In May 1977 claimant was hospitalized for traction.

On September 7, 1977 claimant was examined by the Orthopaedic Consultants who diagnosed chronic muscle and ligamentous strain, low back, superimposed on degenerative disc disease lumbar spine with osteoarthritis and bilateral early degenerative arthritis, both hip joints. Claimant's condition was stationary and he could return to his regular occupation with limitations of no heavy lifting, bending or repetitive twisting. Claimant's sole occupation for 32 years has been as an ironworker. The total loss of function from this injury was mild.

Dr. Sirounian, claimant's treating physician, disagreed with the Orthopaedic Consultants and rated claimant's loss of function as moderate.

In October 1977 claimant was hospitalized for a myelogram and underwent a laminectomy at L4.

On March 6, 1978 Dr. Sirounian found claimant's condition to be stationary.

Dr. Rollins, a vocational specialist, reported on August 24, 1978 that claimant has a third grade education and is functionally illiterate.

On June 1, 1978 a Determination Order granted claimant an award of 160° degrees for 50% unscheduled disability.

Claimant has sought no employment since this injury.

The Referee found, according to the vocational rehabilitation reports, that retraining for claimant was unfeasible. He found claimant was no longer able to use his strong back to earn his livelihood and he had nothing else to offer. He couldn't be retrained for lighter work, therefore, claimant was permanently and totally disabled.

The Board, on de novo review, concurs with the conclusion reached by the Referee. The Board finds claimant should be considered as permanently and totally disabled as of the date of the Determination Order, June 1, 1978.

ORDER

The order of the Referee, dated November 14, 1978, is affirmed and claimant's award of permanent total disability shall be effective as of June 1, 1978.

Claimant's attorney is granted, as a reasonable attorney's fee, for his services at Board review, the sum of $300, payable by the State Accident Insurance Fund.

WCB CASE NO. 78-350 APRIL 27, 1979

WILLIAM E. VAN METER, CLAIMANT
David R. Vandenberg, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which awarded claimant 192° for 60% unscheduled low back disability. Claimant contends he is permanently and totally disabled.

Claimant suffered a compensable injury on May 27, 1975. He was hospitalized and placed in pelvic traction by Dr. Bidleman. Later he was referred to Dr. Campagna, a neurosurgeon, and a myelogram was performed on June 14 which revealed extensive degenerative changes, however, the lumbar region was normal. Claimant's condition was diagnosed by Dr. Campagna as lumbar spondylolisis and he recommended claimant return to work on September 7, 1975. Claimant did so but had difficulty working a full day due to pain.

Claimant was later examined by Dr. Campagna and his condition was found to be stationary; Dr. Campagna recommended closure of his claim with an award for mildly moderate disability.

A Determination Order dated March 31, 1976 awarded claimant 16° for 5% unscheduled low back disability.

Dr. Campagna continued to treat claimant and on August 24, 1976 performed back surgery. Later he recommended claimant be referred to Callahan Center for rehabilitation.

On January 11, 1977 Dr. Lynch, an orthopedic surgeon, examined claimant and found his symptoms stemmed from his low back and not from the traumatic arthritis of the hip; he recommended referral to the pain clinic.

On August 17, 1977 claimant was examined at the Callahan Center. Occupational therapy was recommended after examination showed severe lumbosacral degenerative intervertebral disc disease and joint disease as well as degenerative joint disease of the lumbar and lower thoracic spine. A psychological evaluation revealed claimant to be a questionable candidate for rehabilitation because of his repeated injuries and his dramatic overfocus thereon. Claimant was found to have no marketable skills by the vocational advisors and it was determined that he possessed a vocational handicap because of his physical conditions.

Claimant was referred to the Oregon Division of Rehabilitation for possible plan development. After claimant had been examined again by Dr. Lynch, the claim was closed based upon his recommendation in which Dr. Campagna concurred. The Determination Order dated December 16, 1977 granted claimant an additional award of 96°, making a total of 112° for 45% unscheduled low back disability.

Claimant's file was closed because neither placement action nor referral to the Vocational Rehabilitation Division appeared to be feasible and claimant's vocational counselor had found him not eligible for rehabilitation services. The prior referral was withdrawn.

When Dr. Campagna examined claimant on December 22, 1977 he found claimant's back motions were limited to 50% of normal and he concluded that claimant was permanently and totally disabled.

On May 1, 1978 Dr. Matthews, an orthopedic surgeon, examined claimant and found no objective abnormalities present that would sustain a finding that claimant was unable to be suitably and gainfully employed on a regular basis. Claimant was limited more than anything else by muscle strain reaction which grew primarily out of mental difficulties. He found no objective orthopedic problem which made claimant totally disabled.

The claimant has completed the 11th grade and subsequently worked on a ranch driving tractor and doing other farm duties for approximately a year and a half. He was in the military service for four years and received an honorable discharge.

The doctors recommended that claimant look for lighter types of work, however, claimant felt that he could not do the type of work offered to him by his employer. One job was working as a truck spotter. The Referee found that such a job was to be considered difficult because it required claimant to climb on the truck to make markings, use a power saw and pull the binders tight.

The Referee gave consideration to Dr. Campagna's opinion that claimant was totally and permanently disabled. However, Dr. Campagna also stated that claimant suffered from additional diseases and the medical evidence received from Dr. Matthews indicated that such degenerative problems were primarily developmental and not job-related. Therefore, unless pre-existing, such problems could not be considered in determining permanent total disability under ORS 656.206(1)(a).

The Referee did find that claimant, although not permanently and totally disabled, was severely disabled. His work history has been primarily in the labor field and his back impairment would be a material handicap in any attempt to return to that particular area of endeavor. An injury that is substantially physically disabling would have a greater affect upon the worker's wage earning capacity if such worker had a limited education and was incapable of training for lighter types of employment than it would upon a worker without such limitations and incapability.

The Referee concluded that the medical evidence indicated that much of claimant's present physical disability was caused by conditions pre-existing the industrial injury and not as a consequence of such injury. Notwithstanding, the Referee found that claimant's disability was greater than that for which he had been previously awarded compensation. He therefore increased the award to 192°.

The Board, on de novo review, agrees basically with the findings and conclusions reached by the Referee, however, in the opinion of the Board, the medical evidence supports a finding that claimant has lost a greater amount of his potential wage earning capacity than is represented by an award equal to 60% of the maximum. The evidence does not show claimant to be permanently and totally disabled, contrary to Dr. Campagna's opinion, but it does, through Dr. Matthews' reports and the reports of Callahan Center and the Pain Center, show that claimant has very severe disability. His motivation is somewhat questionable. Some of the jobs offered claimant by his employer appear to be jobs which claimant could do in his present physical condition, however, he chose not to attempt to do them.

The Board concludes, in view of the medical reports and taking into consideration claimant's education, work background and potential for retraining for lighter type employment, that claimant is entitled to an award of 240° which represents 75% of the maximum for unscheduled low back disability.

ORDER

The order of the Referee, dated November 28, 1978, is modified.

Claimant is awarded 240° of a maximum of 320° for 75% unscheduled low back disability. This award is in lieu of the award granted by the Referee in his order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation awarded claimant by this order. Said fee shall be payable out of the compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-654 APRIL 30, 1979

EVELYN BORMANN, CLAIMANT
Morley, Thomas & Kingsley,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which granted claimant an additional award equal to 16° for 5% unscheduled psychological disability; this gave claimant a total award of 112° for 35% of the maximum. Claimant contends she is permanently and totally disabled.

Claimant alleges she sustained an injury which she described on her claim as "mental depression and anxiety". The claim was signed by claimant on April 16, 1971 and accepted by the Fund. Initially, it was closed by a Determination Order dated March 29, 1974 whereby claimant was awarded no compensation for disability. It was reopened by stipulation approved on June 27, 1974 and closed by a Second Determination Order dated November 22, 1977 which awarded claimant 32° for 10% of the maximum for unscheduled disability, based on claimant's psychological condition. Claimant has received compensation for temporary total disability on March 19, 1971 through August 18, 1977, less a few days.

Claimant was employed as a circulation manager by the Lebanon Express, a city newspaper. She states that she has undergone many personal problems but had been able to live with them; however, a change in ownership of the newspaper resulted in poor working conditions and caused claimant to become very emotionally upset. She terminated on March 17, 1971.

Claimant's emotional condition apparently began on or about October 20, 1970 when she saw Dr. Thomas, her family physician. He diagnosed agitated depression and treated her from October 1970 through March 1971. Claimant had made some improvement until March 19, 1971 at which time she developed hysteria and said she could not continue her employment. Claimant was in such a hysterical condition that her husband requested that she be admitted to the hospital.

Claimant was referred to Dr. Newman, a psychiatrist, who has been claimant's attending physician for the past 7-1/2 years. Dr. Newman, initially, felt that the change of management of the newspaper caused considerable emotional strain to be placed upon claimant. This resulted in claimant resigning from her job although she had doubts about it because she believed there were some aspects of the job which would be very rewarding. Dr. Newman also listed numerous other factors which he thought contributed to her depressive condition. These were the personal problems which claimant had prior to the change in management, e.g., the death of her father, followed by the death of her step-mother, and the bitterness in the manner in which her step-mother's estate had been distributed.

As indicated before claimant has received compensation for temporary total disability for nearly 6-1/2 years and she has been treating with Dr. Newman constantly since March 1971. Dr. Newman connects her emotional breakdown in March 1971 to her employment and apparently based upon his opinion the claim was accepted by the Fund. In February 1972 and again in February 1973 Dr. Newman stated that claimant could never return to her job at the newspaper.

Claimant has also been examined and/or interviewed by other psychiatrists, namely, Dr. Parvaresh, Dr. Maltby and Dr. Colbach. Dr. Maltby unequivocally stated claimant's disability was not due to her employment. Dr. Colbach felt that if it were a matter of physical survival claimant could and would function in a variety of jobs. He felt that neurotic problems such as claimant's usually have their origin in childhood; the amount of job stress to which she was exposed was not so great that it could account for all of her current symptomatology.

The Referee found that claimant has had substantial secondary gains from her accepted claim. Her gross pay at the newspaper was $375 a month; her compensation benefit at the time of the last Determination Order was $160.60 every two weeks which would at least equal her net take home pay from the newspaper job. She has received these payments for six years and five months. Dr. Colbach believed it would be therapeutic and helpful for claimant to somehow close this episode in her life.

Dr. Maltby stated that he felt that there was little motivation on the part of claimant to return to work because of the payment she was receiving for temporary total disability and because of the fact that her husband had a good job.

The Referee found no evidence that claimant had sought employment in any other fields, particularly in those in which she would have not been subjected to undue pressure, e.g., jobs which did not require claimant to exercise any supervisory duties nor force her to meet any particular deadlines.

The Referee found it difficult to accept the premise that the work pressures which caused the original emotional upset and claimant's subsequent quitting could, after seven years, still render claimant totally disabled. Based upon the preponderance of the psychiatric evidence, the Referee found that claimant's pre-existing condition was temporarily exacerbated by the stress of her employment and that she was now medically stationary and able to return to the labor market. He did find, however, that she had sustained a moderate loss of earning capacity in that she now cannot return to any type of work which would involve stress. He found that her loss of earning capacity had not been adequately compensated for by the 32° awarded claimant on November 22, 1977 and he increased the award to 112°.

The Board, on de novo review, finds that only Dr. Newman is of the opinion that claimant cannot participate to a great extent in the labor market under present conditions and even he stated that her present condition was caused by numerous non-work-related factors. All of the psychiatrists, with the exception of Dr. Newman, feel that if claimant has any permanent impairment at all it is minimal. Dr. Maltby feels that claimant lacks motivation; that is understandable. For nearly seven years claimant has received compensation for her injury which amounts to approximately the same as her net take home pay received while working for the newspaper. Dr. Colbach feels that claimant's neurotic problems in all probability had their origin in childhood.

The Board finds that claimant did undergo many personal problems, however, the evidence did not indicate that her job at the newspaper even after change in ownership placed claimant in such a stressful situation that she could no longer continue to do her work.

Dr. Parvaresh, Dr. Maltby and Dr. Colbach all feel that claimant is not precluded from returning to gainful employment in an area in which she has had prior training.

The Board is persuaded by the opinion of Dr. Parvaresh that claimant has some permanent psychological impairment, but concludes that claimant has been adequately compensated for her loss of wage earning capacity by the award of 32° for 10% unscheduled psychological disability.

ORDER

The order of the Referee, dated October 27, 1978, is reversed.

The Determination Order, dated November 22, 1977, is reinstated in its entirety.

WCB CASE NO. 78-2214 APRIL 30, 1979

ANNA MAE HALLADAY, CLAIMANT
Virgil E. Dugger, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which dismissed her request for hearing.

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

ORDER

The order of the Referee, dated December 4, 1978, is affirmed.

SAIF CLAIM NO. HB 133167 APRIL 30, 1979

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

Claimant suffered a compensable injury on June 30, 1965 when he was involved in a truck accident; claimant was struck on the back by lumber that was pushed into the cab of his truck. The initial diagnosis was contusion, cervical strain and lumbar strain.

Claimant came under the care of Dr. Rask who performed a laminectomy on March 18, 1966. Further surgery was done and claimant had a long period of staph infection at the surgical site. Claimant subsequently developed psychological problems and came under the care of Dr. Dixon, a psychiatrist.

Claimant took a course in barbering under the auspices of the Vocational Rehabilitation Division.

Claimant's claim was closed by a Determination Order of November 19, 1968 with an award of compensation for time loss and compensation equal to 40% loss of an arm for unscheduled disability. The circuit court, on November 28, 1969, increased this award to 55% loss of an arm for unscheduled low back disability.

Between November 1968 and March 1978, when claimant was hospitalized, he had worked as a barber for eight months, had been unemployed about 4-1/2 years and had worked as a journeyman carpenter for six years.

On April 4, 1978 claimant underwent surgery for evacuation and drainage of a lumbar epidural abcess. The diagnosis was chronic osteomylitis of the spine, lumbar area. The Board was requested to reopen claimant's claim under ORS 656.278. It did so by an Own Motion Order, dated July 10, 1978, directing the Fund to reopen the claim and commence time loss payments on March 30, 1978.

Claimant was seen by Dr. Franks who recommended on September 12, 1978 that claimant be enrolled in a vocational rehabilitation program. The Orthopaedic Consultants, on January 30, 1979, found residuals from claimant's surgery, chronic osteomyelitis of the spine and documented psychological problems, although not present at the time of their evaluation. They felt claimant could not return to his former occupation but could be retrained. The residual disability in claimant's back related to the industrial injury was rated as severe. Claimant's condition was stationary.

On March 6, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional time loss benefits from March 30, 1978 through January 25, 1979 and additional compensation equal to 30% loss of function of an arm for unscheduled disability to the low back.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 30, 1978 through January 25, 1979, less time worked, and compensation for 30% loss of function of an arm for unscheduled low back disability. These awards are in addition to all awards granted claimant for his June 30, 1965 industrial injury.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of July 10, 1978.

SAIF CLAIM NO. A 773486 APRIL 30, 1979

ADA HARRIS, CLAIMANT
Cash R. Perrine, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 4, 1979 the Board received from claimant, by and through her attorney, a request for the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury sustained on December 8, 1959 while employed by Parkview Nursing Home.

Claimant's claim was accepted and closed by an order dated July 17, 1962 whereby claimant was awarded 108-3/4° for 75% loss of function of an arm for unscheduled disability. Claimant's aggravation rights have expired.

Claimant's request was supported by her own affidavit and medical reports from Dr. Ray Miller, Dr. Roger Ambroson and Dr. James Luce.

On April 10, 1979 the Fund was advised by the Board of claimant's request for own motion relief (the request indicated that all documentation in support of the request had been forwarded to the Fund) and asked to inform the Board within 20 days of its position with regard thereto.

On April 12, 1979 the Fund responded, stating that claimant had already been granted permanent partial disability totaling 75% loss of an arm for unscheduled disability and it opposed the request based upon the Orthopaedic Consultants report dated September 1, 1978. This report stated, in part, that claimant was presently retired and did not plan to return to work, her back problem was rated as moderately severe total loss of function as it existed at the time of the examination due to the injury. The three physicians felt claimant's medical condition was currently stationary and that she had reached maximum improvement for her troubles. They agreed that her current back problems and limitations were directly related to her 1959 injury but they differed from the opinion expressed by Dr. Miller on the limitation of further activities. The physicians at the Orthopaedic Consultants encouraged claimant to do the things that she wanted to do that didn't seem to stress the back.

The Board, after considering all of the medical testimony, finds no evidence of a material worsening of claimant's condition since 1962, the date of her last award and arrangement of compensation. Claimant was hospitalized on June 3, 1977 and subsequently back surgery was performed on July 6, 1977. Dr. Miller, who performed the back surgery, was requested by the Fund to advise it of claimant's total length of unemployability due to her surgery and the recovery therefrom. On November 3, 1977 Dr. Miller replied, stating that claimant total length of unemployability was five months, claimant was medically stationary and that her disability did not exceed the amount which she received when her claim was closed in 1962.

The records indicate that the Fund has paid claimant time loss from June 6, 1977, the date of the surgery, until November 3, 1977, the date that Dr. Miller indicated claimant was medically stationary.

The Board concludes that claimant's request for own motion relief should be denied.

IT IS SO ORDERED.

CLAIM NO. 65-73260 APRIL 30, 1979

JAMES R. HYDE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Order Vacating Own Motion
Determination

On April 11, 1979 the Board entered its Own Motion Determination in the above entitled matter which awarded claimant compensation for temporary total disability from November 8, 1978 through January 15, 1979; such award was in addition to all previous awards for temporary total disability which claimant had received as a result of his September 25, 1971 injury.

It has now been brought to the attention of the Board through claimant's attorney, Richard T. Kropp, that the claim had been reopened within the five-year aggravation period and closed by a Determination Order dated September 26, 1978. In October 1978 the claimant, by and through his attorney, had requested a hearing on the adequacy of that Determination Order. This request for hearing is still pending, therefore, the closure by the Board pursuant to ORS 656.278 should be set aside.

The claim had been submitted by the carrier, Scott Wetzel Services, Inc., because of its voluntary reopening of the claim on November 8, 1978. Nevertheless, the claimant still desires to pursue his remedy under ORS 656.283 and request a hearing on the adequacy of the September 26, 1978 Determination Order. The issue of the subsequent voluntary reopening of the claim can, of course, be raised at the time of the hearing.

ORDER

The Own Motion Determination entered in the above entitled matter on April 11, 1979 is hereby set aside and held for naught.

WCB CASE NO. 78-3455 APRIL 30, 1979

BUEL KINCHELOE, CLAIMANT
Blair & MacDonald, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Order of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-5164 APRIL 30, 1979

ORVILLE H. MARR, CLAIMANT
Richard L. Gassman, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On March 5, 1979 an Opinion and Order was entered in the above entitled matter. On March 4, 1979 the Board received a request for review from the claimant, by and through his attorney. Attached to this request was a certificate of service of the request for review upon the State Accident Insurance Fund, Legal Division, Attention James Blevins, SAIF Building, Salem, Oregon 97312; DLJ Trucking Company, 126 NE "F" Street, Grants Pass 97526, Orville H. Marr, P.O. Box 116, Blue River, Oregon 97413, and Workers' Compensation Board, Mill Creek Office Park, 555 - 13th St. NE, Salem, OR 97312 on April 3, 1979.

On April 16, 1979 the Fund, by and through one of its attorneys, requested the Board to dismiss claimant's request on the grounds and for the reason that claimant had not complied with the statute regarding requests for Board review. The attorney for the Fund set forth the pertinent statutes and stated that there had been no showing that the employer was served as required by ORS 656.263.

The Board finds that claimant, by and through his attorney, has complied with ORS 656.295(2) and mailed the request for review to the Board and copies thereof to all parties to the proceedings before the Referee. In this case, both the employer and the Fund were served within the 30 days required by ORS 656.289(3).

ORDER

The request by the State Accident Insurance Fund that the Board enter an order dismissing claimant's request for review in the above entitled matter is hereby denied.

WCB CASE NO. 77-6213 APRIL 30, 1979

FLOYD NIEMI, CLAIMANT
Bert Gustafson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
MacDonald, Dean, McCallister & Snow,
Defense Attys.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks review by the Board of the Referee's order which directed it to accept claimant's claim and pay him compensation as provided by law and further ordered the Fund to pay claimant's attorney a fee of $1,000 for prevailing on a denied claim and for establishing unreasonable failure to pay compensation pending the denial.

The Board, after de novo review, affirms the findings and conclusions reached by the Referee in his order. However, it feels that the attorney's fee awarded claimant's attorney by the Referee is excessive and reduces it to $750.

ORDER

Claimant's attorney is awarded as a reasonable attorney's fee the sum of $750 for prevailing on a denied claim and for establishing unreasonable failure to pay compensation pending the denial of the claim. In all other respects the Referee's Opinion and Order, a copy of which is attached hereto and, by this reference, is made a part hereof, is affirmed and adopted as the Board's own order.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $200, payable by the Fund.

WCB CASE NO. 78-7912 APRIL 30, 1979

WILMA OVERBAUGH, CLAIMANT
Merten & Saltveit, Claimant's Attys.
G. Howard Cliff, Defense Atty.
Order

On April 4, 1979 the Board entered its Own Motion Order in the above entitled case denying claimant's request for reopening of her claim for an injury suffered on September 9, 1972. The Board found that claimant had suffered an intervening injury on April 15, 1978 and that the medical evidence did not indicate any worsening of claimant's original injury.

On April 10, 1979 claimant, by and through her attorney, requested the Board to reconsider its Own Motion Order. Claimant contends that she was seeing Dr. Thomas prior to her April 15, 1978 injury and, while it is possible that the carrier is not responsible for all of her medical care, it certainly should pay for the care received prior to the April 1978 incident. Claimant indicated there was not much "evidence" before the Board at the present time but she felt a hearing would take care of that problem.

The Board concludes that if it did not have all of the relevant evidence before it at the time it made its decision on April 4, 1979 it was because claimant failed to provide it to the Board. Unless and until such evidence, if available, is furnished to the Board and to the employer and its carrier, the Board will not reconsider its Own Motion Order of April 4, 1979. The motion to reconsider must be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-247 APRIL 30, 1979

RICHARD D. PIRTLE, CLAIMANT
John D. McLeod, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the order of the Referee which awarded claimant 75° for 50% loss of the left forearm.

Claimant had suffered a compensable injury on January 2, 1973 when he caught his hand in the automatic molding machine. The distal aspect of the left forearm was crushed and there was an open fracture of the distal left radius and laceration of most of the extensor tendon on the back of the wrist. On December 18, 1973 surgery was performed and on September 26, 1974 claimant had the staple removed which had been inserted at the time of the surgery.

On February 27, 1975, because of the instability of the distal end of the left ulna, additional surgery was performed and in October 1975, after an examination, it was revealed that claimant was able to volar flex his left wrist only about 5° compared to the 90° on the opposite normal side. More surgery was performed on December 9, 1975.

On April 19, 1976 Dr. Berselli reported that claimant had passive flexion of his left wrist to about 30° which was considered to be quite an improvement over his condition before the surgery, however, the prognosis would, according to Dr. Berselli, have to be guarded because claimant had suffered a very severe injury to the left wrist which had required substantial reconstructive surgery.

Claimant testified that pain develops after he has worked for any length of time with his left hand and that he has no endurance beyond 1-1/2 hours. He also has a loss of feeling in the upper portion of the hand and complains that the position of the left hand is unnatural and clumsy. Claimant testified that at the end of each shift his hand felt like a claw. Others have observed claimant using his right hand to support his left wrist both for the purpose of warmth and to maintain it in a less painful position.

At the time of his injury claimant was working in the molding machine. Bacon would come down a conveyor belt and claimant, using a meat hook, would spread the bacon. In the parlance of the trade this is called "shingling". After his injury, claimant was unable to do this work because the production lines received incentive pay and claimant's slowness obviously would slow down production and thereby adversely affect the pay of the other employees working on the line. Claimant was given various jobs around the plant but did not return to the incentive pay lines.

On March 18, 1977 Dr. Nathan, at the request of the Fund, had evaluated claimant's left arm. As a result of this evaluation and a review of all previous medical reports, Dr. Nathan found physical impairment of the member equal to 18.5% of the upper extremity.

The Referee was of the opinion that Dr. Nathan's estimate of physical impairment based upon loss of motion was probably accurate but it did not reflect the other impairment factors of loss of endurance and disabling pain. Dr. Nathan's rating was on the whole upper extremity which is a higher radical than the forearm upon which claimant's award had been based.

The Referee concluded that claimant's loss of physical function was best illustrated by the evidence that he was unable to perform several jobs at his place of employment, including his former job. The Referee increased the award from 15° for 10% to 75° for 50% loss of the left forearm.

The Board, after de novo review, finds that claimant has lost more than 10% use of his left forearm, however, the evidence indicates that he still has the use of at least 2/3 of it. The Board concludes that claimant would be adequately compensated for the loss function of his left forearm with an award equal to 35% of the maximum allowed by statute for this scheduled disability.

In measuring this type of disability, consideration must be given to more than just pure measureable impairment. The Referee correctly stated that such factors as loss of endurance and disabling pain must be considered. The record indicates in this case that claimant has disabling pain and he certainly has lost substantial endurance; the testimony indicates he has no endurance beyond 1-1/2 hours. He also has a loss of feeling in the upper portion of his hand. There are many things he is now unable to do because he is fearful of placing any reliance upon his left hand.

The order of the Referee, dated October 13, 1978, is modified.

Claimant is awarded 52.5° of a maximum of 150° for 35% loss function of his left forearm. This award is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-1127 APRIL 30, 1979

RONALD DELBERT ROLLINS, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Employer's Attys.
Lang, Klein, Wolf, Smith, Griffith &
Hallmark, Insurer's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which affirmed United Pacific Insurance Company's denial of December 15, 1977 and remanded claimant's claim to the self-insured employer for acceptance and payment of compensation. Both the self-insured employer and United Pacific were required to pay related medical bills and penalties.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. However, several errors in the order should be corrected: on page three, the first full paragraph, last line, "February 15, 1976" should read "February 15, 1978"; in the following paragraph, line 9, "December 31, 1976" should be corrected to state "December 31, 1975" and in the next line, "January 1, 1977" should read "January 1, 1976"; on page four, the first full paragraph, in lines three and four, "1976" should read "1975" and "1977" should be changed to read "1976".

ORDER

The order of the Referee, dated September 1, 1978, is affirmed.

WCB CASE NO. 78-3200 APRIL 30, 1979

MARJORIE VANDEVORT, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of that portion of the Referee's order which directed it to pay claimant interim compensation from April 25, 1978 through October 12, 1978 and assessed penalties on that amount; claimant cross-appeals that portion of the order which failed to find her current condition was related to her April 29, 1972 industrial injury.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board notes that claimant's claim was first closed as a "medical-only" claim. The June 25, 1975 stipulation, therefore, constitutes the first closure under ORS 656.268 and claimant's aggravation rights start from the date of the stipulation allowing claimant until June 24, 1980 to file a claim for aggravation.

ORDER

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

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

SAIF Claim No. A 779323 May 1, 1979

CHARLES E. BREWSTER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right elbow on February 5, 1960 while working as a shipping and receiving clerk for Safeway Pre-Pakt Produce Company. The claim has been closed twice; first on May 25, 1965 and again on July 14, 1975, with awards of compensation totaling 23% loss of function of the right arm.

On August 17, 1978 claimant underwent an olecranon bursectomy of the right elbow. A Board's Own Motion Order, dated September 29, 1978, directed the Fund to accept claimant's claim and pay compensation for temporary total disability commencing on the date of claimant's surgery. Claimant received follow-up care and was released for work on October 30, 1978.

Dr. Hopkins' closing examination of claimant on February 1, 1979 indicated that the areas of the elbow that had been flaring up before the surgery were now entirely quiescent. He felt claimant's permanent disability was no different than before.

On April 13, 1979 the carrier requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional compensation for time loss from August 17, 1978, the date of his surgery, through October 30, 1978, the date he was released for work. It felt claimant had been adequately compensated for any permanent disability he might have.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 17, 1978 through October 30, 1978, less time worked. This award is in addition to all awards previously granted claimant by the Determination Orders of 1965 and 1975.

Claim No. 99W 10 5044 May 1, 1979

RICHARD M. VERNON, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
Own Motion Order

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained to his left wrist on July 17, 1972. Several medical reports were offered in support of claimant's claim, including a report by Dr. Melvin, dated March 13, 1979, indicating claimant should undergo further surgery on the wrist.

By its denial of March 15, 1979 the carrier indicated it would not reopen claimant's claim although it would pay any medical bills necessitated by the surgery.

Claimant indicates that time loss is expected as a result of the surgery and requests that his claim be reopened for the payment of compensation for such time loss.

On April 10, 1979, the Board requested the carrier to advise it of its position with respect to claimant's request. On April 16 the carrier notified the Board that its position had not changed since it issued its denial letter of March 15, 1979.

The Board, after fully considering the evidence before it, concludes that claimant's claim should be reopened for the surgery recommended by Dr. Melvin and for the payment of compensation, as provided by law, until the claim is closed pursuant to ORS 656.278.

ORDER

Claimant's claim is hereby remanded to the carrier, Truck Insurance Exchange, for acceptance and payment of compensation, as provided by law, commencing on the date claimant enters the hospital for the recommended surgery and until the claim is closed pursuant to ORS 656.278.

WCB CASE NO. 77-1629 May 4, 1979

HENRY R. BAKER, CLAIMANT
D. S. Denning, Claimant's Atty.
A. Thomas Cavanaugh, Employer's Atty.
Stipulation

It is stipulated between the claimant, Henry R. Baker, his attorney, D. S. Denning, and A. Thomas Cavanaugh, attorney for the employer and its insurer, Universal Underwriters Insurance Company, as follows:

That the insurers obligation to claimant under the Administrative Law Judge's Opinion and Order dated August 4, 1978 has been fully paid and discharged.

That a bona fide dispute exists as to the compensability of the claimant's heart attack of December 11, 1976; that the parties desire to settle this dispute and to settle this disputed claim now pending before the Workers Compensation Board on claimant's request for board review of the Opinion and Order dated August 4, 1978. The insurer will pay claimant $3,750.00 and claimant agrees to accept said sum in full and final settlement of this claim. In consideration of said payment the claimant agrees that said claim shall remain in its denied status; that there is no acceptance of it, express or implied by insurer, and that no other sum shall now or hereafter be payable thereunder.

Insurer will pay in addition thereto the sum of $250.00 to D. S. Denning as and for a reasonable attorney's fee.

Claimant further agrees that his request for board review be dismissed.

It is so ordered:

WCB CASE NO. 78-5005 May 4, 1979

SUSAN A. BOWERS, CLAIMANT
Henry M. Silberblatt, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Order of Dismissal of her request for hearing.

The State Accident Insurance Fund moved to dismiss claimant's request for hearing on the grounds that it was not filed with the Board, pursuant to ORS 656.283, within 180 days from the date claimant received notice of denial as required by ORS 656.319(1).

Claimant contends that a request for hearing was sent to the Board on December 22, 1977, 49 days after the mailing date of the denial letter.

The records of the Hearings Division of the Board reflect no receipt of the original letter dated December 22, 1977; the first receipt of claimant's request for hearing by the Hearings Division occurred on June 12, 1978 in the form of a copy of the December 22, 1977 letter which was enclosed in a letter from claimant's attorney dated June 9, 1978.

The Presiding Referee found that claimant had received the notice of denial on November 5, 1977; 180 days from that date was May 4, 1978 and the first instrument requesting a hearing which was received by the Board from claimant was after May 4, according to the records of the Hearings Division. Therefore, whether or not claimant's allegations constituted good cause was irrelevant. Claimant did not file within 180 days and under Oregon law a document must be "received" in order to be "filed".

The Presiding Referee granted the motion to dismiss.

In Norton v. State Compensation Department, 252 Or 75 (1968), claimant mailed his request for hearing on the 59th day following the mailing of the denial letter and it was not received by the Board until two days later. The Court upheld the defendant's denial of benefits to claimant based on the untimely request for hearing. In 1978 the Court held basically the same in Bergeron v. Ontario Rendering Co., 34 Or App 1025.

However, in Burkholder v. SAIF, 11 Or App 334 (1972), the denial letter was sent to an incorrect address; when the claimant finally learned of the denial he promptly requested a hearing but it was after the expiration of the 60 days. The Court of Appeals held that a hearing should be allowed. The Court referred to the opinion of the Supreme Court in Norton wherein the Court said there could be "extenuating circumstances", stating:

> "'It is, of course, conceivable that the mailing of the notice of denial will not bring notice of the denial to the workman within 60 days after the denial or will not bring notice within a reasonably substantial time after the mailing, all through no fault of the workman. What relief can be granted to the workman in such event will have to depend upon the particular circumstances of each case.' 252 Or at 78."

Claimant contends that her case fits within the "extenuating circumstance" exception to the rulings in Norton and Bergeron. She states that unlike the parties in Norton and Bergeron her request was mailed in more than enough time to be received in Salem at the Board's office within the 60-day period; in the other two cases the request for hearing was mailed at the last possible moment.

The Board, on de novo review, agrees with the contention of the claimant that a practical construction of ORS 656.283(2) is that mailing a hearing request calculated to be received in Salem before the expiration of the 60-day period is sufficient; especially, when combined with the disputable presumption that a letter duly directed and mailed is received in the regular course of the mail [ORS 41.360(24)]. This presumption has not been overcome by any evidence.

The Workers' Compensation Laws are to be construed liberally in the worker's favor and the Board concludes that the mailing of the request for hearing on the 49th day after the mailing date of the denial letter was a timely request.

The Board finds that a copy of the request for hearing dated December 22, 1977 mailed to the Fund must have been received by it as it responded to said letter in January 1978. December 22, 1977 was within the 60-day period following the letter of denial.

The rules of practice and procedure for contested cases under Workers' Compensation Law provide for situations like this. OAR 436-83-230 states as follows:

> "If a claimant sends a request for hearing to the employer or insurer, it shall forward forthwith the request to the Hearings Division of the Board."

In this case the Fund did not transmit the request for hearing to the Board. The claimant contends that because of this the Fund should be estopped from asserting that claimant failed to file a timely request for hearing. The Board finds that this contention is not well taken because the Fund had no way of knowing whether or not the original had been received by the Board at the time it received its copy.

The Board concludes that the Order of Dismissal should be reversed and that claimant's request for hearing should be allowed.

ORDER

The Order of Dismissal entered by the Presiding Referee on December 6, 1978 is reversed.

Claimant's request for hearing on the propriety of the denial by the Fund on November 3, 1977 of claimant's claim for an injury to her right knee and right wrist which occurred on July 19, 1977 while in the employ of the Fraternal Order of Eagles, Aerie #4, is hereby remanded to the Hearings Division of the Workers' Compensation Board to be set down for hearing.

A reasonable attorney's fee for the services rendered claimant by her attorney will be determined after the hearing before a Referee.

WCB CASE NO. 77-4501 May 4, 1979
WCB CASE NO. 77-1934

FADDIE JAMES CREAR, CLAIMANT
McMenamin, Joseph, Herrell &
Paulson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Cheney & Kelley, Employer's Attys.
Request for Review by the SAIF
Cross-appeal by Claimant

On October 27, 1978 the Board entered its Order on Review in the above entitled matter. A timely request was made by the Fund that the Board reconsider that portion of said Order on Review which stated that the Fund had not complied with the .307 order and, therefore, was not entitled to any reimbursement from Industrial Indemnity. The Fund stated that it had, in fact, paid claimant all amounts due under that order.

An order, dated December 8, 1978, set aside the Order on Review entered on October 27, 1978 based on the request for reconsideration which was made while the Board had jurisdiction over this matter.

A letter from the Fund dated February 16, 1979 indicated it had paid one time loss payment to claimant under Claim No. GD 225229 in the amount of $634.70 for the period January 19 through February 28, 1977. Said payment was made on March 1, 1978; the Fund had also paid medical bills amounting to $1,267.15.

On April 4, 1979 an order was issued reinstating the Order on Review entered on October 27, 1978 because the Board thought the aforesaid information had been available to the Fund prior to the hearing. It had not been. The hearing was held on February 1, 1978, closed on February 3, 1978, and the Referee's Opinion and Order issued on February 22, 1978; all of these dates preceeded the date of the payment which was March 1, 1978.

Therefore, the Board, still having jurisdiction because of its orders of December 8, 1978 and April 4, 1979, concludes that it would be in the best interests of all parties concerned to amend the original Order on Review entered on October 27, 1978 in certain respects and that the most orderly process would be to recite the original Order on Review with the appropriate amendments. The foregoing will constitute the Amended Order on Review with appeal rights to all parties commencing on the date the Amended Order on Review is mailed.

The State Accident Insurance Fund seeks Board review of the order of the Referee which approved the denial of claimant's claim by Industrial Indemnity but directed it to pay claimant 16° for 5% unscheduled low back disability on the 1974 claim. The order disapproved the denial of claimant's claim by the Fund and ordered the Fund to accept it and pay compensation to claimant until closure pursuant to ORS 656.268. The ALJ also ordered the Fund to pay claimant, as a penalty, an additional amount equal to 10% of the compensation due claimant from the date of his injury until May 23, 1977 plus any amounts due claimant under the order of December 28, 1977 designating the Fund as the paying agent and to pay claimant's attorney a sum of $800.

The claimant filed a cross-request for Board review, contending that he is entitled to a greater degree of permanent partial disability than that awarded by the Referee.

Claimant is a 63-year-old furniture cleaner who has worked for this employer since 1973. On September 25, 1974 he suffered a compensable injury to his back while lifting a chair. He was first treated by Dr. Gambee and returned to his regular work except for a short period in June 1975. Claimant missed no time from work because of his back pain and his claim was closed by a Determination Order dated June 6, 1976 which granted claimant compensation for temporary total disability only.

On or about December 22, 1976 claimant, who had been doing considerable bending and stooping while cleaning furniture for the employer due to the pre-Christmas rush, had a recurrence of his back problem. At the time claimant had been injured in 1974 the employer was insured by Industrial Indemnity, however, on January 1, 1976 the employer's workers' compensation coverage was furnished by the Fund.

Dr. Gambee advised Industrial Indemnity that claimant had returned for treatment on January 13, 1977 and had been admitted to the hospital. On March 17 Industrial Indemnity denied claimant's request to reopen on the grounds that claimant had sustained a new injury in December 1976.

On April 26 claimant's attorney notified the employer that claimant would file a claim against the Fund; this claim was denied by the Fund on June 29, 1977 on the grounds that claimant's current problem was a natural aggravation of his 1974 injury.

On December 28, 1977 an order was issued by the Workers' Compensation Department pursuant to the provisions of ORS 656.307, designating the Fund as the paying agent pending a determination of the responsibility for claimant's condition.

At the hearing claimant contended that he was entitled to an award for permanent partial disability as a result of his 1974 injury and a determination of whether he had sustained a new injury on December 22, 1976 or aggravated his 1974 injury. He also contended that he was entitled to penalties and attorney fees on the wrongful denial by both carriers and for delay in making said denials. Claimant did not receive compensation within 14 days nor has he received any payments under the .307 order. On this latter matter, claimant asked for additional penalties and attorney fees.

The medical evidence indicated claimant had a degenerative spine disease associated with sciatica and involved the L4-5 left, however, he was not considered a good candidate for surgery.

The Referee found that claimant was able to return to work immediately after his accident and worked until June 6, 1975, a period of almost nine months. Dr. Gambee, claimant's treating physician, believed claimant would have a definite permanent residual. At the time of his injury claimant was 60 years old, he has a high school education and a basic work background in furniture cleaning.

The Referee concluded, considering claimant's age, education, experience, training and impairment prior to the second injury, that claimant did sustain a mild loss of earning capacity and he granted claimant an award of 16° for 5% unscheduled disability.

On the issue of whether the incident of December 22, 1976 represented a new injury or an aggravation of the 1974 injury, the Referee found a causal relationship did exist between the disability evidenced by claimant's entering the hospital on January 19, 1977 and his increased work activities prior to Christmas, 1976. Claimant admitted that he had been feeling pretty good prior to December 22, 1976 but after the increased work due to the pre-Christmas rush he developed a great deal of pain and numbness which radiated into his left leg. Although Dr. Gambee, in his report of July 27, 1977, suggested claimant had sustained an "aggravation" of his 1974 injury, the Referee found there was no way of determining whether he used the word "aggravation" as a term of art relating to the workers' compensation law.

The Referee found that claimant had worked at his regular job until December 1976 and although he had had some discomfort at work after his first injury it had not been sufficient to force him to seek additional medical attention for at least a year. When claimant was last seen by Dr. Gambee in December his back condition was improving. Dr. Gambee said he would not see claimant again unless he had more trouble.

The Referee concluded that this was an indication that claimant's degenerative back condition had been stable for at least a year and that the work at the employer's in December 1976 did contribute, even though slightly, to his overall major condition, therefore, the carrier on the risk at the time of the December 1976 incident, Industrial Indemnity, was responsible for claimant's current condition which must be considered as a new injury.

The Referee found that claimant had not received compensation from either carrier even though he was off work from January 19 through February 25, 1977. The Referee further found that Industrial Indemnity denied claimant's claim on March 17, 1977 but because there was no indication in the file of the date Industrial Indemnity first learned of the claim for aggravation, the Referee found that Industrial Indemnity was not liable to pay claimant compensation for temporary total disability from the date of claimant's accident to the date of the denial.

Claimant's employer had notice of the claim for a new injury on April 26 and the Fund should have paid compensation no later than 14 days thereafter and the compensation should have commenced as of the date of the injury and continued until the date of the denial. Claimant, on March 23, 1977, had sustained a heart attack while at work and the Fund had paid claimant compensation for temporary total disability arising out of this condition until its denial of the claim therefor on November 7, 1977. The Referee concluded that the Fund was liable for the payment of compensation to claimant for temporary total disability from the date of his injury until March 23, 1977, less time worked, because its failure to pay this compensation constituted unreasonable conduct.

The Referee found that the Fund did not make any payments of any benefits due claimant in accordance with the .307 order issued on December 28, 1977. She found that this consituted unreasonable resistance and subjected the Fund to penalties and attorney's fees. The Referee then issued the directive recited in the opening portion of this order.

The Board, on de novo review, finds that the incident of December 22, 1976 cannot be considered to be a new industrial injury. Dr. Gambee, on July 27, 1977, stated that claimant has had essentially one disease process which dates from his industrial accident of September 1974, that he has had intermittent exacerbations and remissions of that process. In his opinion the etiologic mechanism of claimant's problems is the industrial accident of 1974 and claimant has had an aggravation in 1976.

The Board concludes that the claimant's increased work activities just prior to Christmas 1976 was an aggravation of his 1974 injury. Any significant increase in activities such as bending and stooping necessitated by cleaning furniture for the employer could have caused claimant's prior back problems to flare up.

The Board concludes that Industrial Indemnity, the carrier on the risk at the time of the 1974 injury, is responsible for claimant's present conditions and must pay claimant compensation, as provided by law, from the date of his injury to the date of this order. The Fund is entitled to reimbursement from Industrial Indemnity for all compensation which it paid claimant on March 1, 1978; however, the Fund's delay in complying with the .307 order constitutes unreasonable resistance to the payment of compensation, therefore, it must be assessed a penalty and pay claimant's attorney a reasonable attorney's fee for such unreasonable delay.

The Board finds, based upon the medical evidence, that claimant's condition is again medically stationary but that the award made by the ALJ of 16° for 5% unscheduled disability is not adequate to compensate claimant for the loss of wage earning capacity resulting from the aggravation of his 1974 claim. The Board increases the award to 48° which is equal to 15% of the maximum allowable by law for unscheduled disability.

ORDER

The Order reinstating the Order on Review dated April 4, 1979 is vacated and the Order on Review dated October 27, 1978 is reissued as amended hereby.

The order of the Referee, dated February 22, 1978, is reversed.

The denial of claimant's claim for a new injury made by the Fund on June 29, 1977 is approved.

The claimant's claim for aggravation is referred to the employer and its carrier, Industrial Indemnity, for the payment of compensation, as provided by law, commencing on December 22, 1976, the date claimant aggravated his 1974 injury, and until the date of this order which closes claimant's claim with an award of 48° for 15% unscheduled low back disability, less benefits paid for his heart condition.

Industrial Indemnity shall reimburse the State Accident Insurance Fund for all compensation which it paid to claimant on March 1, 1978, including temporary total disability and medical bills.

The State Accident Insurance Fund shall pay claimant compensation equal to 25% of the compensation due claimant from December 28, 1977, the date the order was issued pursuant to ORS 656.307 designating it as the paying agent, and until March 1, 1978.

Claimant's attorney shall be awarded as a reasonable attorney's fee the sum of $800, payable by the State Accident Insurance Fund for its unreasonable delay in paying compensation as directed pursuant to the order issued under the provisions of ORS 656.307.

Claimant's attorney is entitled to a reasonable attorney's fee for his services at Board review in an amount equal to 25% of the increased compensation granted claimant by the order, payable out of such increase as paid, not to exceed $2,300.

WCB CASE NO. 78-5145 May 4, 1979

CHARLOTTE J. EATON, CLAIMANT
Robert J. Thorbeck, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-4986 May 4, 1979

JAMES R. McQUEEN, CLAIMANT
Gracey & Roeschlaub, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

A request for review, having been duly file with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn,

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

SAIF CLAIM NO. BC 431525 May 4, 1979

ROBERT G. ROSE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury on April 4, 1973. His claim was accepted and initially closed by a Determination Order dated February 8, 1974. Claimant's aggravation rights have expired. After claimant had requested the Fund to reopen his claim the Fund forwarded the operative and medical reports from Dr. Ellison to the Board with a cover letter, stating that if the Board found medical evidence justified it the Fund would not oppose a reopening.

On March 20, 1979 Dr. Ellison performed a surgical repair of a previous surgery. On April 20, 1979 Dr. Ellison informed the Fund that claimant's current condition was related to his previous injury sustained on April 4, 1973 and that his condition had worsened to the extent that he began to develop pain as a consequence of a tethering effect of scar tissue in the region of a previous surgery. The prognosis was good and payment for time loss should begin, according to Dr. Ellison, from March 20, 1979. Claimant was expected to return to work on April 15, 1979.

The Board, having reviewed the medical documentation, concludes that claimant's claim for an industrial injury sustained on April 4, 1973 should be reopened.

ORDER

Claimant's claim No.BC 431525 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on March 20, 1979, the date of the surgery, and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

SAIF CLAIM NO. A 908964 May 8, 1979

HOWARD V. BRUNSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on February 5, 1962 when he was hit by a falling log. The diagnosis was a mildly depressed skull fracture and compression fractures of D6 and D8. The skull fracture was elevated and a cranioplasty was performed by Dr. Stainsby. Dr. Anderson reported claimant's back fractures healed well after treatment and the claim was closed on February 7, 1963 with an award of compensation equal to 58° for 40% loss function of an arm for unscheduled disability.

On August 17, 1976 claimant fell and struck his head while suffering from a second syncopal episode. Dr. Roy Miller hospitalized him and diagnosed a post-traumatic seizure disorder, recent skull fracture and subdural hematoma. The Fund reopened the claim and surgery was done on August 18, 1976. Claimant returned to his regular work on November 1, 1976.

After his final examination on February 13, 1979, Dr. Miller found claimant's condition to be medically stationary, stating he was essentially asymptomatic. He is presently on Dilantin medication and will be for the rest of his life. He has not had any more seizures and his neurological examination was entirely normal.

On March 1, 1979 the Fund requested a determination of claimant's present condition. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for time loss from August 17, 1976 through October 31, 1976, less time worked.

The Board concurs in this recommendation.

ORDER

The claimant is hereby granted compensation for temporary total disability from August 17, 1976 through October 31, 1976, less time worked. The record indicates that claimant has already been paid this compensation by the Fund.

ROBERT E. EGGIMAN, CLAIMANT
Harold W. Adams, Claimant's Atty.
Thomas J. Mortland, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which granted him 64° for 20% unscheduled low back disability.

Claimant is a 58-year-old meat cutter who has a high school education. Claimant worked as a meat cutter in his father's meat market during high school and after graduation. Then he was in the service during World War II at which time he went to cook and baker's school. After he was discharged he held various jobs as a meat cutter. In 1965 he suffered an injury while working for Safeway. He was off work two or three weeks and when he returned he had to wear a brace for awhile. In 1967, Dr. Misko performed back surgery and claimant returned to work for Safeway. Because of continued back problems, Dr. Misko, in July 1968, performed a second surgery. After the second surgery claimant did not attempt to work at Safeway's meat service counter but he went to work in the warehouse where he was not required to lift heavy weights, but merely trimmed on a production line. He continued this work until October 1976 when he began to have low back and right leg pain.

On October 19, 1976 claimant slipped while at work; he sought chiropractic treatment. This did not help and he was eventually seen by Dr. Snodgrass, an associate of Dr. Misko. His injury was diagnosed as a lumbosacral strain superimposed upon pre-existing degenerative and post-operative low back disease. Claimant was given some medication and an exercise program. Dr. Snodgrass was unable to find any evidence of a recurrent disc, although claimant remained tender over the entire lumbar and lumbosacral area; he recommended claimant see an orthopedic physician. Dr. Logan, an orthopedic physician, saw claimant and prescribed a Stuttel brace. He also gave claimant some injections but they were of little help and thereafter

physical therapy was tried. In April 1977 Dr. Logan suggested claimant not return to meat cutting and try to be retrained for a different type of occupation. The first attempt by claimant ended in a non-referral because claimant was going on a vacation and was not available. Claimant's condition did not improve by October and Dr. Logan felt he would not be able to return to his former job in any event. He found claimant to be medically stationary in December but said he was unable to bend or do any lifting. Claimant felt he could not be up more than three hours a day, but could walk a mile each day.

In January 1978 Dr. Misko again began treating claimant on a conservative basis. Dr. Logan also continued to treat claimant.

Field Services Division of the Workers' Compensation Department again attempted to get claimant in a vocational rehabilitation program. According to the evidence, the interview with claimant took place about the same time he had received an injection of Xylocaine from Dr. Misko and, according to claimant, he was quite miserable and unable to fully answer the necessary questions and asked that his interview by postponed.

The Referee apparently felt that claimant wished to rely upon Dr. Misko's assessment of his disability rather than that made by Dr. Logan. Dr. Misko reported claimant was not able to participate in vocational rehabilitation and at the same time Dr. Logan reported that he could be rehabilitated for a sedentary type of work which did not require him to bend or lift.

In June 1970 Dr. Misko stated that claimant was medically stationary but at his age he could not return to his former job where he had to do heavy lifting. The Referee was unable to determine whether Dr. Misko's report should be interpreted as discouraging rehabilitation or not but apparently claimant so interpreted it.

On June 21, 1978 the claim was closed by a Determination Order which awarded claimant 32° for 10% unscheduled low back disability. Claimant had received awards totalling 30% for unscheduled disability and 15% for right leg disability as a result of his earlier injuries in the 1960's.

During October 1978 the Field Services Division made another attempt to obtain employment re-entry assistance for claimant, however, medical instability precluded assessment of vocational feasibility.

The Referee was not convinced that claimant was unable to participate in some kind of vocational rehabilitation program or aid in obtaining employment. The first attempt was aborted because claimant was unavailable, the second because claimant was suffering from some unsuccessful treatment received from Dr. Misko who had not encouraged claimant to attempt to return to work. Dr. Misko insisted that claimant should not return to his former job as a meat cutter where he is required to do heavy lifting yet the evidence is clear that for the last eight years of claimant's employment he has been not working as a butcher but rather as an assemblyline trimmer. Contrary to what Dr. Misko believes, Dr. Logan feels that claimant would benefit from retraining.

Claimant testifies that he had been able to work as a trimmer but that he was not able to do so now because of his last accident and does not feel that he is able to be retrained because he cannot sit for long periods of time in the classroom.

The Referee found that claimant had not taken advantage of the placement services to which he has been exposed and concluded that claimant was familiar with all the phases of butchering and meat cutting and, therefore, he felt comfortable with such types of work and he did not wish to look for other types of employment. However, he did feel that claimant's disability (presumably he was referring to his loss of wage earning capacity) was greater than indicated by the award of 10% of the maximum for such unscheduled disability. He granted claimant an additional 10%, giving claimant a total of 64° for 20% unscheduled low back disability.

The Board, on de novo review, finds that claimant has not been adequately compensated for his loss of wage earning capacity. Claimant is 58 years old and obviously he cannot return to work as a meat cutter, a job at which he was employed for many years, because it requires heavy lifting. Claimant says he can no longer work as a trimmer.

Based upon the medical evidence and the lay testimony, the Board concludes that claimant is entitled to 96° for 30% unscheduled disability to adequately compensate him for his loss of wage earning capacity. The Board urges claimant to take advantage of the vocational rehabilitation services which are available to him through various agencies of this state.

It would have been most helpful to the Board had the parties seen fit to submit briefs on their respective positions, however, they did not do so.

ORDER

The order of the Referee, dated November 29, 1978, is modified.

Claimant is awarded 96° out of a maximum of 320° for unscheduled low back disability. This award is in lieu of that granted by the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-2817 May 8, 1979

ELSIE BASS-JOHNSON, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review of the Referee's order which granted claimant 224° for 70% unscheduled mid and low back disability.

Claimant was a 49-year-old general mill worker when she suffered a compensable injury on August 6, 1976 while lifting a box filled with chair components. She worked for 14 months after her injury, being treated during that period of time by several doctors. Dr. Bond, in July 1977, diagnosed a left-sided lumbar myositis and spasm with left sciatica.

Claimant's claim was closed by a Determination Order awarding compensation for time loss only. Thereafter she was seen by Dr. Parshall who diagnosed a possible slipping rib syndrome and in January 1978 performed a resection of the left 11th and 12th ribs.

In February 1978, Dr. Perkins reported that claimant's burning radicular type of pain had disappeared since the surgery, but she still had discomfort over the scar area and claimed pain in the sacral area with questionable radiation into the left groin. In March 1978, he advised the carrier that he had discharged claimant as a patient because he could find no reason for her symptoms and referred her to Dr. Rockey, an orthopedic surgeon. He released her for modified work as of March 19, 1978.

Dr. Rockey, in May 1978, felt claimant might have a herniated lower thoracic disc. He opined she was not medically stationary but disabled from work and had been disabled at the time she was released by Dr. Perkins. Dr. Rockey hospitalized claimant for traction and diagnosed a chronic lumbar and thoracolumbar back strain. Upon her discharge, he stated she should not return to work which required repetitive bending or heavy lifting. He said that if claimant could not find other types of work she should be retrained for work which would not stress her back.

Claimant was referred to vocational rehabilitation in August 1978. She testified that no program had been provided for her; she felt this was because of her continuing physical limitations and her lack of education.

Her claim was again closed on September 7, 1978 by a Determination Order which granted claimant 64° for 20% unscheduled mid and low back disability.

Claimant has finished the sixth grade, but she has had no specialized training. Her work background consists of working on a farm, as a waitress for a couple of years, and intermittently as a babysitter. Her basic employment has been in low-skilled factory work and the evidence indicates that she never stayed more than five or six years at any one job.

Claimant testified that she has continuing burning, stinging and pulling sensations in her back with intermittent sharp pains. She quit work in October 1977 and her only attempt thereafter to secure other employment has been reading the want ads in the newspapers. She found nothing that she felt she could do although claimant would work presently if she were able to do so. The Referee found that her motivation must be considered good because of the fact that she worked although in pain for 14 months after her injury and quit only when the pain became so severe that she could no longer continue.

The personnel manager of the employer testified that the employer had two jobs in the plant requiring virtually no physical exertion. One job consisted of stapling labels together; the other required placing nuts and bolts in bags to accompany furniture components shipped from the plant. Each job permitted a change from a sitting to a standing position at the worker's option and required virtually no bending or twisting. He testified that both jobs were required to be performed as part of the production operation at that plant and that claimant had never been separated from employment by the employer. He stated that if she wished to apply for either job they would be available to her at the same rate of pay she had earned on the job she was performing at the time of her injury. Claimant testified that she would accept the opportunity to return to work.

The Referee, taking into consideration claimant's lack of education and her limited work experience together with the restrictions placed upon her work activity by Dr. Rockey, concluded that claimant's industrial injury had a significant impact on her wage earning capacity. He found that she was excluded from practically all of the work which she had performed in the past and that, in all probability, she was not retrainable for any type of sedentary work requiring clerical or intellectual skills. He found that the jobs offered claimant by the employer appeared to be within claimant's competency but the two jobs mentioned were apparently the only two jobs of this character within the employer's entire plant which employs some 100 people.

He concluded that as a matter of common knowledge jobs making such minimal demands on a worker are few and far between and, therefore, claimant has sustained a large loss of wage earning capacity, greater than that for which she has previously been awarded compensation. He increased her award of 20% of the maximum to 70% of the maximum.

The Board, on de novo review, finds that while it was very commendable on the part of claimant to continue to work while she was in pain for a period of 14 months after her industrial injury in 1976, nevertheless, her motivation is questionable. The Board agrees with the Referee's conclusion that the two jobs offered claimant by the employer appear to be within claimant's competency; they certainly do not require any type of activity which Dr. Rockey forbid claimant to engage in and the employer has indicated that she would be paid at the same rate of pay she was receiving at the time of her injury, yet the evidence indicates that claimant only tried one of the jobs for a short period of time and decided she didn't want it. She didn't even attempt the second job. Furthermore, claimant has not sought any type of employment other than to read the newspaper want ads. Apparently, claimant is not interested in returning to the labor market.

The Board does conclude that claimant has suffered a substantial loss of her wage earning capacity as a result of her industrial injury but not to the degree that would justify an award equal to 70% of the maximum for her unscheduled disability. Therefore, the Board reduces the award made by the Referee from 70% to 50%.

ORDER

The order of the Referee, dated October 31, 1978, is modified.

Claimant is awarded 160° of a maximum of 320° for unscheduled mid and low back disability, including disability to her ribs. This award is in lieu of the award made by the Referee in his order which in all other respects is affirmed.

CLAIM NO. GC 76726 May 8, 1979

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

Claimant suffered a compensable injury to his right knee on June 7, 1967. The claim was last closed by a Board's Own Motion Determination whereby claimant was granted additional compensation for 15% loss of the right leg.

On March 12, 1979 Dr. Heusch, in his letter to the Fund, requested claimant's claim be reopened. He indicated claimant's condition showed progressive degenerative and increasing pain. He felt claimant would benefit from a procedure where a polyethylene button would be placed in the patella so as to articulate with the metal flange of the knee prosthesis.

The Fund forwarded the above letter to the Board together with a cover letter indicating it would not oppose reopening.

The Board, after consideration of the evidence before it, concludes that claimant's claim should be reopened for the procedure recommended by Dr. Heusch.

ORDER

Claimant's claim is remanded to the State Accident Insurance Fund for reopening of his claim commencing on the date the recommended procedure is performed and until the claim is closed pursuant to ORS 656.278.

SAIF CLAIM NO. HC 410227 May 8, 1979

EDWARD L. LEACH, CLAIMANT
Dana R. Taylor, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 9, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on November 7, 1972 with an award of 80° for 25% unscheduled disability. Later this was increased to 128° by a Referee's order dated February 1, 1974. Claimant's claim was first closed on August 24, 1973 and his aggravation rights have expired.

By affidavit, claimant indicated that he was examined by Dr. Kayser on August 7, 1978 for increasing low back pain which he diagnosed as lumbar L5-S1 spondylolisthesis. Dr. Kayser felt that claimant's condition at the time of his examination was a result of the 1972 industrial injury. He requested the Fund to reopen the claim. It refused. Claimant requested a hearing. The Referee dismissed the matter because claimant's aggravation rights had expired.

On April 11, 1979 the Board advised the Fund of claimant's request and asked it to respond within 20 days as to its position.

The Fund responded on April 16, 1979, stating that claimant's spondylolisthesis pre-existed his 1972 injury and that injury merely aggravated this pre-existing condition. It believes claimant has again aggravated this condition while self-employed as a plumber. It feels it has no responsibility for claimant's present problems and opposes the reopening of the claim.

The Board, after fully considering the medical evidence before it, concludes that claimant's claim should be reopened to be accepted and for payment of compensation as provided by law, commencing November 13, 1978, the date of claimant's hospitalization, and until closed pursuant to ORS 656.278, less time worked. Claimant's attorney should be granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 76-4821 May 8, 1979

JAMES LYNESS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests the Board to review the Referee's order which granted claimant an award of 32° for 10% unscheduled disability.

Claimant is a 42-year-old asbestos mechanic who suffered a compensable injury in February 1975 when he fell on a valve stem striking the right side of his chest and cutting his finger. Dr. Innes, a vascular and thoracic surgeon, diagnosed a right-sided pleural effusion. Dr. Innes performed a thoracotomy and decortication in April 1975. His final diagnosis was "pleuritis, recurrent pleural effusion secondary to hyaline plagues and probably secondary to asbestos or fiberglass". Claimant's claim for an occupational disease was denied by the Fund on June 24, 1975.

Claimant was last seen by Dr. Innes on July 19, 1975. At that time Dr. Innes did not feel claimant would have any further problems nor would there be any permanent impairment.

After a hearing on the denial, the Fund was ordered to accept the claim.

On July 27, 1976 claimant was examined at the Respiratory Care Center in Tacoma, Washington by Dr. Lawson who reported that claimant had a mild obstructive ventilatory defect that could be accounted for on the basis of a history of very heavy cigarette smoking by claimant. The level of ventilatory reserve and the performance of the gross exercise test were such that he could not find any evidence of pulmonary disability relative to the impairment of exercise performance. He did find a slight degree of partial impairment but felt it was not significant enough to cause work disability.

Claimant's claim was closed by a Determination Order issued September 8, 1976 which awarded claimant compensation for time loss only.

In September 1977 a Dr. Cook examined claimant. He found no evidence of asbestos reaction present on chest x-rays and only a slight reduction in pulmonary function. He advised claimant to avoid extensive exposure to dust and irritating vapors, gases or fumes and that he should not be required to wear any non-powered respirator if he had any difficulty in breathing.

Claimant had smoked one to two packs of cigarettes a day since he was 12 years old. He quit smoking approximately two years ago.

Claimant underwent open heart surgery in June 1978. The surgery had no relationship to the claimant's job.

Claimant testified that it was increasingly difficult to keep up with his trade as an asbestos mechanic. He stated that while working around fiberglass he coughed and became weak and breathing became more difficult. He stated that he could not work in close places where fumes were present and that the mask which asbestos workers wore filtered out dust but not fumes.

The Referee found that both Dr. Innes and Dr. Lawson felt the disease would not affect claimant's employment. The September 1977 examination was given by the Western States Asbestos Health Plan and the evaluation of claimant did not reveal any specific abnormality although pulmonary function was slightly reduced and, as stated before, claimant was advised not to expose himself to dust and other irritating vapors, gases or fumes.

The Referee found that claimant was generally able to continue working in his specialized occupation subject to the restrictions, limitations and difficulties which have heretofore been discussed. Taking into consideration claimant's age, education, training, work experience and physical condition, the Referee concluded that claimant had lost 10% of his wage earning capacity and therefore granted him an award equal to 32°.

The Board, on de novo review, finds no medical evidence that claimant has sustained a loss of wage earning capacity which would justify granting an award of permanent partial disability. Therefore, the Board reverses the Referee and reinstates the Determination Order which adequately compensated claimant for any loss of time which he has sustained as a result of his industrial injury.

ORDER

The order of the Referee, dated September 28, 1978, is reversed and the Determination Order, dated September 8, 1976, is reinstated.

SAIF CLAIM NO. PC 371059 May 8, 1979

STANLEY J. OLES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right hand on May 24, 1972 while employed as a truck driver. The claim was initially closed on November 20, 1972 with an award of compensation equal to 45% loss of his right hand.

By his report of February 15, 1979 Dr. Ross advised the Fund that claimant had a neuroma of the right hand which was related to his 1972 industrial injury. A Board's Own Motion Order reopened the claim, with time loss payments to begin on February 5, 1979.

Claimant underwent excision of the neuroma on February 23, 1979. Dr. Ross, in his closing report of April 3, 1979, indicated that claimant's symptoms were relieved and claimant had no further disability. He released claimant to work as of that date.

On April 12, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Worker's Compensation Department recommended that claimant be granted compensation for time loss from February 5, 1979 through April 2, 1979, less time worked and no additional compensation for permanent partial disability.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 5, 1979 through April 2, 1979, less time worked. The record indicates that claimant has already been paid most of this compensation by the Fund.

CLAIM NO. 502-66-0263 01 May 8, 1979

WALTER C. PHILLIPS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Newhouse, Foss, Whitty & Roess, Defense Attys.
Own Motion Order

On March 15, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an industrial injury sustained on December 1, 1966. Claimant's claim was first closed on December 20, 1967 and his aggravation rights have expired.

Dr. Anthony Smith, on March 6, 1979, indicated he had followed claimant's condition since the injury of 1966. On September 26, 1978 he did a Charnley compression arthrodesis of the right ankle which resulted in a nonunion; this was repaired with a bone graft on February 19, 1979. The claimant is still in a cast and is unable to work and will probably not be able to return to work until at least the first part of June. Dr. Smith relates claimant's current condition to his December 1966 injury.

The Board, on April 2, 1979, advised the employer of claimant's request for own motion relief and asked it to state its position within 20 days.

On April 24, 1979 the employer advised the Board that it objected to the reopening of claimant's claim.

The Board, after fully considering the information before it, concludes that claimant's claim should be reopened for time loss benefits and medical care and treatment until such time as he can be released for work.

ORDER

Claimant's claim is hereby remanded to the carrier for acceptance and payment of compensation to which he is entitled, commencing February 19, 1979, the date of the bone graft, and until his claim is closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

CLAIM NO. D53-124543 May 8, 1979

LEO T. SHAFFER, CLAIMANT
Own Motion Order

On July 26, 1968 claimant suffered a compensable injury while working for Willamette Industries, Inc., Griggs Division. The carrier was Employers Insurance of Wausau. The claim was accepted and closed by a Determination Order dated June 18, 1973 which awarded claimant compensation for 16.25% loss bineural hearing due to 15% loss of hearing left ear and 25% loss of hearing right ear, equal to 31.2° and 80° for 25% unscheduled head and shoulder disability.

Claimant requested a hearing and, after said hearing, the Referee directed the carrier to pay claimant a total of 24% loss bineural hearing due to 22.5° loss of hearing left ear and 34.5° loss of hearing right ear equal to 46° and 160° for 50% unscheduled eye, head, shoulder and back disability; said amounts to be in lieu of the awards granted by the Determination Order of June 18, 1973. The Opinion and Order was entered on November 18, 1974 and represents the date of the last arrangement and award of compensation for claimant's industrial injury.

On March 28, 1979 Dr. Harry Mittelman, a specialist in eye, nose, throat and facial plastic surgery who practices in Palo Alto, California, examined claimant. At that time claimant desired to have a meloplasty and other reconstructive procedures in an attempt to correct some of the deformities which were caused by the industrial injury of July 26, 1968 which resulted in right facial paralysis. Subsequent to the injury claimant had considerable lower lid lag with a large scleral show and atrophy of the musculature there with considerable sagging and elastosis of the skin. Dr. Mittelman planned to do a reconstructive cervical facial rhytidoplasty.

Dr. Mittelman was of the opinion that claimant's present need for this surgery was directly connected with his 1968 injury.

On April 19, 1979 Wausau forwarded to the Board all of the medicals which it had received regarding claimant's claim and stated it would accept the responsibility for paying the medical bills and time loss; it had voluntarily reopened the claim.

The Board, having reviewed all of the medicals and the order of the Referee dated November 8, 1974, concludes that there is definitely a worsening of claimant's condition since the date of the last award or arrangement of compensation and that said worsening is directly related to his 1968 industrial injury.

ORDER

Claimant's claim, designated as D53-124543, filed on an industrial injury sustained on July 26, 1968 is hereby remanded to Willamette Industries, Inc., Griggs Division, and its carrier, Employers Insurance of Wausau, to be accepted and for the payment of compensation, as provided by law, commencing on January 17, 1979, the date claimant was initially admitted to the Stanford University Medical Center, and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

WCB CASE NO. 78-4483 May 8, 1979

LARRY E. TIMBROOK, CLAIMANT
John R. Sidman, Claimant's Atty.
Fredrickson, Weisensee & Cox,
Defense Attys.
Request for Review by Employer
Cross-appeal by Claimant

Reviewed by Board Members Phillips and McCallister.

The employer seeks review of the Referee's order which awarded claimant compensation equal to 48° for unscheduled low back disability, subject to the employer's right to offset $1,130.84 which it has paid as compensation for temporary total disability from February 1, 1978 to March 28, 1978 and represents overpayments of compensation to claimant.

Claimant, a 30-year-old lift truck operator, sustained a compensable injury to his low back on June 23, 1976. He was treated by Dr. Cherry and later underwent a therapy program at Callahan Center.

Claimant was in a program of vocational retraining at the Franklin Institute of Sales and completed his course in December 1977. From January 13, 1978 to March 16, 1978 claimant worked as an automobile salesman for Roy Burnett Chrysler Plymouth.

A Determination Order entered on March 6, 1978 awarded claimant compensation for temporary total disability from June 23, 1976 through February 3, 1978 and 16° for 5% unscheduled low back disability.

On April 4, 1978 claimant became employed as a new and used car salesman by Downtown AMC Jeep; claimant is still working for that employer.

Claimant testified that standing, sitting or lifting weights in excess of 25 pounds caused pain in his low back; also, twisting and turning would bring on low back pain and claimant stated he could not do any type of manual labor.

When claimant was examined by the doctors at the Orthopaedic Consultants, Dr. Ebert, a neurologist, stated that claimant was hostile, with passive,aggressive responses during the examination which was conducted on August 7, 1978. On numerous tests claimant gave inconsistent responses indicating voluntary restriction of movement and functional interference. Dr. Ebert testified he could not determine, objectively, any muscle weakness because of this performance by claimant. He concluded that claimant could do at least medium work and had lifting abilities of up to 50 pounds and that prolonged sitting, standing and bending should not cause any problems.

The Referee felt that Dr. Ebert's report should be given greater weight than that of Dr. Cherry's final report because Dr. Cherry's report indicated a lack of knowledge of claimant's employment and vocational retraining.

The Referee found the claimant had received a total of $1,130.84 in temporary total disability payments from February 1 to March 20, 1978 which were overpayments and to which defendant was entitled to a credit or offset. He found the evidence did not support claimant's entitlement to any additional periods of temporary total disability or temporary partial disability beyond those awarded by the Determination Order.

In evaluating claimant's loss of wage earning capacity as a result of his low back disability, the Referee found that claimant did not earn as much as a car salesman as he did when he was working for Zidell as a lift truck operator, however, his earnings as a salesman have steadily increased and can be expected to continue to do so. He felt that because of claimant's restricted employability in the general field of industrial employment he was entitled to an award equal to 48 degrees representing an increase of 32 degrees over that awarded by the Determination Order. He held that this award should be subject to the offset of the overpayment of compensation for temporary total disability previously referred to.

The Board, after de novo review, agrees with the Referee's evaluation of claimant's loss of wage earning capacity. However, the Board finds that on March 17, 1978 the employer wrote to claimant as follows:

> "This is to confirm that you are aware that your temporary partial disability payments will cease as of the last payment of 4-13-78. This will extend this benefit for pay periods, or 28 days after this current check.
>
> "As you know, the determination order has been satisfied as have the requirements under the law. We are at this time extending these benefits to further enable you to be established in your new career."

ORS 656.018(4) states that nothing in the Workers' Compensation Act shall prohibit payment, voluntary or otherwise, to injured workers or their beneficiaries in excess of the compensation required to be paid under the act.

The Board finds that the letter of March 17, 1978 indicates that the additional payment of compensation to claimant represents a gratuitous act on the part of the employer which is sanctioned by the Workers' Compensation Act. Therefore, the employer is not entitled to offset that amount of money against any payments due claimant for permanent partial disability.

ORDER

The order of the Referee, dated November 8, 1978, is modified.

Claimant is awarded 48° of a maximum of 320° for unscheduled low back disability. This award is not subject to any offset of payments by the defendant to claimant for temporary total disability which were made gratuitously.

In all other respects the Referee's order is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the employer.

SAIF CLAIM NO. FC 331423 May 8, 1979

CLAUDIE R. WALKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left ankle on October 12, 1971 while employed by Howard Brewton, General Contractor, Inc. The injury required open surgery and screw fixation. The claim was initially closed on January 4, 1973 with an award equal to 30% of the left foot. This award was appealed and, after a hearing, an order dated April 4, 1973, granted claimant 67.5° for 50% loss of the left foot.

On March 2, 1979 the Board issued its Own Motion Order directing the Fund to reopen claimant's claim, based on a letter from Dr. Baskin recommending claimant have further surgery. This surgery was done by Dr. Baskin on February 14, 1979 and claimant was released for regular work on March 27, 1979.

On April 6, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the the Workers' Compensation Department recommended that claimant be granted time loss benefits from February 14, 1979 through March 26, 1979, less time worked but no additional permanent disability.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 14, 1979 through March 26, 1979, less time worked. The evidence before the Board indicates that this compensation has already been paid to claimant.

CLAIM NO. PT 18081 May 9, 1979

MARCELLA HOLY ANDERSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Own Motion Determination

On March 1, 1979 an Own Motion Determination was entered in the above entitled matter.

It has now come to the attention of the Board that the claimant's claim had been reopened prior to the expiration of her five-year aggravation rights and subsequently closed on April 30, 1976. Therefore, claimant had until April 30, 1977 within which to request a hearing on the adequacy of that Determination Order. On February 22, 1977 the claim was reopened as of November 5, 1976 pursuant to a stipulation dated February 22, 1977, both dates being within the one-year period.

On August 18, 1978 claimant's condition was found to be stationary and no further surgery or treatment necessary.

The Board concludes that claimant's claim should not have been closed pursuant to the provisions of ORS 656.278 but should be closed pursuant to ORS 656.268 and, therefore, the entire matter should be referred to the Evaluation Division of the Workers' Compensation Department for the entry of a Determination Order pursuant to ORS 656.268 based upon the carrier's request for a determination of claimant's present disability made on January 24, 1979.

IT IS SO ORDERED.

WCB CASE NO. 77-5890 May 9, 1979

RICHARD F. EMBREE, CLAIMANT
Kulongoski, Heid, Durham &
Drummonds, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which set aside their denial dated July 29, 1977. The Referee remanded the claim to the Fund for acceptance.

Claimant has been a wood working shop teacher in the public schools for 30 years. For the past 16 years he has taught "shop" at South Eugene High School. He filed a claim alleging progressive hearing loss due to exposure to machine noise in the classroom. The Fund denied the claim. The claimant requested a hearing. The Referee found a work-related hearing loss, that the claim was compensable as an occupational disease and ordered the Fund to accept the claim.

Dr. Springate examined claimant and reported he found "bilateral sensori neural hearing loss". This diagnosis was later supported by Mr. Nanny, an audiologist, after audiologic testing at Eugene Center for Hearing and Speech.

Dr. Springate found the cause of the "bilateral sensori neural hearing loss" to be "undetermined"; see his undated report, Defendant's Exhibit 2. Subsequent to that report no medical evidence was submitted which relates the diagnosis to work exposure beyond a mere "possibility".

The Board, on de novo review, finds that the claimant has not proven medical causation. "Hearing loss" presents a complex medical problem and a claim that "hearing loss" is related to a work exposure must be supported by competent medical evidence. In this case, to raise the medical evidence beyond the level of speculation would be to indulge in an inference based on a questionable assumption. The assumption here appears to be that any "excessive" noise exposure at work coupled with a diagnosed hearing loss compels a finding of compensability. This "post hoc ergo propter hoc" reasoning would negate the need for careful evaluation of the evidence beyond the establishing of legal causation.

The burden of proof is upon the claimant; he must prove by a preponderance of the medical evidence that his hearing loss is related to his job; claimant has failed to do so.

The Board, having found the claimant's claim for hearing loss is not compensable, does not reach the other issues raised in the Fund's request for review.

ORDER

The order of the Referee, dated August 11, 1978, is reversed.

The denial of the Fund, dated July 29, 1977, is hereby affirmed.

WCB CASE NO. 78-2189 May 9, 1979

CLIFFORD L. MYERS, CLAIMANT
Kennedy, King & McClurg,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which found that the termination of compensation for temporary total disability on March 1, 1978 was proper; approved the non-referral for vocational rehabilitation by the Field Services Division; approved the denial dated January 25, 1978 of responsibility for claimant's neck disability and denied the Fund the right to offset $1,923.75 which the Fund alleges it overpaid claimant for temporary total disability.

Claimant suffered a compensable injury on September 15, 1977, diagnosed by Dr. Harder as fracture of the head of the fourth metatarsal bone of the left foot. The claimant was required to wear crutches to relieve all weight bearing on the left foot. On September 23 a short leg cast was applied and removed on October 17. Approximately ten days later Dr. Harder advised claimant that he could attempt to return to work in a week. However, claimant decided to seek different medical advice and sought it from Dr. Wisdom, also an orthopedic physician. Dr. Wisdom felt claimant's condition was not medically stationary but was improving and he anticipated no permanent disability.

For three days in November 1977 claimant visited the Western States Chiropractic Clinic for treatment for a neck strain. The treatment resolved the neck and shoulder problems which Dr. Schachle attributed to the foot treatment. A bill in the amount of $24.00 was submitted by WSCC on December 5, 1977 and one for $12.00 was submitted by National College of Naturopathic Medicine for this treatment.

Claimant was seen by Dr. Pasquesi on November 28, 1977. Claimant said that he told Dr. Pasquesi about his neck problems and his visit to the chiropractor and naturopath, however, the record does not indicate this. Dr. Pasquesi found claimant's foot condition was not stationary but he anticipated no permanent impairment. Dr. Wisdom agreed.

Claimant continued to be seen by both Dr. Wisdom and Dr. Pasquesi for his foot problem but apparently no mention was made of any neck problems. Dr. Pasquesi recommended claim closure and Dr. Wisdom agreed that claimant was medically stationary and no further treatment would be needed.

The claim was closed by a Determination Order dated May 2, 1978 which granted claimant compensation for temporary total disability from September 16, 1977 through March 1, 1978, the date Dr. Wisdom advised claimant he could try to return to work.

The Referee found that "causation is not proven concering the neck. Foot disability will necessarily await further medicals. Since the case has been reopened, the Determination Order will be superceded".

Claimant claims that his time loss was "unilaterally" terminated on March 1, 1978. The Referee found that the three medical reports from Dr. Wisdom and Dr. Pasquesi did not constitute a "unilateral" termination of time loss by the Fund. Based upon Dr. Wisdom's report of June 7, 1978 which found claimant was not stationary at that time the Fund, without a date to rely on, claims it reopened the foot claim with commencement of time loss as of April 19, 1978. The Referee concluded that in any event claimant had failed to provide a more definite date than March 1, 1978 and he held that the termination of compensation for time loss was properly made on that date.

The Referee found that the overpayment of temporary total disability was gratuitous; ORS 656.268, in his opinion, did not convincingly support a "set off". Therefore, he denied the Fund the right to "set off" the overpayment made claimant for time loss benefits.

Concerning the issue of non-referral of claimant for vocational rehabilitation, the Referee found no evidence that claimant had proven that he was a vocationally handicapped worker nor any evidence to justify a reversal or modification of the non-referral.

The Referee stated that a determination by him of the extent of claimant's left foot disability would be premature.

The Board, on de novo review, finds that the denial by the Fund on January 25, 1978 of claimant's neck disability should be set aside. There is sufficient medical evidence from Dr. Schachle to causally relate claimant's neck and shoulder problems to his foot problem. Also, the Board finds that although the claim was closed by a Determination Order which terminated compensation for temporary total disability on March 1, 1978 this Determination Order was not issued until May 2, 1978 and the Fund continued paying compensation for temporary total disability until the date it received the Determination Order. Thereafter, based on Dr. Wisdom's report of June 7, 1978 which stated that claimant's foot condition was not stationary, the Fund reopened the claim with commencement of time loss on April 19, 1978.

The Board concludes that the Fund has a right to offset the amount of $1,923.75; however, at this time claimant has received no award for permanent partial disability and there is no sum against which this amount can be offset. When claimant's claim is ultimately closed if an award for permanent partial disability is granted claimant the Fund will be entitled to offset the aforesaid sum against such award.

The Board agrees with the Referee that the compensation paid claimant for temporary total disability was properly terminated on March 1, 1978, based upon the medical reports received from Dr. Wisdom and Dr. Pasquesi.

The Board finds no reason to conclude that the decision of the Field Services Division in regard to vocational rehabilitation is improper.

ORDER

The order of the Referee, dated October 31, 1978, is modified.

The claimant's claim for a neck strain denied by the State Accident Insurance Fund on January 25, 1978 is hereby remanded to the Fund to be accepted for the payment of medical bills of $36, as provided by law.

The State Accident Insurance Fund is hereby allowed to offset against any future award for permanent partial disability claimant may receive for his September 15, 1977 industrial injury the amount of $1,923.75 which represents an overpayment of temporary total disability made by the Fund.

In all other respects the Referee's order is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with the hearing and this Board review in the amount of $100 for prevailing on the denial of responsibility for neck disability, payable by the Fund.

WCB CASE NO. 76-5766 May 10, 1979

VELMA R. BENTLEY, CLAIMANT
Bernard K. Smith, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Remand

On December 7, 1977 the Board entered an Order on Review affirming and adopting the Opinion and Order of the Referee, dated June 2, 1977, which had granted claimant an award for permanent total disability.

The State Accident Insurance Fund petitioned the Oregon Court of Appeals for judicial review and the Court issued its Opinion and Decision on February 20, 1979 which affirmed the Board and the Referee insofar as the award of permanent total disability but reversed that portion of the Board's Order on Review which awarded claimant's attorney as a reasonable attorney's fee for his services in connection with the Board review a sum of $100, payable by the State Accident Insurance Fund.

The Court found that no services had been performed by claimant's counsel in his behalf and, therefore, no fee was justified.

Pursuant to the Judgment and Mandate of the Court which was received by the Board on May 4, 1979, the Order on Review entered in the above entitled matter on December 7, 1977 is amended by deleting therefrom the fifth paragraph on page one thereof. In all other respects the aforesaid Order on Review is reaffirmed.

SAIF CLAIM NO. KD 358381 May 10, 1979

STANLEY A. LINDSLEY, CLAIMANT
Hayes Patrick Lavis, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Rescinding Own Motion Determination

On April 12, 1979 an Own Motion Determination was entered in the above entitled matter whereby claimant was awarded compensation for temporary total disability from April 26, 1978 through March 9, 1979, less time worked, and compensation equal to 30% loss of the right leg for an industrial injury sustained on July 14, 1955.

On April 24, 1979 the Board was informed by the State Accident Insurance Fund that the Fund's request for a determination was premature. Claimant's condition is not stationary and Dr. C.S. McLaughlin has tentatively scheduled surgery on the right knee consisting of a lateral closing wedge osteotomy of the proximal tibia. He advised the Fund that subsequent to the surgery claimant would be in a cast for approximately eight weeks and there would be an additional period of time required for physical therapy and rehabilitation.

The Fund requested the Board to rescind its order.

The Board, concludes, after reading Dr. McLaughlin's letter which was furnished to it by the Fund, that the request made by the Fund was premature and the Own Motion Determination dated April 12, 1979 should be rescinded.

The Own Motion Order entered on February 26, 1979 had provided that claimant's claim be accepted for the payment of compensation, as provided by law, commencing on May 26, 1978 and until the claim was closed pursuant to ORS 656.278 and awarded claimant's attorney as a reasonable attorney's fee a sum equal to 25% of the compensation claimant received as a result of the Own Motion Order and the ultimate closure of his claim. This Own Motion Order shall remain in effect.

IT IS SO ORDERED.

WCB CASE NO. 77-6211 May 10, 1979
WCB CASE NO. 77-6994

In the Matter of the Compensation
of the Beneficiaries of
CHARLES MAWHINNEY, DECEASED
Richardson, Murphy & Nelson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests Board review of the Referee's order which directed it to accept the claim for decedent's fatal heart attack and pay the beneficiaries compensation to which they were entitled by law and awarded claimant's attorney an attorney's fee of $1,800.

Decedent had been working for the Lake County Road Department assigned to signs and solid waste disposal when he suffered a heart attack on February 16, 1977. He was hospitalized about 9:00 p.m. and died on March 11, 1977 as a result of this heart attack. The decedent's widow and beneficiary, hereinafter referred to as claimant, filed a claim which was denied by the Fund on June 23, 1977 on the ground that decedent's work activity did not contribute materially to the coronary attack and further that the attack could not be an aggravation of a 1974 compensable myocardial infarction. The 1974 infarction left decedent with no residual problems. Decedent had been examined in 1975 and told he could return to heavy type work.

The admission chart of February 16, 1977 indicates that on February 15 decedent had been involved in loading some heavy tires onto a truck but had no pain or other difficulty while doing it. Decedent had awakened from a sound sleep about 2:00 a.m. February 16 with severe left precordial chest pain for which he took five or six nitroglycerin pills. The pain gradually subsided but returned shortly after he went to bed on the evening of February 16. The nitro did not relieve the pain at this time and decedent was hospitalized by Dr. Kliewer.

A report from Dr. Bomengen also referred to decedent's loading of heavy tires the day before he had been admitted to the hospital and indicated that he had been able to do so without pain, however, he did indicate that decedent had experienced some shortness of breath. Dr. Hawn, who had examined decedent after his earlier myocardial infarction, was of the opinion that decedent's work activity probably did not contribute materially to the 1977 coronary accident.

On May 16, 1978 the Fund furnished Dr. Hawn an additional history that decedent had lifted a tire or two with no complaints on the day he had been admitted to the hospital, had arrived home at about 5:30, eaten dinner and had complained of pain. Dr. Hawn was also told that decedent had watched T.V., taken some nitro pills without relief and had complained of inability to breathe and had been taken to the hospital around 9:00 p.m. that evening. Based upon this additional information, Dr. Hawn still felt that the infarction was not caused by decedent's work activity earlier that day.

Decedent's handwritten diary for February 15 states, among other things, that he had picked up two flat tires that afternoon. His diary for the following day recites that he had picked up three tires in the morning and later picked up a flat tire in the afternoon. Decedent had been working approximately 100 miles from his home at the time.

There was a letter dated July 27, 1977 which was signed by claimant but it was doubtful whether it was written by her. This letter states that decedent had tried to load five large heavy road grader tires alone by rolling them, one at a time, up a plank and onto a bed of a pickup. As decedent had been loading the last tire, according to the letter, it began to roll back on him and he had seized it and tried to hold it and push it back on the truck. He had later told his wife that when he did so it felt like he'd torn something loose in his chest. The claimant stated when decedent had arrived home that night he had been in pain and his color was grayish; she wanted to call the doctor but decedent said no and took some nitro pills and rested. He did not eat any dinner and about 9:00 he complained of inability to breathe. The claimant called the hospital and the decedent was taken there immediately.

Dr. Griswold, a specialist in cardiology, at the hearing gave his expert opinion that the work exertion in lifting the heavy tire had materially contributed to the heart attack. The Referee found that this opinion was clearly persuasive provided the exertion that Dr. Griswold assumed had happened actually had happened.

The Referee found there were some obvious discrepancies among the reported medical histories, the decedent's diary, the letter signed by the claimant and her testimony and that of decedent's friend, Mr. Albertson, who testified to the loading of the tires. The Referee found that the credibility of the claimant and Mr. Albertson was very important. Even though their testimony relating to what the worker had stated about loading the tires was hearsay, nevertheless, such testimony is admissible in Worker's Compensation proceedings. The alleged incident occurred while decedent had been alone therefore there was a need for such type of testimony from others. The Referee further found that decedent's statements were made under circumstances which would not suggest untrustworthiness.

The Referee concluded that a compensation claim need not be proven beyond any reasonable doubt and, after hearing and observing the claimant and the witness, Mr. Albertson, he found that they were credible witnesses and, considering the positive detailed nature of their testimony, concluded that the compensability of the claim had been established by the preponderance of the evidence. He ordered the claim accepted.

The Board, on de novo review, finds the claim is not compensable. As indicated by the Referee, there are obvious discrepancies among the reported medical histories and other testimony. There is also sufficient conflict between the testimony of claimant and Mr. Albertson and the testimony of other witnesses to raise substantial doubt. Unless reliance is placed solely on the testimony of claimant and Mr. Albertson and all of the other testimony is completely disregarded, compensability has not been established.

The Board concludes that a preponderance of the evidence indicates that the work which decedent had been performing did not involve substantial heavy lifting. The medical evidence indicates that the myocardial infarction was from natural causes. Dr. Hawn stated that it was not probable that decedent's work activity contributed materially to the coronary accident. Dr. Griswold's opinion was that if the decedent had had no pain at the time of lifting the tire on February 16, or within 30 to 60 minutes thereafter, no heart attack was precipitated by that episode.

Only claimant and Mr. Albertson testified that decedent had lifted more than one tire on February 16; the decedent's handwritten diary indicates he had picked up "a flat tire" at the pit. Only claimant and Mr. Albertson testified that decedent had picked up five large grader tires which he had loaded himself, leaving one lying on the ground because he had been unable to finish the job.

The Board concludes that although the hearsay testimony of claimant and Mr. Albertson was allowable in this Workers' Compensation proceedings, nevertheless, in this instance the preponderance of the evidence is in direct conflict with such testimony.

The Board finds no conflict in the statements contained in decedent's diary, the testimony of the defense witnesses, and the history of the doctor. It concludes that the claimant failed to establish by a preponderance of the evidence that decedent had suffered a compensable injury which ultimately resulted in his death. Therefore, the denial was proper.

ORDER

The order of the Referee, dated December 7, 1978, is reversed.

The June 23, 1977 denial issued by the Fund is affirmed.

DOROTHY E. REAVIS, CLAIMANT
Sahlstrom & Lombard, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which approved the denial by the State Accident Insurance Fund on March 2, 1978 of her claim for aggravation.

Claimant, at that time a 50-year-old nurse's aide, had an onset of severe pain in her low back and left hip on June 14, 1974 when a patient flipped and she grabbed him to keep him from falling out of bed. Claimant lost some time from work and then returned to her regular employment on July 17, 1974. She continued to work until she was married on November 30, 1974; she has not worked since.

Claimant has a tenth grade education and in 1972 she completed a six-week nurse's aide training course while living in Texas. For most of her adult life claimant has been a housewife. She worked for a few months as a nurse's aide in Texas prior to her employment with the defendant (Douglas Community Hospital) which commenced on February 12, 1973.

Claimant testified she had never fully returned to her pre-injury status of health and that this was true during the several months she was working for defendant prior to her marriage in November 1974. Claimant's husband testified that when he first met claimant she told him about the industrial injury in August 1974, but she did not complain particularly about any physical condition and he believed that she was quite healthy, except that just prior to the marriage she had been "down in the back" to the point that postponement of the marriage had been considered.

The testimony of both claimant and her husband persuaded the Referee that claimant has had a substantial worsening of her back condition since the Determination Order of May 2, 1975 which had awarded claimant compensation for temporary total disability only from June 15, 1974 through July 16, 1974. The basic question to be answered was whether this industrial injury was a material contributing cause of the worsening.

Claimant was released by Dr. Gombart on July 17, 1974 and she did not seek further medical treatment or evaluation until March 21, 1975 when she was examined by Dr. Smith, an orthopedic surgeon. He diagnosed a sprain of the lumbosacral spine superimposed on pre-existing degenerative osteoarthritis at the lumbosacral level with mild persisting symptomatology. At the time of this examination claimant weighed 215 pounds and Dr. Smith recommended that she go on a diet and take other conservative measures for the care of her back; he felt that her condition was stationary. After this evaluation, the Determination Order of May 2, 1975 was entered.

On January 26, 1978 claimant was again examined by Dr. Smith at the request of her attorney. Dr. Smith was asked to determine whether there had been any deterioration in her physical condition since the closure of her claim on May 2, 1975 and, if so, was such deterioration the result of her June 14, 1974 injury. Dr. Smith's impression was increased disability arising from the low back; he felt that claimant was having a lot more pain and showed considerable restriction of back motion. She also had pain with hip motion and tenderness about the back and legs. None of these findings were present when claimant was examined by Dr. Smith in 1975. He found a certain amount of functional overlay which might have developed since he had seen her in 1975. He also stated that claimant assured him that she would very much like to return to work and that she had lost 35 pounds. Dr. Smith suggested that claimant be seen at the Callahan Center for both rehabilitation and training in the proper use of her back and for vocational evaluation.

On March 7, 1978 the Fund denied claimant's claim for aggravation on the grounds that her present physical status was the result of an exacerbation of a pre-existing underlying osteoarthritis of the lumbosacral spine, not related to the injury of June 14, 1974.

Claimant testified that following her marriage she was very active in taking care of a flower garden and engaged in this activity for some six months after November 1974 but then had to substantially reduce her gardening because of back and hip pain. Between 1975 and 1978 she developed increasing difficulty with walking and riding a bicycle.

Claimant began receiving treatment from Dr. Brauer in February 1975. On November 14, 1977 Dr. Brauer reported that he did not have medical information of claimant's injury in 1974 and it would be speculative on his part to say that her problems at the present time were related to that injury. Later Dr. Brauer stated that he could not say with absolute certainty that claimant's present condition had been aggravated by the old injury but he would suspect that it was probably contributed to in some degree even though this could have occurred without injury.

On April 21, 1978 Dr. Smith stated that he felt claimant's initial symptoms were brought on by her 1974 industrial injury but that the persistance of such symptoms was due to her underlying osteoarthritis and obesity. He found it more likely that her recent exacerbation of symptoms was caused by the osteoarthritis along with the normal stresses of daily life rather than to the 1974 injury.

The Referee found that claimant was asymptomatic prior to the industrial injury, but thereafter she became symptomatic and remained so up to the date of the Determination Order. Her condition worsened subsequent to the entry of that Determination Order. He found this strongly suggested a significant worsening of the underlying condition because of the obvious contrast of being pain-free and suffering a substantial disabling level of pain, but it appeared to be a matter of comparing symptomatology only.

The Referee relied strongly on Weller v. Union Carbide, 35 Or App 355, wherein the Court commented:

> "We now hold that a worsening (purposely avoiding the term of art 'aggravation') of symptoms is not compensable. Only the onset or significant worsening of injury or disease arising out of, i.e., caused by, employment can be compensable. A worsening of symptoms is only significant to the extent that it supports an inference that employment caused a worsening of the underlying injury or disease."

The Referee, based on the medical reports, concluded that the inference that claimant's injury was a significant factor in worsening her underlying disease could not be supported. According to the principle set forth in Weller he held that the claim was not compensable and approved the denial.

The Board, on de novo review, finds the medical records support a conclusion that the industrial injury may have had some effect but it was so minute that it did not meet the standard of a material contributing cause and it finds such a conclusion would be highly speculative. The Board concludes that the claimant has failed to carry the burden of proof that she has sustained a compensable aggravation.

ORDER

The order of the Referee, dated September 22, 1978, is affirmed.

SAIF CLAIM NO. C 383267 May 10, 1979

AUGUST E. STUBER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury to his back on July 25, 1972. His aggravation rights have expired and he has requested the Fund to reopen his claim for further benefits.

The Fund, on April 30, 1979, forwarded numerous medical reports to the Board with the statement that it would not oppose claim reopening.

Dr. Andersen, in his February 14, 1979 report, indicated that claimant had been complaining intermittently of pain until February 14. On that date, while he was climbing down a ladder, he turned around, experiencing sudden sharp, severe pain in his neck radiating into his right upper extremity. The doctor indicated that if he did not improve he would be hospitalized for a myelography. He felt claimant's problem was a chronic herniation which was aggravated by the ladder incident.

The myelogram was done on February 27, 1979. Dr. Andersen's follow-up report indicated the myelogram was within normal limits and claimant had not shown any organic lesion for his present complaints. He felt claimant should return to work, although claimant indicated he could not because of the pain he experienced when riding a truck or cat.

The Board, after considering all of the medical evidence before it, concludes that claimant's claim should be reopened by the Fund for the payment of compensation, as provided by law, from February 27, 1979 and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. A 716728 May 11, 1979

RICHARD L. CASEDAY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable left eye injury on December 4, 1958. As a result, a cataract operation was performed on April 1, 1959. The claim has been closed on March 14, 1960 with an award for 50% loss of vision of the left eye. His aggravation rights have expired and he has requested the Fund to reopen his claim for further benefits.

The Fund, on April 30, 1979, forwarded certain medical reports to the Board and stated it would not oppose claim reopening.

In his April 13, 1979 report, Dr. Emanuel Tanne referred to the 1959 cataract surgery and stated that in July 1978 claimant suffered a retinal detachment that was treated surgically. The doctor noted that retinal detachments would occur more frequently after cataract extraction and there was a probable relationship between the retinal detachment and the history of cataract disease secondary to the incident of 1958. Dr. Tanne indicated that claimant's left eye condition was untreatable and was definitely related to his 1958 industrial injury.

The Board, after considering all of the medical evidence before it, concludes that claimant's claim should be remanded to the Fund to be accepted and for payment of benefits as provided by law commencing April 13, 1978 and until closed pursuant to ORS 656.278, less time worked.

IT IS SO ORDERED.

WCB CASE NO. 77-6161 May 11, 1979

MARIANO DeMELO, CLAIMANT
Walter Hammond, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which granted claimant 20.25° for 15% loss function of his left foot. Claimant contends this award is not adequate.

Claimant, a carpenter, suffered a compensable injury to his left ankle on August 11, 1976. Dr. Potter diagnosed a fracture of his left talus. On November 18, 1976 an arthrotomy was performed to remove loose osteochondral fragments in the left ankle joint.

On April 14, 1977 Dr. Potter reported that claimant was medically stationary. He found claimant had excellent range of motion in the ankle and was not suffering any pain. He opined that claimant could return to his regular work.

On May 25, 1977 the claim was closed by a Determination Order which awarded claimant compensation only for temporary total disability.

Claimant returned to work, but had some difficulty and was seen by Dr. Samuel, a chiropractic physician, on November 15, 1977. The claimant related his medical history to Dr. Samuel, who felt claimant's left foot and ankle were gradually improving, but he did not predict a complete recovery. He felt an adequate prognosis could be given in a few weeks. Dr. Samuel saw claimant ten times from November 15, 1977 to January 24, 1978.

At the request of the Fund, Dr. James examined claimant. He reported on March 27, 1978 that he felt claimant had some mild permanent impairment in the left ankle resulting from the industrial injury of August 11, 1976. He did not feel that there was any need for further care or treatment at the time of his report.

He opined that there was a possibility in the future that claimant might have a mild degree of degenerative arthritis as a result of his industrial injury. Dr. James stated that claimant was medically stationary and would probably have 10-15% permanent physical impairment in his left ankle resulting from the fracture. Based upon Dr. Potter's operative report, Dr. James felt that the rest of the talus articular surface and tibial articular surface at the tibiotalar joint was intact and he doubted that the arthritis was going to be a significant problem.

In May 1978 Dr. Samuel informed the Fund that claimant had reached a stationary status as a result of his accident and active treatment would be discontinued.

Claimant has returned to his prior work as a carpenter. He testified he does all types of carpentry work. He does not have difficulty with walking on flat surfaces, but walking on rough or uneven surfaces causes his ankle to hurt and by the end of the day his foot gets numb. Climbing ladders causes his ankle to ache and go numb. He feels he has to concentrate on moving quickly and worries about losing his balance.

The Referee found there was some impairment in claimant's foot, primarily in the ankle, which gave him difficulty and has restricted the use of his foot. Dr. James had rated this impairment at 10-15% and the Referee found nothing in claimant's testimony nor in Dr. Samuel's reports which would indicate any greater impairment.

The reports of the examinations of claimant done by Dr. James and by Dr. Samuel and the treatment received from Dr. Samuel were not available to the Evaluation Division of the Workers' Compensation Department at the time the claim was closed. Only Dr. Potter's closing report was available which indicated no permanent disability.

The Referee concluded, based on the later reports from Dr. James and Dr. Samuel, that claimant should be awarded compensation equal to 15% of the maximum allowable by statute for his scheduled disability.

The Board, on de novo review, concurs in the findings and conclusions of the Referee.

ORDER

The order of the Referee, dated July 12, 1978, is affirmed.

WCB CASE NO. 77-7732 May 11, 1979

SHIRLEY ANN FREEMAN, CLAIMANT
Arthur R. Barrows, Claimant's Atty.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

The claimant seeks review by the Board of the Referee's order which approved the carrier's denial of claimant's claim for a low back injury.

On November 26, 1975 the claimant sustained a neck injury while employed as a laborer. The claim for his injury was accepted by the carrier as a non-disabling injury.

Claimant was examined at Hermiston Medical Center on December 8, 1975. The Clinic Record notes of that date indicate claimant "Fell at work November 26, 1975 and hurt back and neck". The chief complaints noted relate to a non-industrial infection and treatment was for that condition. In a report dated March 26, 1976 T. Douglas Flaiz, M.D., diagnosed a cervical strain. Dr. Flaiz reported the initial impression based on the examination of December 8, 1975 was that the claimant's headache and complaints of neck pain could have been caused in part by the severe infection she had when first examined. He went on to report that since the claimant was still complaining of neck pain and headaches as of March 25, 1975 the pain is "most likely due to the injury of November 26, 1975". The carrier, shortly after receipt of this report and a report of injury from the employer, accepted a claim for cervical strain.

After the injury of November 26, 1975 the claimant continued to work for the same employer as a laborer. On May 23, 1976 she sustained a compensable injury to her right foot; this was a "disabling injury" with time loss commencing May 23, 1976.

Shortly after the May 23, 1976 right foot injury the claimant moved to Idaho. She was treated there for her foot injury by Ronald Panke, M.D. Dr. Panke reported October 26, 1977 that claimant had been at the Doctor's Clinic and examined by several

doctors for "headache, neck pain, back pain". His impression was that claimant suffers from a "chronic recurrent low back strain". Dr. Panke does not relate the low back complaints to the November 26, 1975 accident. He reported he could neither relate nor not relate the complaints to that accident.

William H. Slaughter, M.D., examined claimant at Dr. Panke's request. Dr. Slaugher reported on September 14, 1977, "I feel that this lady has a chronic, recurrent, low back strain, . . .". He does not relate her condition to the accident of November 26, 1975; in fact, he makes no comment on the cause of her condition except by inference by his statement, "I think she should be encouraged to lose weight".

The Board, on de novo review, concludes that the medical evidence fails to establish a connection between claimant's injury of November 26, 1975 and her low back condition. The burden of proof is on the claimant; she must show by a preponderance of the medical evidence that the fall of November 26, 1975 caused her low back condition. In this case, none of the physicians found a medical relationship beyond a mere possibility.

ORDER

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

SAIF CLAIM NO. KD 99866 May 11, 1979

ROSCOE GEMMELL, CLAIMANT
SAIF, Legal Services, Defense atty.
Own Motion Order

On April 30, 1979 the Fund forwarded to the Board several medical documents relating to the above case and indicated that Dr. Mayhall had requested that claimant's claim for a left knee injury of January 4, 1962 be reopened.

In his December 14, 1978 report, Dr. Mahoney found substantial crepitance in the left knee and felt that there was an effusion which could account, in part, for the swelling of the knee.

Dr. Mayhall indicated on January 10, 1979 that claimant's left knee condition was moderately to severely disabled and he felt claimant should undergo a program of physical therapy to strengthen the knee and possibly avoid surgery. He later indicated claimant would need reconstructive surgery on the knee, probably in the form of total knee or hemi-arthroplasty. Physical therapy had not benefited claimant much at that point.

On March 2, 1979 Dr. Mayhall again indicated a total knee arthroplasty should be done and stated that a resurfacing procedure was scheduled for March 26 to give claimant greater range of motion and decrease his pain.

The Fund advised the Board it would not oppose reopening of claimant's claim.

The Board, after fully considering the medical evidence before it, concludes that claimant's claim should be reopened for the surgery recommended by Dr. Mayhall.

ORDER

Claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation to which claimant is entitled commencing the date claimant is hospitalized for the March 26, 1979 surgery and until the claim is closed pursuant to ORS 656.278.

CLAIM NO. 05X-014736 May 11, 1979

WINFRED E. HUSK, CLAIMANT
Own Motion Order

On April 20, 1979 claimant requested the Board to exercise its own motion jurisdiction and reopen claimant's claim for an industrial injury sustained on July 7, 1971. Claimant's aggravation rights have expired. Claimant has made several prior requests to the Board, all of which have been denied.

Attached to claimant's petition were reports from different doctors indicating claimant was complaining of low back and left leg pain. Most of the medical findings were normal and there was no indication that claimant's condition had worsened since the last closure of his claim.

The Board, after giving full consideration to the medical reports in the record, concludes that there is insufficient medical evidence to justify reopening claimant's claim at this time and, therefore, his request that the Board reopen his claim for his 1971 industrial injury should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-5361 May 11, 1979

FRANCIS JOHNSON, CLAIMANT
Heisler & Van Valkenbargh, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn.

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

WCB CASE NO. 77-4402 May 11, 1979

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

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which set aside its denial of claimant's claim for a hearing loss and remanded the claim to it for acceptance and for payment of compensation as provided by law.

Claimant is 42 years old and has worked for the employer for approximately 10 years, 8-1/2 of which was spent working around the chipper. The noise level in the area of the chipper was outside the permissible limits set by OSHA. In order to protect himself claimant wore muff type hearing protectors at all times that he was working around the chipper. The muff type hearing protectors, according to claimant, were old when they were issued to him. He testified they did not fit well, therefore, they did not eliminate all of the noise.

Claimant testified he also tried wearing old hard type rubber plugs along with the muffs but they irritated his ears. Approximately three years prior to the termination of his employment, claimant was given some sponge foam plugs which, when worn with the muffs, were much more effective and caused no irritation to his ears.

Claimant contends that his hearing loss occurred between 1968 and 1976.

Dr. Ingram examined claimant in February 1976 and reported on February 13 that claimant had apparently worked in a noisy area at the mill for a long time but had been careful to wear "earmuffs" at all times. Claimant noticed some difficulty with speech discrimination. Dr. Ingram performed an audiogram which showed a mild high-frequency sensorineural loss in each ear enough to cause some difficulty with discrimination since the consonants are involved in these frequencies. Additional years of exposure to this intensity of noise might decrease claimant's hearing acuity in the high frequency range and Dr. Ingram recommended claimant work in a less noisy area, if practical.

On June 16, 1977 Dr. Ingram gave claimant's attorney basically the same information he had furnished to the employer on February 13, 1976. He further stated that high intensity noise will, at times, cause the hearing loss which claimant has. It could be either a cause or aggravation of his present hearing problem but he had no way of stating with any certainty that such was the case.

On July 22, 1977 Dr. Ingram again wrote claimant's attorney, stating that after reviewing claimant's history he found that claimant believes he has a slight increase in difficulty hearing since the last examination. The latest examination showed relatively normal ear drums and canals and the audiogram is very similar to the one taken in February 1976. It was his impression that claimant was not showing a progression of his hearing loss. His speech discriminations scores showed excellent discrimination with amplification. Such tests are done in a quiet room and do not determine speech discrimination with background noise. People with this type of hearing loss primarily have difficulty with their hearing in crowds where there is background noise.

On August 25, 1975 the Fund was advised by Dr. Ingram that claimant had a fairly typical mild high-frequency hearing loss and he doubted that additional testing would be of any benefit as far as diagnosis or treatment of the patient was concerned although if there was a problem of litigation he thought additional independent testing would be indicated.

On September 28, 1977 the Fund denied claimant's claim on the grounds that there was insufficient evidence to relate claimant's hearing loss to his work activities.

Claimant was later examined at the Eugene Hearing and Speech Clinic by an audiologist who found claimant had a bilateral sensorineural mild to moderate high-frequency hearing loss. He felt the test results were consistent and were a good indication of hearing ability. Based upon the evidence he had received he felt claimant had been exposed to high noise levels and because he had not worn appropriate ear protection to diminish the noise levels claimant would lose a certain degree of his hearing because of noise exposure.

Claimant testified that the noise around the chipper in the past seven years had been cut down as a result of a wall being placed there by the company. Claimant also testified that he was at the chipper several times per hour to insure that it was operating properly. He spent the rest of his time in a work area within 60 feet of the chipper. He said that the foam plugs and the fillers of the earmuffs were never changed although he did change the rubber lining around the muffs a couple of times when they hardened or wore out.

Claimant said he developed a ringing sensation a few years prior to filing a claim and that he has had no other job or activity which exposed him to any excessive noise level. He does own a power saw and he does cut his own wood but he states he uses plugs for his ears when he cuts for a long period of time.

The Referee found that the evidence was overwhelming that claimant was subjected to an extensive amount of noise and that although earmuffs were provided by the employer they were probably inadequate to give the necessary protection. He thought that perhaps there had been a violation of the OSHA standards insofar as the noise level although he did find that the standards relating to ear protection had been met.

The Referee concluded the medical evidence showed that claimant definitely suffered a hearing loss of some sort which was probably either caused, or aggravated, by exposure to noise at work and, therefore, the denial by the Fund must be reversed.

The Board, on de novo review, finds that the medical evidence consists of several reports from Dr. Ingram, who diagnosed a mild high-frequency sensorineural hearing loss in each ear, and tests made by the Eugene Center for Hearing and Speech, which supported Dr. Ingram's diagnosis. None of this evidence causally related claimant's "hearing loss" to the noise exposure on claimant's job. Dr. Ingram reported noise could be a cause or aggravation of claimant's present hearing problems but stated he had no way of knowing with any certainty that it was.

The Board finds that at most there could be an inference that the noise to which claimant was exposed on the job caused his hearing loss. This case presents a complex medical problem which must be resolved by expert medical evidence.

The Board concludes that claimant has failed to meet his burden of showing by a preponderance of the expert medical evidence that the noise to which he was exposed at his job caused his hearing loss. Therefore, the denial of claimant's claim for a work-related hearing loss should be upheld.

ORDER

The order of the Referee, dated July 12, 1978, is reversed.

The denial of the Fund of claimant's claim for a hearing loss is hereby affirmed.

WCB CASE NO. 78-889 May 11, 1979

STEVE PATTERSON, CLAIMANT
Brown, Burt & Swanson, Claimant's Attys.
Michael J. Hansen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which affirmed the Fund's denial of December 23, 1977 of all responsibility for all pre-existing unrelated conditions, including schizophrenia, stating it was solely responsible for claimant's left forearm condition. The Referee further granted claimant an award of 30° for permanent loss of the left forearm.

Claimant sustained a compensable injury on January 15, 1975 when he caught his left hand between the belt and a pulley of a small meat slicer machine. Claimant subsequently developed a neuroma which was surgically excised.

Since this injury claimant has been examined and/or treated by numerous physicians. In addition to surgical procudures he has received extensive conservative treatment. The claim has been reopened on several occasions.

During the course of claimant's treatment it was discovered that he suffered from a serious psychological disorder, incipient paranoid schizophrenia. This condition became apparent in March 1977. Claimant has a long history of severe emotional problems, with suicidal attempts.

Dr. Knox, a neurologist, and Dr. Newman, claimant's psychiatrist, find claimant's disabling mental state is related with the industrial injury significantly exacerbating his pre-existing mental state.

Dr. Halferty, a psychologist at the Disability Prevention Center, and Dr. Colbach, a psychiatrist, disagree. Dr. Halferty opined claimant's mental condition is of longstanding duration with little or no relationship to the injury. Dr. Colbach opined that schizophrenia is some sort of brain disease whose etiology is unknown. Schizophrenia is progressive when severe with this progression unrelated to any external factors. Dr. Colbach further stated that in all his reading, there was no precedent for this illness to be work-related.

The Referee found claimant had failed in his burden to prove that his claim for a psychological condition was compensable. The Referee was most persuaded by the opinion of Dr. Colbach and found claimant's underlying incipient paranoid schizophrenia was not permanently aggravated by the industrial injury. He affirmed the Fund's denial.

The Referee further found claimant entitled to 30° loss of the left forearm.

The Board, on de novo review, finds this case falls squarely under Patitucci v. Boise Cascade Corporation, 8 Or App 503. In order to be compensable, psychopathology need not be caused by the industrial injury; it is sufficient that it was exaggerated to a degree that would not have occurred but for the injury. In the case before us, the injury did not cause the incipient paranoid schizophrenia but the injury did cause a material worsening of the condition that would not have occurred but for this injury.

Based on the opinions of Dr. Newman, claimant's psychiatrist, the Board finds that the worsened psychological condition is compensable and is the responsibility of the State Accident Insurance Fund.

The Board further finds that the Determination Order of July 11, 1978 should be set aside as neither Dr. Knox nor Dr. Newman released claimant for work, nor did either physician find the psychological disorder to be medically stationary.

ORDER

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

The Determination Order of July 11, 1978 is hereby set aside as being premature.

Claimant's claim for a psychological condition arising out of his industrial injury of January 15, 1975 is remanded to the Fund for acceptance and payment of compensation as provided by law.

The Fund's denial of December 23, 1977 is reversed.

Claimant's attorney, Mr. Keith Swanson, is hereby granted a reasonable attorney's fee for his services at hearing level in the amount of $1,000, payable by the Fund.

Claimant's attorney, Mr. Michael Hansen, is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $500, payable by the Fund.

WCB CASE NO. 77-2866 May 11, 1979

PATRICIA PEMBLE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Dean M. Phillips, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the order of the Referee which remanded claimant's claim for a cervical condition, including left shoulder and left arm involvement, for acceptance and the payment of compensation as provided by law. He affirmed the denial of claimant's claim for aggravation by Liberty Mutual, ordered the Fund to make the necessary monetary adjustments with Liberty Mutual pursuant to the .307 order of June 2, 1977. The Referee assessed a penalty of 25% of the time loss benefits due and owing claimant from April 4, 1977 to April 28, 1977 against the Fund and ordered the Fund to pay claimant's attorney an attorney's fee of $1,250 on the denied claim, plus $75 pursuant to ORS 656.262(8) and 656.382.

Claimant was working for Albany Frozen Foods weighing french slice beans and had a gradual onset of neck swelling and shoulder pain on September 13, 1976. Liberty Mutual Insurance Company was the carrier for this employer.

Dr. Endicott diagnosed strain of the left trapezius of the shoulder. The claim was accepted as disabling. Claimant was subsequently examined by Dr. Bassinger who released her to regular work on October 9.

A Determination Order of February 24, 1977 granted claimant time loss only.

Claimant did not return to Albany Frozen Foods, in fact, did not return to employment for a while and spent some time in Arizona, Washington and California. Claimant saw no physician from October 3, 1976 to March 28, 1977.

On March 27, 1977 claimant went to work for Oregon Freeze Dry, whose workers' compensation carrier was the Fund. Claimant developed a return of her symptoms and was working on the sealer, which was also light employment. Claimant quit work on April 1, 1977.

On April 1, 1977 Dr. Bassinger examined claimant and opined that assembly line work caused her problems. Claimant was treated conservatively. On May 3, 1977 Dr. Bassinger opined, based on a reasonable medical probability, that claimant's original injury was a direct result of her work at Albany Frozen Foods; Oregon Freeze Dry employment was an exacerbation of this original injury and a definite significant contributing cause to her present symptoms.

On May 11, 1977 Liberty Mutual denied claimant's claim for aggravation.

On June 2, 1977 the Board issued its .307 order designating Liberty Mutual as the paying agent.

On June 1, 1977 Dr. Bassinger had released claimant for regular work.

An October 10, 1977 Determination Order granted claimant time loss from April 1, 1977 through May 31, 1977 and temporary partial disability from June 1, 1977 through June 29, 1977 and an award of 32° for 10% unscheduled disability.

By letter dated November 1, 1977 claimant's attorney wrote to Liberty Mutual informing them claimant had had surgery on October 27, 1977 performed by Dr. Gerstner. Claimant's attorney requested that the carrier reopen the claim.

On November 8, 1977 the carrier responded stating it was extremely strange claimant had an operation and that claimant's attorney's letter was the carrier's first knowledge of it with no medical support attached.

The carrier, Liberty Mutual, was furnished on November 22 Dr. Gerstner's report. That report indicated the doctor saw claimant on September 28 as a referral from Dr. Bassinger. At that time Dr. Gerstner diagnosed bilateral thoracic outlet compression syndrome with the left being symptomatic. On October 27 claimant underwent a left first rib re-section. The doctor opined that the September 1976 injury was the initiating injury. The second injury aggravated her condition and brought claimant to surgery.

On December 16, 1977 Liberty Mutual issued its denial.

On January 24, 1978 the Board issued its second .307 order, this time designating the Fund as the paying agent.

Claimant was examined by the Orthopaedic Consultants on January 16, 1978. The physicians found claimant's condition stationary but she was precluded from her regular occupation. Claimant's disability was rated as minimal.

Dr. Bassinger was deposed and testified that claimant's being asymptomatic after the first injury was due to her relative inactivity. In his opinion, up to April 1, 1977, claimant had had an injury from which she did not recover. He felt all of her problems stemmed from the September 1976 industrial injury.

Dr. Gerstner was deposed and he testified that under a reasonable medical probability claimant's symptoms were caused by her September 1976 industrial injury. When asked if the April 1, 1977 injury was a new injury, he replied that claimant's return to work aggravated her thoracic outlet syndrome. There was no new injury. He testified from September 1976 onward claimant's condition was progressive as outlet syndromes always are. He indicated claimant was released to work on January 30, 1978.

The first hearing was held on August 27, 1977 and an Opinion and Order of Referee Johnson remanded the claim to the Fund and awarded penalties and attorney's fees against the Fund, affirmed the denial by Liberty Mutual, and ordered the Fund to reimburse Liberty Mutual pursuant to the .307 order.

The Fund then requested reconsideration and by an order of February 14 the Opinion and Order was suspended. Meanwhile on January 24 a .307 order was issued designating the Fund as the paying agent. On March 28 an order was issued by the Referee consolidating the two claims for docketing. On May 3, 1978 the second hearing was held. The parties stipulated at hearing that time loss was owing from April 1, 1977 through January 30, 1978. The Fund paid time loss from October 27, 1977 through November 24, 1977 but made the payment on April 11, 1978. Liberty Mutual had time loss owing from the surgery date to December 16, 1977, the date of its denial. The Fund, on the other hand, ignored the .307 order of January 24, 1978.

The Referee then ordered what is detailed in the first paragraph of this order.

The Board, on de novo review, finds, based on the medical opinions of Dr. Bassinger and Dr. Gerstner, that claimant's claim is compensable as an aggravation and would reverse the order of the Referee.

ORDER

The order of the Referee, dated January 19, 1978, is reversed.

The Determination Order of October 10, 1977 is hereby set aside as being premature (per the stipulation of the parties).

Claimant's claim of aggravation is hereby remanded to Liberty Mutual Insurance Company, to be accepted and for the payment of compensation as provided by law, commencing April 1, 1977.

Liberty Mutual is hereby ordered to pay compenstion for temporary total disability from August 7, 1977 (when it terminated time loss payments) through October 26, 1977 and a penalty of 25% on said compensation for its unreasonable resistance to the payment of compensation for its failure to comply with the .307 order.

Liberty Mutual is further ordered to pay temporary total disability compensation from October 27, 1977 (the date of claimant's surgery) to December 16, 1977 (the date of its denial) and a penalty of 25% on said amounts for unreasonable resistance. Liberty Mutual is further ordered to pay claimant's attorney a reasonable attorney's fee of $125.

The Fund is hereby ordered to pay compensation for temporary total disability from January 24, 1978 (the date of the .307 order) to January 30, 1978 (when claimant was found to be medically stationary) and a penalty of 25% on said amount for unreasonable resistance in failure to comply with the .307 order.

The Fund is further ordered to pay a penalty of 25% on compensation for temporary total disability from October 27, 1977 (the date of claimant's surgery) through November 24, 1977 (the date it terminated benefits) and is further ordered to pay 25% of temporary total disability from November 24, 1977 through January 30, 1978 (when claimant's condition was medically stationary) for its unreasonable resistance to the payment of compensation. The Fund is further ordered to pay claimant's attorney a reasonable attorney's fee of $125.

The Fund and Liberty Mutual are instructed to make whatever monetary adjustments are necessary in accordance with this order.

The attorney fee granted by the Referee at the hearing level of $2,000 is hereby payable by Liberty Mutual.

Claimant's attorney is hereby granted, as a reasonable attorney's fee for his services at Board review, the sum of $100, payable by Liberty Mutual.

SAIF CLAIM NO. YC 306439 May 11, 1979

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

On April 17, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on May 28, 1971. Claimant's claim was first closed on June 9, 1971 and his aggravation rights have expired.

Claimant's petition indicated that he had undergone surgery on his left knee on March 29, 1979. He attached a statement from the Fund authorizing this surgery and attributing it to claimant's 1971 industrial injury.

On April 30, 1979 the Fund forwarded to the Board all the medical reports pertinent to the matter and indicated it would not oppose reopening of claimant's claim.

The Board, after considering the evidence before it, concludes that claimant's claim should be reopened for payment of benefits relating to his May 1971 industrial injury.

ORDER

Claimant's claim is hereby remanded to the State Accident Insurance Fund for the payment of compensation, as provided by law, commencing on the day claimant entered the hospital for his March 29, 1979 surgery and until the claim is closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 76-4037 May 15, 1979

ARTHUR L. ANDERSON, CLAIMANT
Richard A. Carlson, Claimant's Atty.
Gearin, Landis & Aebi, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order issued on March 30, 1977 whereby claimant's award was increased to 160° for 50% unscheduled disability, ordered the defendant to reimburse claimant for the $33 which claimant had paid to Dr. Darnell and to pay claimant's attorney an attorney's fee of $50.

Claimant, who was 61 years old at the time, sustained a compensable injury on May 6, 1975 while lifting a lawn mower from a work bench. Claimant bent over and was unable to straighten up. He was first seen on May 8, 1975 by Dr. Woodmansee, who diagnosed muscle strain and hospitalized claimant in June 1975. While claimant was in the hospital he was seen by Dr. John Nelson for a neurological consultation. Claimant's condition did not improve and Dr. Nelson referred him to Dr. Fry for an orthopedic consultation.

On March 25, 1976 Dr. Darnell reported that claimant was being treated by him for the control of diabetes and high blood pressure. He stated that claimant's low back pain did not cause the high blood pressure, but it was contributing to some extent to it because of nervous anxiety, pain and concern over claimant's ability to return to work.

On April 23, 1976 claimant was examined by three physicians at the Orthopaedic Consultants. Their diagnosis was chronic lumbosacral muscle and ligamentous strain, superimposed upon pre-existing osteoarthritis of moderate degree, with narrowing of intervertebral joint spaces. They also diagnosed obesity, diabetes mellitus and hypertension, all unrelated to the injury. They felt claimant's condition was stationary, but that he could not return to his former occupation even with limitations. It was believed that he could do lighter work if an appropriate job could be found for him. Because of claimant's age and the fact that he had previously been retrained, the doctors did not feel it advisable to consider further vocational rehabilitation. They concluded the total loss of function of the back was moderate and, as due to the industrial injury, mildly moderate.

On May 4, 1976 claimant was hospitalized because of uncontrolled diabetes. This hospitalization had no bearing on the industrial injury of May 6, 1975.

On May 10, 1976 Dr. Fry stated that he concurred in the findings of the physicians at Orthopaedic Consultants, stating emphatically that he did not believe that claimant was capable of returning to work.

Claimant's claim was closed on June 22, 1976 by a Determination Order which granted claimant compensation for 25% unscheduled disability.

Claimant continued to have low back pain and Dr. Fry reported on November 10, 1976 that the continuation of pain was on the basis of degenerative joint disease in the low back area which was worsened by mechanical abnormalities in claimant's back. He requested that the claim be reopened to allow claimant to continue further physical therapy. In February 1977 Dr. Fry hospitalized claimant. The x-rays showed further progression of narrowing of the disc space between L4, L5 and L5, S1. On March 8, 1977 Dr. Fry reported claimant was making excellent improvement and that his condition was stable. He rated his low back disability in the range of moderate/severe.

On March 30, 1977 a Second Determination Order awarded claimant additional compensation for temporary total disability and 25% for unscheduled disability, giving claimant a total of 50% for his unscheduled disability.

After the issuance of the Second Determination Order claimant was seen by Dr. Leveque. He stated that claimant had apparent pain in his lower back area most of the time and was unable to move around very well as a result of the injury and concurrent heart problems and diabetes. He stated it was very unlikely that claimant would ever be gainfully employed in his past employment situation and that it was very doubtful that he'd ever be able to do any lifting or to place himself in awkward lifting positions. It was his opinion that all of claimant's diseases were progressive and although they could be controlled there was no probability of reversing the situation from that which presently existed.

On May 10, 1978 Dr. Utterback, an orthopedic surgeon, at the request of the carrier, examined claimant and stated that it was his opinion that claimant's current problem was primarily that of lumbar spine arthritis. Secondarily, claimant had a chronic lumbar strain that was not allowed to improve because of his overweight condition and lack of muscular, expecially abdominal, control.

Dr. Leveque stated that claimant could do no lifting with his back, could lift no more than 20 pounds with his arms and should do no work involving repetitive bending and stooping nor prolonged standing or sitting. Dr. Leveque reiterated his opinion that it was doubtful that claimant would ever be employable again at his former occupation but that there were possibilities of some type of work at which claimant might be employable in which he could utilize his skills with small machinery. Before Dr. Leveque would make a frank statement on this he stated he would need a specific job description. He also said that it was quite likely that an employer would require some physical ability along with other skills and that claimant did not appear to have this physical ability nor was it very probable that he would regain it in the future.

The Referee found that the carrier had refused to pay a bill of $33 which claimant had paid to Dr. Darnell during claimant's hospitalization in February 1977. Dr. Darnell stated that at the request of Dr. Fry he had seen claimant with regard to his diabetic condition and although he could not state that the diabetes was related to claimant's industrial injury he did feel that his hypertension was job-related.

The Referee found that claimant had not graduated from high school and that after apprenticeship as a painter he had worked as a spray painter for 20 years. He injured his right foot in 1961 and was advised by his physician that he could not return to painting which required using a ladder. Thereafter claimant was retrained in small engine repair and did that type of work up until the date of his injury in 1975. The claimant also worked for nine years driving a lift truck in a lumber yard; this was prior to his work as a painter. Claimant had a prior back injury approximately 20 years ago which resulted in him losing time from work for about six months, however, claimant states that after his recovery he had had no further problems with his back until the 1975 injury.

Claimant has had diabetes for some period of time; it was discovered in the mid-1960's and he has been on medication and a restricted diet since the day of the discovery of this disease. He also takes medication for high blood pressure, a condition he was not aware of until his 1975 injury. When claimant was 17 years old he cut his left knee with an ax and he has had limitation of motion in that knee since. Claimant wears a hearing aid and states that he is practically deaf.

The Referee found that in this case claimant had received awards totalling 50% for unscheduled disability and that all the medical records show that what he experienced was a back strain superimposed upon pre-existing degenerative arthritis. She found the strain had been slower to resolve than the usual back strain because of unrelated problems which include obesity and diabetes. Claimant has had no back surgery and the evidence indicates little, if any, effort being made by claimant to find employment which he is now capable of performing. Dr. Leveque related claimant's current physical limitations to his longstanding degenerative disease as did the other doctors who examined claimant.

The Referee concluded that claimant had failed to meet his burden of proving that he was permanently and totally disabled from performing any work at a gainful and suitable occupation and that he had been adequately compensated by the awards he has received which total 160° for 50% of the maximum allowable by statute for his unscheduled disability.

With respect to the bill for $33 which claimant paid, the Referee found that neither claimant's diabetes nor his hypertension, both conditions for which claimant was receiving treatment from Dr. Darnell, is related to his industrial injury. However, the bill in question was for Dr. Darnell's services while claimant was hospitalized in February 1977 for his back condition and Dr. Darnell was present at the request of Dr. Fry, claimant's treating orthopedic physician, to adjust claimant's insulin level to conform with the treatment he had prescribed for claimant's back problems. Therefore, the Referee concluded that that specific consultation for which the bill of $33 was submitted was related to claimant's back condition and was the responsibility of the carrier. Because the carrier denied payment of that bill the Referee also found that the carrier should pay claimant's attorney a reasonable attorney's fee.

The Board, on de novo review, finds that this is a classic case of a worker who, after taking into consideration all of his pre-existing non-job-related conditions together with the residuals of his industrial injury, is so badly disabled that it is of relatively little importance that he has made small effort to seek employment since his injury.

In this case claimant has very little, if any, prospects of returning to the labor market. The doctors say that it is not feasible to attempt to again retrain claimant. Claimant had suffered an injury to his right foot in 1966 which precluded him from returning to his former occupation as a painter. After that incident he was retrained to repair small engines and apparently the retraining program was successful because claimant continued to do that type of work up to the date of his injury.

However, taking into consideration claimant's limited background which basically involves heavy manual labor, his age, and the limitations placed upon his work activities and his non-work activities by the doctors who examined and/or treated him, the Board finds that claimant has suffered a serious depletion of his wage earning capacity. When this is considered with his pre-existing conditions of hypertension and diabetes, poor hearing and limited motion in his left knee, the Board concludes that claimant is now precluded from returning to any type of suitable and gainful employment on a regular basis. He is permanently and totally disabled.

With respect to the responsibility of the bill which claimant paid Dr. Darnell in the amount of $33, the Board agrees with the reasoning of the Referee.

ORDER

The order of the Referee, dated September 29, 1978, is modified.

Claimant is found to be permanently and totally disabled as of the date of the Determination Order of March 30, 1977. This is in lieu of the aforesaid Determination Order which was affirmed by the Referee's order. In all other respects the Referee's order is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum equal to 25% of the increased compensation granted claimant by this order, payable out of said increased compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-4461 May 15, 1979

MILTON HILL, CLAIMANT
Welch, Brunn, Green & Caruso,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which awarded claimant 48° for 15% unscheduled mid and upper back disability in lieu of the award granted claimant by a Determination Order dated May 9, 1978.

At the time of the hearing claimant was enrolled in an authorized vocational rehabilitation program and receiving compensation for temporary total disability. Because of this the Fund moved to dismiss claimant's request for hearing.

The Referee was of the opinion that where there has been a gap in benefits the ruling of the Court in Leedy v. Knox, 34 Or App 911 (1978), permits the claimant to proceed to hearing on the issue of permanent partial disability as it appeared at the time of the Determination Order. He limited the evidence which would be considered to that pertaining to the period up to May 9, 1978, the date of the Determination Order.

The Referee allowed the hearing to remain open for submission by claimant of medical evidence relating to a subsequent period of time with the understanding that this would be included in the record as an "offer of proof" to make the record complete for the purposes of appeal.

Claimant suffered a compensable injury to his back while loading railroad box cars on or about May 8, 1977. About two days later claimant began to develop pain in his lower ribs-back area and in his upper back which caused him to lose time from work for a few weeks. He returned to work for several weeks but because of his difficulty had to cease. The diagnosis of claimant's problem has been basically one of strain with the recommendation that claimant perform lighter work.

Claimant was referred for vocational rehabilitation services and a program was developed. Following the termination of this program a Determination Order was entered on May 9 which awarded claimant 16° for 5% unscheduled mid and upper back disability.

As of the date of the aforesaid Determination Order claimant was experiencing some normal days and some days of increased neck and back pain with no explanation therefor. Claimant could not tolerate prolonged sitting although he did the majority of the driving on several long trips to visit some hot springs in southeastern Oregon. Claimant testified that when he used his hands in front of him it caused his back to ache and to become tired; he also had difficulty backpacking and fishing.

Claimant worked for a short time at Gilchrist Timber doing a variety of jobs, most of which were relatively heavy insofar as strain on his back. At the time of his injury he had been employed about five months. His prior work experience consisted of driving a food delivery truck on the campus of the University of Oregon which he attended for two terms, working as a grocery store box boy and delivering papers.

The Vocational Rehabilitation Division characterized claimant's learning capacity as well above average and stated he had the ability to handle most academic programs intellectually.

The Referee found claimant to be a credible witness and he accepted his testimony regarding the back symptoms he was experiencing at the time of the Determination Order. These symptoms caused Dr. Smith and Dr. MacCloskey to place certain restrictions on claimant's work activity. The Referee found that although claimant had apparently improved up to the date of the Determination Order, Dr. MacCloskey stated claimant would "gradually get better until he can return to heavy labor", it was also true that as of May 9, 1978 claimant had been experiencing symptoms for over a year. He noted that Dr. McCloskey's last report indicated that he approved of claimant's work with the Vocational Rehabilitation Division.

Considering all of the above factors together, the Referee concluded it was more reasonable and less speculative to conclude that as of May 9, 1978 claimant suffered from permanent limitations on his ability to regularly perform work which required repetitive and constant strain on his back. These restrictions and limitations clearly handicapped claimant insofar as obtaining and holding employment in a portion of the labor market. After considering these limitations together with claimant's age, education, training, general physical and mental capacity, and adaptability, the Referee concluded that claimant had proven

that he had suffered a greater loss of earning capacity than was represented by the award of 16° for 5% unscheduled disability. He, therefore, increased his earning capacity, which he described as "slight loss", to 48° for 15% of the maximum allowable by statute for unscheduled disability.

The majority of the Board, on de novo review, finds that the motion made by the State Accident Insurance Fund to dismiss claimant's present request for hearing should have been granted because claimant was at the time he made the request enrolled in an authorized vocational rehabilitation program. The Referee relied upon Leedy v. Knox, 34 Or App 911, in finding that where there was a gap in benefits claimant was allowed to proceed to hearing on the issue of permanent partial disability. The Board does not feel that the ruling made by the Court of Appeals in Leedy actually covers the problem presented in this case.

ORS 656.268(4) provides:

> "If, after the determination made pursuant to subsection (3) of this section, the director authorizes a program of vocational rehabilitation for an injured worker, any permanent disability payments due under the determination shall be suspended, and the worker shall receive temporary disability compensation while he is enrolled in the authorized vocational rehabilitation program. When the worker ceases to be enrolled and actively engaged in an authorized vocational rehabilitation program, the Evaluation Division shall redetermine the claim pursuant to subsection (3) of this section unless the worker's condition is not medically stationary" [Emphasis supplied].

When claimant is terminated or completes his authorized vocational rehabilitation program his disability will have to be re-evaluated and his claim again closed pursuant to ORS 656.268. At that time claimant will have a right to request a hearing on the adequacy of that Determination Order. The Board feels that it would be premature at the present time for the Referee to make a determination of claimant's extent of disability even though he bases that evaluation on claimant's condition as of the date of the Determination Order of May 9, 1978.

The Court in Leedy held that claimant was entitled to have his claim closed by a Determination Order when he was determined to be medically stationary and that he was to continue to receive awards for his permanent partial disability, if any, until he was actually enrolled in an authorized program. It also held that should there be interruptions in claimant's enrollment in an authorized program he would be entitled to receive compensation for permanent partial disability during such periods of interruption. However, while claimant was actually enrolled and participating in the authorized program he would be entitled only to compensation for temporary total disability.

When the claimant is granted a rather minimal award of permanent partial disability, as in this case, there undoubtedly will be a gap in the payment of compensation. Even if claimant's award is substantial, it may take quite some time before a suitable program can be set up for claimant and this might cause a gap in compensation. The ideal situation would be to place a worker in an authorized program of vocational rehabilitation before he becomes medically stationary, however, that is not always possible.

For the foregoing reasons, the majority of the Board would grant the motion made by the Fund and dismiss the matter.

ORDER

The order of the Referee, dated November 27, 1978, is reversed.

Board Member Kenneth V. Phillips dissents as follows:

In this case claimant was found to be medically stationary and his claim was closed by a Determination Order. Claimant was dissatisfied with the Determination Order and requested a hearing on the issue of extent of permanent partial disability. After this request was made, claimant was placed in an authorized vocational rehabilitation program. The employer and the State Accident Insurance Fund at the time of the hearing moved for dismissal of the hearing based on claimant's entry into an authorized vocational rehabilitation program. The majority of the Board found that the motion to dismiss was well-founded based on Leedy v. Knox, ORS 656.268(4), and OAR 436-61-050(3).

This reviewer does not agree. Claimant is entitled to a hearing on his Determination Order under ORS 656.268(5) and ORS 656.283. There is no provision in Oregon law or in the Board's own Administrative Rules that allows termination of claimant's appeal rights.

The Leedy v. Knox case does not speak to the issue in these cases. In Leedy the claimant had not yet entered an authorized program. The Court in that case held that claimant was entitled to a closure (a determination of his disability) when he was medically stationary. The procedure set forth by the Court was claimant, after his claim was closed, was paid compensation from the award of permanent partial disability (under the Determination Order). This payment was stopped when claimant entered an authorized vocational rehabilitation program and at which time he is again paid temporary total disability. It he terminates this program, payment of temporary total disability is stopped and payments out of the permanent partial disability award are commenced again. The reason given for this procedure was continuity of support for the worker (34 Or App at 916). [In Leedy the Court stated, "We therefore hold that the determination of a claimant's permanent disability may not be delayed until completion of a post-closure rehabilitation program. Claimant was entitled to an award of permanent disability at the time his claim was closed, based upon then existing conditions. That award would be subject to review and adjustment when he completes or abandons his rehabilitation program" (34 Or App 921).] In this case claimant had appealed the Determination Order and then entered an authorized vocational rehabilitation program. The program is long enough that claimant's appeal time on his Determination Order will have run before he has completed it. Thus he is barred from ever appealing the Determination Order.

In this case claimant was awarded 5% unscheduled disability. This award was paid out prior to his entry into the authorized vocational rehabilitation program. If he, one year after the date of the Determination Order, terminates his program he will not be paid any additional award and is not entitled to contest that award of permanent partial disability. As set forth in Oregon statutory and case law, claimant is entitled to a determination of permanent disability at the time his claim is closed based upon then existing conditions and an appeal from the award if he feels the award is incorrect. This award then would be subject to review and adjustment when he completes or abandons a vocational rehabilitation program. The determination of his permanent disability may not be delayed until completion of a post-closure rehabilitation program.

To establish a rule as set forth by the majority of the Board which would bar a claimant's contesting of a Determination Order award of permanent disability merely because he entered a post-closure rehabilitation program, appears to be contrary to Oregon statutory and case law. If claimant entered a vocational rehabilitation program after a hearing and issuance of an Opinion and Order, the Opinion and Order would not be set aside and the hearing held for naught. Therefore, merely because claimant enters a vocational rehabilitation program before a hearing appealing a Determination Order, it is not logical to bar his right to appeal merely because of his entry into the program.

This Board Member affirms the conclusion of the Referee.

WCB CASE NO. 78-3979 May 15, 1979

WILLIAM LEAD, II, CLAIMANT
David W. James, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order Of Dismissal

On April 27, 1979 an Order of Dismissal was entered and on May 4, 1979 EBI moved for the reconsideration of this order.

On January 4, 1979 the employer requested review by the Board of the Referee's order dated December 26, 1978. The certificate of mailing signed by the attorney for EBI indicates that the Board, claimant, EBI, claimant's attorney and the employer were served on January 4, 1979. The Fund was not served.

On March 13, 1979 the Fund moved for an order dismissing the request for review of the Referee's Opinion and Order on the grounds that it was not timely filed on all the parties as required by ORS 656.295(2).

It is the contention of EBI that it is not necessary to serve the Fund who insured a previous employer of claimant, Breeden Brothers, citing the Court's holding in Calder v. Hughes & Ladd, 23 Or App 66 (1975).

EBI further contends that it was not necessary to serve the Fund in order to litigate the validity of its denial of claimant's claim because the Fund received actual notice of EBI's appeal within 30 days as required by statute. This was accomplished when the Board mailed the Fund a copy of the letter acknowledging receipt of the employer's request for Board review. The date of the acknowledgment was January 10, 1979 which was within the 30 day period provided by ORS 656.289(2).

The Board, after considering the cases cited in support of EBI's Motion for Reconsideration of the Order of Dismissal, concludes that the contentions set forth by EBI, are well taken and that the Order of Dismissal, dated April 27, 1979, should be set aside in its entirety.

The Board has received the appellant's brief, the respondent's brief (claimant) and has also received what purports to be a brief filed in behalf of the Fund which was made a part of the initial motion to dismiss the request for Board review. Therefore, the Board, having set aside its Order of Dismissal, will now proceed to review the above entitled matter de novo.

IT IS SO ORDERED.

WCB CASE NO. 78-2995 May 15, 1979

MILTON MINOR, CLAIMANT
Tooze, Kerr, Peterson, Marchall & Shenker, Claimant's Attys.
Rankin, McMurry, Osburn, Gallagher & VavRosky, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

The claimant seeks Board review of the Referee's order which found that claimant had failed to prove by a preponderance of the evidence that his claim had been prematurely closed by a Determination Order issued on January 20, 1978.

Claimant had suffered a compensable back injury in August 1974 for which he underwent three back surgeries between that date and May 1976. In March 1977 claimant was given a psychological evaluation by Dr. Michael Fleming and Dr. Norman Hickman, both clinical psychologists. They found no evidence of severe neurosis nor psychosis but felt that claimant had moderate anxiety reaction and frustration which was materially related to his industrial injury. They felt further psychological assistance was needed.

In July 1977 claimant's treating physician reported that claimant was medically stationary and on October 12, 1977 the vocational counselor indicated that he was closing his file at claimant's request. On August 26, 1977 the psychological center reported that claimant had received eight psychotherapy sessions between April 22 and August 17, 1977. His response was positive but they felt that the anxiety was likely to persist until claimant's vocational problems were satisfactorily resolved. They stated that claimant was not psychologically stationary.

On January 20, 1978 the claim was closed by a Determination Order which awarded claimant compensation for temporary total disability from September 20, 1974 through October 12, 1977, less time worked, and 80° for 25% unscheduled low back disability.

On May 3, 1978 the center reported that claimant had received 5-1/2 hours of psychotherapy treatment between October 7, 1977 and February 2, 1978.

On the issue of whether the claim was prematurely closed, the Referee cited ORS 656.268 which provides, in part, that claims shall not be closed nor compensation for temporary total disability terminated if the worker's condition has not become medically stationary. He found that medically stationary meant that no further material improvement would reasonably be expected from the treatment or the passage of time.

By October 12, 1977 claimant was stationary from a physical standpoint, therefore, the only question was whether he was psychologically stationary as well. In August 1977 the psychologist had indicated claimant was not psychologically stationary but there is no evidence concerning claimant's psychological condition between August 17, 1977 and October 12, 1977. Between October 7, 1977 and February 2, 1978 claimant only received 5-1/2 hours of therapy. The evidence from the psychologists concerning claimant's condition during this period related to his progress in physical therapy and his attorney's efforts to obtain an approved vocational program for claimant. The Referee found nothing concerning claimant's anxiety or emotional condition during this period. He concluded that claimant had failed to prove by a preponderance of the evidence that his claim had been prematurely closed and affirmed the Determination Order dated January 20, 1978.

The other issue before the Referee was the extent of claimant's permanent partial disability.

At the hearing, the attorney for the employer had moved for a dismissal of the matter on the grounds that claimant was presently enrolled and actually engaged in an authorized program of vocational rehabilitation. The Referee ruled that insofar as claimant's request to litigate the issue of his extent of permanent disability was concerned the motion would be granted. When claimant ceases to be enrolled and actively engaged in an authorized program of vocational rehabilitation or has completed said program he will be entitled to have his disability re-evaluated by the Evaluation Division which will then issue a new Determination Order pursuant to OAR 436-61-050(3). Therefore, the Referee concluded that claimant would be able at that time to litigate the extent of his permanent partial disability.

The majority of the Board, after de novo review, agrees with the findings and conclusions of the Referee. The only issue which was actually disposed of by the Referee at the hearing was the issue of premature closure of claimant's claim. The second issue, namely, the extent of claimant's permanent disability was indirectly dealt with by the Referee's affirmance of the Determination Order of January 20, 1978.

The majority of the Board agrees with the Referee that while claimant is enrolled and actively engaged in an authorized program of vocational rehabilitation, he cannot contest the adequacy of the Determination Order because upon either the completion or termination of the authorized program his disability will be re-evaluated, assuming that claimant's condition is still medically stationary.

Claimant's right to compensation is protected at all times. The Determination Order dated January 20, 1978 awarded claimant 80° for 25% unscheduled low back disability and claimant was entitled to receive compensation for such permanent partial disability up until the time he was actually enrolled in an authorized program of vocational rehabilitation. The Oregon Court of Appeals in judicially disposing of the issues in Leedy v. Knox, 34 Or App 911 (1978) stated in part:

> "We therefore hold that the determination of a claimant's permanent disability may not be delayed until completion of a post-closure rehabilitation program. Claimant was entitled to an award of permanent disability at the time his claim was closed, based upon then existing conditions. That award would be subject to review and adjustment when he completes or abandons his rehabilitation program. . .".

ORS 656.268(4) states:

"If, after the determination made pursuant to subsection (3) of this section, the director authorizes a program of vocational rehabilitation for an injured worker, any permanent disability payments due under the determination shall be suspended, and the worker shall receive temporary disability compensation while he is enrolled in the authorized vocational rehabilitation program. When the worker ceases to be enrolled and actively engaged in an authorized vocational rehabilitation program, the Evaluation Division

shall redetermine the claim pursuant to subsection (3) of this section unless the worker's condition is not medically stationary."

OAR 61-050(4) provides:

"If the department authorizes a program of vocational rehabilitation after issuance of a Determination Order, the insurer shall suspend any permanent disability payments due under the determination and pay temporary disability compensation under sections (1) and (2) of section 61-052 starting on the date the authorized program of vocational rehabilitation began. Upon completion or termination of the authorized program, Evaluation shall issue a subsequent determination order unless the worker's condition is not medically stationary."

The majority of the Board concludes that claimant's dissatisfaction with the award made by the Determination Order dated January 20, 1978 must be held in abeyance pending either the termination or completion of his authorized program of vocational rehabilitation. At the time claimant either terminates or finishes the program then the disability determination process will continue and a Determination Order upon which claimant may request a hearing within a year of the date of that order will be issued.

The Referee correctly interpreted the statutes and the administrative rules promulgated by the Board and followed the ruling of the Court of Appeals in Leedy insofar as they applied to claimant's rights under the cited statute and administrative rule.

ORDER

The order of the Referee, dated November 5, 1978, is affirmed.

Board Member Kenneth V. Phillips dissents as follows:

In this case claimant was found to be medically stationary and his claim was closed by a Determination Order. Claimant was dissatisfied with the Determination Order and requested a hearing on the issue of extent of permanent partial disability. After this request was made, claimant was placed in an authorized vocational rehabilitation program. The employer and the State Accident Insurance Fund at the time of the hearing moved for dismissal of the hearing based on claimant's entry into an authorized vocational rehabilitation program. The majority of the Board found that the motion to dismiss was well-founded based on Leedy v. Knox, ORS 656.268(4) and OAR 436-61-050(3).

This reviewer does not agree. Claimant is entitled to a hearing on his Determination Order under ORS 656.268(5) and ORS 656.283. There is no provision in Oregon law or in the Board's own Administrative Rules that allows termination of claimant's appeal rights.

The Leedy v. Knox case does not speak to the issue in this case. In Leedy the claimant had not yet entered an authorized program. The Court in that case held that claimant was entitled to a closure (a determination of his disability) when he was medically stationary. The procedure set forth by the Court was claimant, after his claim was closed, was paid compensation from the award of permanent partial disability (under the Determination Order). This payment was stopped when claimant entered an authorized vocational rehabilitation program and at which time he is again paid temporary total disability. If he terminates this program, payment of temporary total disability is stopped and payments out of the permanent partial disability award are commenced again. The reason given for this procedure was continuity of support for the worker (34 Or App at 916). [In Leedy the Court stated "We therefore hold that the determination of a claimant's permanent disability may not be delayed until completion of a post-closure rehabilitation program. Claimant was entitled to an award of permanent disability at the time his claim was closed, based upon then existing conditions. That award would be subject to review and adjustment when he completes or abandons his rehabilitation program" (34 Or App 921).] In this case claimant had appealed the Determination Order and then entered an authorized vocational rehabilitation program. The program is long enough that claimant's appeal time on his Determination Order will have run before he has completed it. Thus he is barred from ever appealing the Determination Order.

To establish a rule as set forth by the majority of the Board which would bar a claimant's contesting of a Determination Order award of permanent disability merely because he entered a post-closure rehabilitation program, appears to be contrary to Oregon statutory and case law. If claimant entered a vocational rehabilitation program after a hearing and issuance of an Opinion and Order, the Opinion and Order would not be set aside and the hearing held for naught. Therefore, merely because claimant enters a vocational rehabilitation program before a hearing appealing a Determination Order, it is not logical to bar his right to appeal merely because of his entry into the program.

This reviewer would reverse the conclusion of the Referee.

WCB CASE NO. 77-1153 May 15, 1979

SIGNA NELSON, CLAIMANT
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks review by the Board of the Referee's order setting aside its denial dated May 24, 1974 of claimant's psychological problems and remanding the claim to the Fund for acceptance and payment of compensation, as provided by law.

At the hearing before the Referee, four issues were presented: (1) extent of disability; (2) propriety of the Fund's denial of responsibility for claimant's psychological problems; (3) propriety of the Fund's refusal to reopen the claim as of March 10, 1977; and (4) whether or not claimant was presently orthopedically and psychologically stationary.

Claimant had suffered a compensable injury to her back in December 1972 and was receiving compensation for that injury at the time she was admitted to the Oregon State Hospital as a patient on April 25, 1973. Claimant remained as a patient there until September 11, 1973 when she was discharged and considered improved, competent, and able to drive a motor vehicle. Claimant's illness was diagnosed as involutional melancholia, in remission. She had been tried on various psychotrophic medications since her admission, but when she failed to respond she was given a course in electroconvulsive therapy in June 1973 to alleviate the depression; this was only moderately successful.

Upon claimant's discharge, it was recommended that she contact the Multnomah County Mental Health Clinic for a follow-up and further prescriptions. The prognosis was fair if in the near future she could get a meaningful full time job, but the doctor indicated that if this did not happen it was quite possible claimant would become depressed again and might require rehospitalization.

Claimant's claim was first closed by a Determination Order in July 1973 which awarded her 16° for 5% permanent partial disability. On December 27, 1973 the claim was reopened for treatment and on February 15, 1974 a laminectomy was performed at L4-5.

Claimant was referred to the Pain Clinic in Portland on June 5, 1974 and her claim was subsequently closed by a Second Determination Order dated June 23, 1974 which awarded claimant additional compensation for 20% permanent partial disability but nothing for the psychological problems which had been denied on May 24, 1973.

Claimant requested a hearing on November 19, 1974 and raised all of the issues referred to previously. Pursuant to a stipulation, dated April 29, 1975, the claim was reopened. A Third Determination Order, dated July 21, 1975, awarded claimant no additional compensation for permanent partial disability. Again a request for hearing was made and again the claim was reopened for further treatment prior to the hearing. The claim was then closed by a Fourth Determination Order, dated February 1, 1977, which awarded claimant additional compensation for temporary total disability and additional 32° for 10% permanent partial disability.

On February 7, 1977 another request for hearing was made and on June 10, 1977 all parties were present for that hearing which was actually treated as a conference and the issue of the competency of claimant at the time she received the letter denying responsibility for her psychological problems was delineated. On August 15, 1977 there was a request for reopening and another request for hearing.

The Fund's position was that the Referee had no jurisdiction to entertain the motion to set aside the denial because at some time the denial was brought to her attorney and she thereafter became competent so that she was now bound thereby.

Dr. Moss, a psychiatrist, testified that claimant's industrial trauma when she fell down some stairs was a significant triggering effect in precipitating claimant's depression and that she had never re-established herself to the psychological state which she had been prior to the industrial injury.

Dr. Moss interviewed claimant to determine if she understood the denial made by the Fund. He read the hospital records relating to the electrical shock treatment to establish the proximity of time to the date she received the denial letter and he also checked her memory and comprehension at that time. He felt she had some knowledge of the denial matter but that her memory changed from day to day and she could not keep it in focus.

It was Dr. Moss' opinion that claimant's memory confusion probably cleared somewhat after September, however, it was not a complete recovery. Claimant told Dr. Moss she continued to have back problems which affected her emotionally and from 1973 to 1976 she had been receiving out-patient mental clinic care. Dr. Moss, who had previously worked at the Oregon State Hospital, said it was standard procedure no matter what condition the patient was in to report that he or she was considered improved, competent, and able to drive a motor vehicle at the time said patient was discharged.

The Referee found that claimant did not have the competency to understand the letter of denial to the extent that she would have been able to make a timely request for hearing when she received the letter while a patient in the Oregon State Hospital. Although several months later she was able to perform day to day tasks, she still did not have the emotional and mental level to request a hearing on the issue until it was actually done on her behalf by an attorney. He found that all the medical evidence indicated that claimant still has not returned to her pre-accident mental status and that she has had on-going mental problems and has a serious problem even at the present time. He set aside the denial by the Fund for responsibility for claimant's psychological problems dated May 24, 1973. This rendered moot all of the other issues.

The Board, on de novo review, finds that Dr. Moss' testimony is sufficient to establish that claimant's psychological problems were related to her industrial injury in December 1972 and, therefore, the denial of responsibility therefor by the Fund was improper. The Board agrees with the Referee that claimant was not mentally competent at the time she received the Fund's denial dated May 24, 1973 to fully realize what was required to make a timely request for hearing on said denial. The Referee properly set aside the denial and by doing so rendered moot all of the other issues presented at the hearing.

ORDER

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

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $350, payable by the State Accident Insurance Fund.

WCB CASE NO. 78-3909 May 16, 1979

RALPH CASTRO, CLAIMANT
Merrill Schneider, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which approved the denial by the State Accident Insurance Fund dated May 22, 1978 of claimant's claim for occupational anxiety.

Claimant is a 32-year-old married man employed as a rehabilitation counselor for the State Department of Vocational Rehabilitation. On March 26, 1978 claimant filed a claim for workers' compensation benefits, claiming that as a result of harrassment by his superiors while working on the job, he had developed a chronic anxiety condition.

The Fund denied the claim on May 22, 1978, stating that it appeared that claimant's present problems were not related to an occupational exposure.

On June 7, 1978 Dr. Levine, a clinical psychologist at the Kaiser Department of Mental Health, evaluated claimant's current medical status and the reasons for his emotional state and work disability. Apparently the initial occurrence of claimant's symptoms which included insomnia, gastro-intestinal distress, physical tension, including a pronounced hand tremor, was in late October 1977. At that time and throughout the following month, claimant reported that he was subjected to frequent criticisms of his work. He also reported that it was the first time in four or more years of continuous employment at the same agency with the same set of supervisors that his work had been negatively reviewed and at such lengths. When claimant's symptoms commenced he did not relate them to the criticism, however, as they persisted, he became more convinced that they were work related.

Dr. Levine stated that claimant had been brought up in an environment where conformity and avoidance of conflict were strongly instilled in him. His background included changes of college and changes of jobs which indicated a conflict-avoidance motive in his life. Dr. Levine felt that when claimant was suddenly and frequently criticized for work which he had formerly performed satisfactorily, he did what most conflict-avoidance individuals do; he internalized his angry frustrated feelings. This resulted in disabling physical and emotional symptoms. Dr. Levine was of the opinion that his emotional distress was precipitated and exacerbated by the job stress.

On July 20, 1978 claimant was examined by Dr. Maletzky, a psychiatrist, who found that claimant's personality predisposition created a susceptibility to an anxiety reaction distress, particularly stress consequent upon criticisms leveled against him. Had such criticisms not occurred, claimant undoubtedly would have continued working amicably for his agency. Dr. Maletzky could diagnose no specific psychiatric condition. He believes claimant was overly sensitive and tended to overreact to any criticism, but he could not fit his impression of claimant into the current diagnostic scheme except to note that claimant could be classified as having a "personality disorder".

Both Dr. Levine and Dr. Maletzky based their evaluation and opinions on the factual history related to them by claimant.

The Referee, after considering the reports of both Dr. Levine and Dr. Maletzky, which constitutes the primary medical evidence in this case, concluded that claimant was accusing various people with whom he worked of making unwarranted criticism of his work, but that the overwhelming preponderance of the evidence indicated that the differences were perpetrated by claimant and he was now seeking revenge. The Referee, based on the psychological reports, was doubtful that claimant's pre-existing emotional make-up would allow him to work for anyone or even to be self-employed.

The Referee found that in the event there was an issue of aggravation of underlying pre-existing emotional condition, the diagnosis of Dr. Maletzky indicated that no specific psychiatric diagnostic category fit claimant. Claimant is merely oversensitive and tends to overreact to criticism but he has no permanent emotional problem.

The Referee cites the rulings of the Court in Weller v. Union Carbide, 35 Or App 355, and Stupfel v. Edward Hines Lumber Company, 35 Or App 457, to the effect that only the onset of a significant worsening of an injury or a disease arising out of, i.e., caused by, employment can be compensable. A worsening of symptoms is only significant to the extent that it supports an inference that employment caused a worsening of the underlying injury and disease. In this case, there is no convincing evidence, in the opinion of the Referee, that such an inference can be drawn; in fact, there isn't even persuasive evidence of any emotional disorder.

The Board, on de novo review, finds that the history of claimant indicates quite clearly that his nature is such that he tends to run away from any situation which might possibly present a conflict.

The record reveals no diagnosis of what, if any, claimant's psychological problems are and, if he has any, whether or not they are permanent. Neither is there any clear-cut evidence that claimant was actually harrassed by his superiors.

The Board concurs with the findings and conclusions of the Referee.

ORDER

The order of the Referee, dated December 12, 1978, is affirmed.

SAIF CLAIM NO. GB 66126 May 16, 1979

BARBARA J. FOSS, CLAIMANT
John M. Parkhurst, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to her low back on June 22, 1964; her claim was closed on November 24, 1964 with compensation for temporary total disability only.

The Board's Own Motion Order reopened the claim as of July 1, 1976, based upon a request received from Dr. Cherry, an orthopedic surgeon. Claimant was subsequently seen by Dr. Cherry, Dr. Paxton, a neurosurgeon, and Dr. Colbach, a psychiatrist. Claimant was also examined by the physicians at the Orthopaedic Consultants on April 25, 1978 and no further treatment was recommended. The physicians at the Orthopaedic Consultants felt the previous awards which totalled 35% loss of function of an arm for her unscheduled disability adequately compensated claimant.

On July 19, 1978 a Board's Own Motion Determination granted claimant compensation for temporary total disability from July 1, 1976 through April 25, 1978, less time worked. On August 13, 1978 claimant, by and through her attorney, requested the Board to reconsider this Own Motion Determination, stating Dr. Cherry did not concur with the opinion expressed by the physicians at the Orthopaedic Consultants. The Board, after considering the medical evidence before it, concluded there was no justification for reconsidering its Own Motion Determination and on September 28, 1978 denied the motion.

On October 16, 1978 Dr. Cherry advised the Board that he felt the claim should be reopened for referral of claimant to a neurosurgeon for an opinion as to exploratory surgery; he also suggested a counselor have a discussion with claimant to determine the need for job retraining.

On November 6, 1978 the Fund responded, stating that based upon Dr. Cherry's report, it would have no objection to claimant being examined by a neurosurgeon or being seen by a counselor for possible job retraining.

On November 22, 1978 the Board issued an Own Motion Order which stated that the neurological examination of claimant and the evaluation of her ability for retraining for a lighter type of work both could be carried out under the provisions of ORS 656.245 and directed the Fund to make the appropriate arrangements.

On January 5, 1979 Dr. Leonard, a neurologist, examined claimant; he also reviewed a large number of reports which had been sent to him by the Fund. He stated that virtually all of claimant's past medical and social history had been adequately summarized in such reports; specifically, the report from the Orthopaedic Consultants dated April 25, 1978 and Dr. Colbach's report dated April 10, 1978. After examining claimant, Dr. Leonard furnished the Fund with his narrative report which concluded with the statement that he agreed entirely with the recommendations made by the Orthopaedic Consultants and Dr. Colbach. He also stated that it was extremely important claimant stop the cycle of seeing more and more doctors as it would only tend to enhance the functional component of her problem.

On January 22, 1979 the claimant was given notice of referral for employment re-entry assistance.

Reports from the rehabilitation consultant dated March 8, 1979 and March 30, 1979 were furnished to the Board together with Dr. Leonard's report. The gist of these reports is that after trying to place claimant in several different types of work which would be within her physical limitations, including pain and fatigue, limited education and skills, it was determined that claimant preferred working with Seven-Up Bottling Company as a demonstrator. In such a job she is her own boss, has flexibility, and earns $30 a day, plus mileage. The consultant, Katherine Bennett, stated that after having presented employment and training alternatives to claimant, claimant decided that such position was the appropriate one for her.

The Board, after fully reviewing the report from Dr. Leonard and the reports from the rehabilitation consultants, concludes that claimant has found something which she likes to do, is able to do physically, and that there is no need for exploratory surgery nor further job training. Both the examination by Dr. Leonard and the consultations with the rehabilitation consultants were carried out through the provisions of ORS 656.245 and there is no evidence that claimant has lost any time from work as a result of either the examination or the consultations.

The Board further concludes, based on the evidence it has before it, that claimant's claim for the industrial injury sustained on November 24, 1964 should be closed.

IT IS SO ORDERED.

ROBERT REED, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which awarded claimant 32° for 10% unscheduled low back disability.

Claimant, a truck driver, sustained a compensable injury to his back on May 21, 1976. Dr. Wolfe diagnosed an acute right iliolumbar musculoligamentous strain. Claimant was released to regular work on August 17, 1976 and the claim was closed on December 20 with an award of compensation for temporary total disability only.

On August 17, 1977 the claim was reopened and in December 1977 claimant was examined by Dr. Goodwin, an orthopedic surgeon, who found a congenital anomaly at L5 which pre-existed the industrial injury and a strain of the lumbar spine due to the industrial injury. He felt claimant could return to lighter type work with no lifting over 35 pounds and that his condition was medically stationary. Claimant's low back disability, as it was related to the industrial injury, was considered minimal. Dr. Wolfe concurred with the findings made by Dr. Goodwin. On January 3, 1978 Dr. Wolfe released claimant to work which did not require lifting over 35 pounds, repetitive bending or stooping.

On February 27, 1978 the claim was again closed by a Second Determination Order which awarded additional compensation for temporary total disability through January 4, 1978.

On March 24, 1978 Dr. Wolfe requested the claim be reopened but stated no reason therefor. Later he explained that claimant had told him he had left his job on April 3 because of the increasing pain in his low back area which was caused by performing heavy work.

Claimant was seen by the Orthopaedic Consultants in June 1978. The congenital anomaly at L5 was noted as was anxiety tension and functional overlay. Claimant's condition was stationary but claimant could not return to his former occupation. The total loss of function as related to the low back was classified as mildly moderate and the loss, due to the injury, in the upper quarter of mild.

Claimant testified he had constant aching and pain in the low back which radiated down the right leg aggravated by prolonged standing on hard surfaces, walking short distances, bending, prolonged stooping and cold weather. Claimant also had difficulty riding in a truck and he is no longer able to ski, fish, bowl or hunt.

From January 5 to April 1, 1978 claimant worked at night for the defendant as a checker. This was modified work which did not require any lifting or walking. Claimant was able to sit in a shelter which did not have a roof. Although there was a heater and a heating pad in the shelter claimant stated his back was aggravated by the cold night air. Claimant stated the job paid $8.40 an hour but he only averaged two nights a week. He quit because of back pain. Later claimant worked as a job counselor at a salary of $450 plus commission, however, there were no fringe benefits such as he had had on his former job. He left because he did not like high pressure selling. Claimant then worked as a repair time estimator; this job paid claimant $644 a month gross but he terminated after three weeks because of low pay and the possibility of a transfer. Since then he has sought work at many places but doesn't apparently have much success in obtaining employment.

Claimant testified he did not like to work at night because it had interfered with his former marriage and might interfere with his present one. Also, he has difficulty sleeping during the day. Claimant receives $600 a month disability benefits from a non-industrial insurance carrier and his wife earns $699 a month gross. The evidence indicates that claimant is not eligible for health and welfare benefits unless he works 40 hours a month and his retirement and vacation benefits are measured by the number of hours worked.

The president of the defendant testified that the job to which claimant returned after his injury was specially created for him. The normal checking job required lifting, hand trucking and jitney driving but the claimant was only required to do the paper work.

Claimant is 35 years old and has a Bachelor of Science degree in Business Administration. Claimant has also attended a mechanical school and has had experience as a truck driver and working as a longshoreman. Claimant has been unemployed since May 30, 1978.

Claimant contends he was not medically stationary on January 4, 1978 but the Referee found no evidence that claimant required curative treatment after that date. On December 15, 1977 Dr. Goodwin had found that further treatment would be palliative only.

Claimant also contends that he is entitled to penalties and attorney's fees because the defendant failed to accept or deny the request made by Dr. Wolfe on March 24, 1978 to reopen claimant's claim. Claimant had requested a hearing on March 22, 1978 and among the issues raised in his request was the need for further medical care and treatment and payment of temporary total disability compensation. Dr. Wolfe's letter was not written nor received until after the request for hearing. The Referee concluded that penalties and attorney's fees were not justified.

The Referee also found that claimant failed to establish his claim for time loss from March 28, 1978 because Dr. Wolfe's statement merely reiterated what claimant had told him. The claim was not supported by any opinion based on medical evidence.

The Referee found no evidence of unreasonable delay in timely furnishing claims information to claimant and on the extent of disability the medical evidence indicated claimant had suffered a chronic lumbar strain superimposed on pre-existing congenital defect in the lower back. The doctor recommended that claimant not return to his regular employment because of the heavy lifting required. The doctors at the Orthopaedic Consultants classified total loss of function of the low back as mildly moderate and in the upper border of mild as it related to the injury.

The Referee concluded that claimant's industrial injury has caused him permanent impairment which precludes him from a segment of the general labor market and that he has suffered a loss of future earning capacity equal to 10% unscheduled disability. The Referee also found that his award was diminished by his apparent lack of motivation.

The Board, on de novo review, in general, agrees that claimant has been adequately compensated for his loss of wage earning capacity for the award of 32° for 10% unscheduled low back disability. Claimant obviously wishes to choose the type of work in which he shall engage in the future without taking into consideration his physical limitations. Claimant is young, he has a Bachelor of Science degree in Business Administration and there are many types of employment which claimant could engage in which are within his physical and mental capabilities.

However, the Referee erred in stating that claimant's ". . . award is diminished by his apparent lack of motivation". An award for unscheduled disability is based upon many factors; motivation is only one of those factors.

ORDER

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

CLARENCE VOIGHT, CLAIMANT
Ringo, Walton, Eves & Gardner,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which awarded him 80° for 25% unscheduled cervical spine disability.

Claimant, at the time of the hearing, was a 59-year-old meat cutter who, on May 26, 1977, suffered a compensable injury when he lifted a case of meat. Initially, he experienced radiating arm pain on the left and a bi-level cervical decompression fusion was done on June 29, 1977. Claimant noticed immediate improvement in his left arm symptoms but later experienced severe radiating pain in the right arm. These symptoms persisted and the same surgical procedure was carried out on the right.

Since the surgeries claimant has continued to experience neck pain and right arm pain. His claim was closed on June 13, 1978 by a Determination Order which awarded claimant compensation equal to 32° for 10% permanent partial disability.

At the present time claimant is unable to move his back in an unrestricted manner; he has pain when he moves his head either sideways or up and down. He has some numbness in the thumb and forefinger of the right hand and some numbness of the right forearm. He believes his right arm and hand are weaker than they were before the injury and because of this he is restricted in the performance of many activities. At the time of the hearing, he was not experiencing any problems with his left arm. Claimant is right-handed.

Claimant has a high school education and graduated in the upper quarter of his class. His work background has been almost exclusively in meat cutting. This type of work at times requires lifting heavy slabs of meat and obviously it requires extensive use of both hands. Because of the problems with his right hand claimant feels he cannot return to meat cutting because he would be unable to handle the cutting tools or do the heavy lifting. Dr. David M. McGee stated on May 16, 1978 that claimant could return to light work duty as of June 1978 but the work could not involve any lifting of weight greater than 10-15 pounds and should minimize stress as applied to the arms, neck and shoulders. He found claimant was medically stationary and permanently disabled insofar as his ability to return to his previous job as a meat cutter; he so advised claimant of this.

Claimant was referred for vocational rehabilitation services but none were rendered because claimant had attended and completed real estate school and obtained his license as a real estate salesman. At the time of the hearing, claimant was planning to move to Bend and engage in the selling of real estate.

The Referee found that claimant's present problems were the result of his compensable neck injury and the subsequent surgeries. He found this to be an unscheduled disability which must be evaluated on claimant's loss of earning capacity.

The Referee, based upon claimant's testimony and the medical evidence, found that claimant could not return to his regular employment. Claimant is 59 years old and had worked most of his adult life as a meat cutter, therefore, the Referee found that claimant had suffered a greater loss of wage earning capacity than represented by the award granted by the Determination Order of June 13, 1978.

However, the medical reports indicated that claimant probably retained a good deal of physical capacity. Dr. McGee reported that claimant noted "minimal posterior cervical discomfort" and "mild" weakness of the right hand and right arm. On February 7, 1978 Dr. McGee reported "mild to moderate remaining weakness of the right arm, right hand" and "very minor intermittent neck pain discomfort".

The Referee concluded that although there was no really specific evidence regarding the claimant's mental capacity there was some evidence on which to base a conclusion that he is reasonably intelligent. The Referee concluded that claimant was capable of learning and being retrained, if necessary, in other areas than real estate sales. The Referee also concluded that claimant had not really attempted any type of retraining other than in real estate sales but the evidence indicated that claimant could learn to do many different types of employment which did not require heavy use of his arms or place significant strain on his neck.

The Referee concluded, after considering both the minus and plus factors, that the total loss of earning capacity which claimant has suffered as a result of his industrial injury would be adequately compensated for by an award of 80° which represents 25% of the maximum allowable for an unscheduled disability.

The Board, on de novo review, agrees that the claimant has suffered a loss of wage earning capacity as a result of his unscheduled disability and concurs in the evaluation of that loss by the Referee. However, based upon the medical evidence, the Board also finds that claimant has suffered some loss of function in his right arm and, therefore, would award claimant, in addition to the 80° for his unscheduled disability, compensation equal to 19.2° for 10% loss function of his right arm.

ORDER

The order of the Referee, dated December 5, 1978, is modified.

Claimant is awarded 19.2° of a maximum of 192° for 10% loss function of the right arm. This award is in addition to the award for unscheduled disability granted claimant by the Referee's order which in all other respects is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

SAIF CLAIM NO. C 57291 May 17, 1979

KENNETH O. BRANDON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On April 27, 1979 an Own Motion Determination was entered in the above entitled matter. Inasmuch as the injury was sustained on January 21, 1967 when the maximum for unscheduled disability was 192° rather than 320°, the following changes must be made with respect to said Own Motion Determination.

In line 5 of the first paragraph on page 1, the figure and word "48° for" should be deleted.

In line 7 of the first paragraph on page 2, the figure and word "64° for" should be deleted and in line 3 of the third paragraph on page 2, the figure and word "64° for" should be deleted.

In all other respects the Own Motion Determination should be reaffirmed.

IT IS SO ORDERED.

CLAIM NO. C70-11-11144 May 17, 1979

PATSY L. GREINER, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Cheney & Kelley, Defense Attys.
Own Motion Order

On September 1, 1978 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for further medical care and treatment for an industrial injury sustained on September 2, 1970.

Claimant also had filed a claim for an alleged injury against her current employer, Albertson's Food Services, which was denied on the grounds that it was an aggravation of her September 1970 injury rather than a new injury.

By an order of the Board, dated September 19, 1978, claimant's request for own motion relief was referred to the Hearings Division to be consolidated with the pending request for hearing on claimant's alleged new injury. The Hearings Division was instructed to hold a hearing and determine whether claimant's need for further medical care and treatment was related to her September 1970 injury or the alleged new injury.

A hearing was held on March 21, 1979 before Referee Neal who found the medical evidence did not support claimant's contention that an incident in early 1978 at her home was related to her 1970 industrial injury. It was Referee Neal's recommendation that claimant's request for own motion relief should be denied.

The Board, after thorough consideration of the transcript and medical evidence before it, affirms and adopts as its own the findings and conclusion contained in the Referee's order, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

Claimant's request to reopen her claim for her September 2, 1970 industrial injury, pursuant to ORS 656.278, is hereby denied.

WCB CASE NO. 78-1463 May 17, 1979

LYNDA HEATHMAN, CLAIMANT
Robert J. Miller, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Order

On September 29, 1978 an Opinion and Order was entered in the above entitled matter by Referee Forrest T. James which affirmed the denial of claimant's claim. The Opinion and Order stated that on October 1, 1977 claimant executed a claim (Form 801) wherein she alleged that she twisted her right leg when she stepped with her left leg into a hole in the floor of a truck on March 7, 1977.

On October 18, 1978 the Board received from claimant, by and through her attorney, a request for review of the Referee's Opinion and Order. The request was acknowledged and the final date for the filing of briefs by both parties was set for April 28, 1979.

On March 30, 1979 the Board received from claimant, by and through her attorney, a motion to amend her Form 801 report of injury and her Request for Hearing to state that the date of the injury was January 28, 1977. The motion was based upon the transcript of the proceedings and affidavits of Lynda Heathman and Laurel Thompson.

The employer responded to the motion, stating that it was an attempt to introduce new evidence which had been available at the time of the hearing; furthermore, that the fact that the accident happened on January 27, 1977 rather than March 7, 1977 as stated on the Form 801 and the request for hearing were immaterial. The Referee's decision was not based upon the allegation of the date of injury in either the 801 form or the request for hearing; the decision of the Referee was based upon the discrepancies in the testimony in the record which persuaded the Referee that claimant had failed to establish by a preponderance of the evidence the chronological sequence of events between the incident in the trailer and her surgery.

The Board, after reading the motion and the supporting affidavits and also the employer's response, concludes that the motion to amend received by the claimant, by and through her attorney, on March 30, 1979 should be denied.

IT IS SO ORDERED.

HELEN L. MORRIS, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
Newhouse, Foss, Whitty & Roess,
Defense Attys.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which awarded claimant 320° for 100% unscheduled neck and shoulder disability.

Claimant, a nurse's aide, suffered a compensable injury to her neck, left shoulder and arm on November 2, 1976 while attempting to lift a rather heavy patient into bed using a mechanical lift. The lift tipped and claimant was struck in the shoulder. She braced herself to restrain the patient from striking the floor. The diagnosis was cervical myositis, secondary to the trauma. Claimant received conservative treatment; she has had no surgery. Claimant has not worked since her injury.

The Orthopaedic Consultants, in July 1977, diagnosed chronic cervical sprain by history, and recommended that the claim be closed. They recommended claimant be weaned from her drugs, particularly the Tranxene. They found claimant's loss of function of the neck at the time of the examination and due to the injury to be in the mild range. They found that claimant was employable and could return to work, however, she could not do any type of work which required lifting. Dr. Murray, claimant's treating physician, concurred with the Orthopaedic Consultants' report.

Dr. Murray referred claimant to Dr. Schostal who did nerve conduction velocity studies; the results were normal. His examination revealed claimant suffered mild bilateral carpal tunnel syndrome and was not a surgical candidate for a carpal tunnel release and he recommended a course of nocturnal wrist immobilization splints. Dr. Schostal found no evidence of a median neurapathy, carpal tunnel compression, thoracic outlet compression, or ulnar neuropathy.

Claimant's claim was closed on February 16, 1978 with an award of 32° for 10% unscheduled neck and shoulder disability.

On February 2, 1978 claimant had been involved in an automobile accident. The car in which she was a passenger had been rear-ended and claimant was not wearing a seatbelt at the time. Claimant reported to Dr. Adams that she did not think the head rests were elevated. The claim was settled and claimant was required to wear a neck collar for a couple of months after the car accident. After her injury on the job she had been required to wear the cervical collar for approximately six months. Claimant contends that the car incident only temporarily worsened her neck condition.

After her claim was closed, Dr. Adams examined claimant and stated that claimant probably would not return to work because she had told him that she was making as much on compensation as she did by working. He suggested to claimant that she attempt to get off most of her medication; he felt that the only thing which would benefit her would be the continuation of her exercises. He did not recommend that she continue with physical therapy nor did he feel she was in need of any surgery. Dr. Adams anticipated there would be difficulty in distinguishing the problems claimant had which were related to her industrial injury and those which were related to the automobile accident.

Dr. Murray had suggested on December 22, 1977 that claimant be retrained in a job which would not require her to do any heavy lifting, however, no retraining program has been offered to claimant. The vocational coordinator on February 2, 1978 would not refer claimant for rehabilitation services, noting that her previous work experience consisted of being a waitress and a cook. Another employee of Vocational Rehabilitation Division at Coos Bay concluded that claimant had such a severe handicap that retraining wasn't feasible. The Referee found that the history which claimant had given to this employee may have overstated her limitations.

Claimant has an 11th grade education, her work experience consists of working as an usherette, cook, waitress and nurse's aide. All of these skills were acquired on the job. At the present time claimant has found no employment; she hasn't made any great effort to seek employment and apparently is not able to be retrained. She did testify that her attempt to find work at a nursing home was unsuccessful. The Referee found that this was to be expected inasmuch as the limitations placed upon her would preclude her from lifting and prevent her from doing any manual labor. Working as a nurse's aide would involve lifting.

Dr. Murray's final diagnosis was cervical myositis and probable arthritis with considerable amuont of muscle spasm.

The Referee found that her treating physician, Dr. Murray, consistently related her problems to the industrial injury of November 2, 1976 and was of the opinion that the history related to him by claimant was true.

The Referee found that claimant had lost a great deal of future earning capacity, after considering her age, educational and job skills, experience and training, and her neck, shoulders and upper arm problems. He found the opinions expressed by Dr. Murray to be very persuasive. He believed that Dr. Murray had a better opportunity to exercise good judgment and assessing claimant's problems and their disabling affects than did Dr. Adams. The Referee felt that claimant needed retraining and that Field Services Division of the Workers' Compensation Department certainly should review her case. He did not speak further on this matter because the non-referral was not an issue before him.

Based upon claimant's loss of future earning capacity the Referee concluded that, " . . . claimant's loss is nearly total but not quite". He found she had a disability equal to 100% of the maximum allowable by law for her unscheduled disability. He stated that unless retraining was undertaken her loss might become greater in the future.

The Board, on de novo review, finds no medical evidence which indicates claimant has more than mild disability. Claimant has lost some potential earning capacity as a result of her industrial injury. The Board agrees with the opinion expressed by Dr. Adams that it is very difficult to determine how much of claimant's present problems is attributable to her industrial injury and how much to her automobile accident, however, the Board concludes that as a result of her industrial injury claimant has not lost more than 30% of her wage earning capacity.

The Board concurs with the Referee's finding that there has been absolutely no attempts made to retrain claimant, either by referral to a vocational rehabilitation program or by the development of an on-the-job training program for claimant. Claimant is only 47 years old and, in spite of the limitations placed upon her work activities by the doctors, there are still many opportunities in the general labor market for which claimant could be trained if given the proper and prompt assistance.

The Board requests that the Field Services Division of the Workers' Compensation Department review claimant's case and, if referral for vocational rehabilitation is not feasible, attempt to place claimant in an on-the-job training program as soon as possible.

ORDER

The order of the Referee, dated October 26, 1978, is modified.

Claimant is awarded 96° of a maximum of 320° for 30% unscheduled neck and shoulder disability. This award is in lieu of the award made by the Referee in his order which in all other respects is affirmed.

SAIF CLAIM NO. KA 963813 May 17, 1979

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

On April 23, 1979 an Own Motion Determination was entered in the above entitled matter.

On line one of the first paragraph on page two of said Own Motion Determination, the figure and word "37.5° for" should be deleted. In all other respects the Own Motion Determination should be reaffirmed.

IT IS SO ORDERED.

WCB CASE NO. 78-4661 May 17, 1979

ALLAN TWIGGER, CLAIMANT
Roger Wallingford, Claimant's Atty.
Michael Hoffman, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks Board review of the Referee's order which granted claimant 112° for 35% unscheduled low back disability, directed it to pay claimant a penalty equal to 15% of the previously underpaid amount for temporary total disability benefits and awarded $100.00 as an attorney's fee for unreasonable resistance of the payment of compensation.

Claimant, a body and fender repairman, suffered a compensable injury to his low back on September 14, 1976 while lifting a car section. The major portion of claimant's work background has been in auto painting and body mechanics.

Claimant's injury was diagnosed by Dr. Thompson, his treating physician, as an acute lumbosacral strain. A laminotomy, L4-5 and L5-S1 with disc excision at both levels was performed on June 13, 1977. Dr. Thompson advised claimant to seek employment which did not involve heavy lifting and repetitive bending which was required by his occupation prior to the injury.

On March 8, 1978 Dr. Thompson re-examined claimant. At that time he found claimant to be medically stationary with mildly moderate permanent partial disability. Dr. Thompson examined claimant again in May and August; each time he reported claimant's condition was basically the same although the claimant's back motion was more limited because of increased stiffness when he was examined in August.

On June 1, 1978 the claim was closed by a Determination Order which granted claimant compensation for temporary total disability from September 13, 1976 through March 8, 1978, less time worked and 32° for 10% unscheduled low back disability.

Claimant requested a hearing on the adequacy of the award; he also raised the issue of his entitlement to penalties and attorney's fees for unreasonable resistance in paying compensation.

Claimant testified that his back becomes sore and stiff when he increases his activities; it is also exacerbated by prolonged standing, sitting, walking or lying down. Claimant is no longer able to engage in many activities such as remodeling a home, fishing, playing ball, working in the garden or repairing automobiles. Claimant has not worked since his injury although he is now taking a training course in draftsmanship. Most of his drafting studies are done at home rather than in school because of his physical condition.

Claimant stated that in late 1976 he called the carrier concerning the underpayment of temporary total disability benefits and was advised that he was receiving the "flat rate for all body and fender workers". The employer stipulated at the hearing that claimant had been underpaid time loss benefits.

An instructor in drafting at Portland Community College testified, based upon interviews of former students and employers, he had determined that the starting salary of graduates in drafting averaged $900.00 per month; some were earning from $825.00 to $1,400.00 a month. The evidence indicates claimant was earning approximately $1,300.00 a month at the time of his industrial injury.

The Referee found that the failure on the part of the employer to correct the underpayment of temporary total disability benefits after being advised of the error by claimant constituted unreasonable delay for which a penalty should be assessed and attorney's fees awarded. The Referee found that claimant had been medically stationary since March 8, 1978, the date Dr. Thompson re-examined claimant and made such a finding.

Based upon the medical evidence, the Referee found that claimant had sustained permanent residuals from his industrial injury which prevented him from performing any type of employment requiring heavy lifting and repetitive bending. Considering this together with the testimony that claimant cannot sit, stand, or lie down for prolonged periods of time nor can he walk for any short distance without incurring pain, the Referee found that claimant was precluded not only from returning to his former occupation as a body and fender repairman but to many other occupations which require heavy manual labor and which claimant could have performed prior to his industrial injury.

Therefore, based upon the preponderance of the evidence, he concluded that claimant had suffered a greater loss of wage earning capacity than that represented by the award of 32° for 10% of the maximum allowed by statute for unscheduled disability. He increased the award to 35%. The Referee also directed the employer to pay claimant an additional amount equal to 15% of the total of the difference between the time loss benefits actually paid to claimant and the time loss benefits to which he was entitled. He awarded the claimant's attorney a sum of $100.00 to be paid by the carrier because of its unreasonable resistance to payment of compensation.

The Board, after de novo review, agrees with the Referee's conclusion with respect to the assessment of penalties and attorney's fees. Between September 13, 1976 and March 8, 1978 claimant was not paid the proper amount of weekly time loss benefits. The employer and its carrier acknowledged this underpayment, although they did not introduce a record of such underpayment. Claimant was told by the carrier that it set a flat rate weekly wage for body and fender repairment of $260.00 and paid time loss benefits on that basis regardless of actual earnings. Such procedure is not authorized by law. The time loss benefits are based upon a percentage of the actual earnings of the worker as set forth in ORS 656.210. Therefore, the carrier's policy of unilaterally establishing a set weekly rate which does not accurately reflect the worker's actual wage is unreasonable conduct. In this case it amounted to an underpayment to claimant by the carrier of temporary total disability compensation.

The medical evidence, basically Dr. Thompson's reports, indicate that claimant's physical impairment is mildly moderate. He stated that claimant could walk approximately five miles, was able to stand on his tip toes and heels with equal facility, and was able to do a deep knee bend without any difficulty. Claimant does have aching in his legs which is relieved by short periods of rest. Claimant's own testimony is very similar to Dr. Thompson's findings. The only limitations which have been placed upon claimant's work and non-work activities are excessive bending and heavy lifting. Because of these restrictions claimant cannot return to his former occupation as a body and fender repairman, however, claimant is relatively young, 38 years old, he has obtained a GED and he has had one and a half years of technical training as a tabulating machine operator. He worked for six months as an IBM 1400 operator. Claimant also has had more than two years training in mechanical drafting at Portland Community College. The evidence indicates in both of these experiences claimant has done well and it can be reasonably assumed that he will be able to make a smooth transition from heavy labor to other less strenuous areas of the labor market. Claimant testified that he preferred mechanical drafting to body and fender repair work and would have attempted to enter that field of employment originally but he was financially unable to do so prior to his injury.

Taking into consideration claimant's physical impairments, his youth, and his apparent adaptability to the lighter type work, the Board concludes that claimant has lost some of his wage earning capacity as a result of the industrial injury. The award of 32° which is equal to 10% of the maximum is not adequate to compensate claimant for this loss. He is entitled to an award of 80° which is 25% of the maximum for an unscheduled disability.

ORDER

The order of the Referee, dated December 4, 1978, is modified.

Claimant is awarded 80° of a maximum of 320° for 25% low back disability. This is in lieu of the award made by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-4455 May 18, 1979

RALPH R. CUTRIGHT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Newhouse, Foss, Whitty & Roess,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Referee's order which directed it to pay claimant 28.8° for 15% loss of the right arm and 288° for 90% unscheduled cervical and thoracic spine disability. The order also allowed the employer to credit payments for temporary total disability made to claimant after December 14, 1977 against this award for permanent partial disability.

Claimant, then a 62-year-old head cutter, sustained a compensable injury on April 20, 1977 when a chunk of wook struck him on the head driving his head between his legs. [Claimant suffered a "closed fracture, spinous process of C-4".] Claimant was hospitalized at Bay Area Hospital from April 20 to April 24, 1977. Dr. Poage reported a final diagnosis of: "1. Closed fracture, spinous process of C-4. 2. Degenerative disc disease of C-4-5 and C-56 [sic]. 3. Minimal depression deformities of T-8 and T-11, probably old. 4. Degenerative arthritis, cervical and thoracic spine. 5. Diabetes mellitus, mild. 6. Pulmonary emphysema. 7. Generalized arteriosclerosis with arteriosclerosis obliterans of the left leg." He advised claimant to wear a cervical collar for approximately a month and a half. Claimant has not worked since the accident.

In July and August 1977 claimant continued to be stiff and sore when he attempted to do very much. He had pain with rotation of his neck and pain between the scapulas. Dr. Poage recommended claimant become more active.

Claimant was again seen on December 14, 1977 by Dr. Poage who said claimant's condition was medically stationary; he released claimant to work. The doctor said he did not believe claimant planned to return to work. He felt claimant was active and could be working. The claim was closed by a Determination Order dated May 30, 1978 which awarded claimant compensation only for temporary total disability from April 20 through December 14, 1977.

In July 1978 claimant was seen by Dr. Freudenberg, an orthopedic surgeon, who expressed his opinion that claimant's "cervical arthritis is probably exacerbated by his injury of a year ago" and continued to state that claimant should be instructed to exercise his neck in order to ". . . strengthen and increase the motion".

Claimant is 64 years old and receives $423 a month from Social Security. He testified that since his industrial injury on April 20, 1977 he had not looked for work of any kind nor had he responded to any want ads.

Dr. Freudenberg reported in August 1978 that claimant complained of pain and stiffness in his neck and back. Dr. Poage felt claimant had probable referred pain secondary to degenerative disease of the spine. He advised claimant to continue medication and exercises and perhaps in one month claimant might be improved enough for light work. On September 21, 1978 Dr. Freudenberg reported claimant was improved, having minimal cervical and low back discomfort. He released claimant for light work. Claimant was able to help his relatives move and managed carrying light objects with no difficulty at the time. After doing this claimant had pain in the low back area which was relieved by a hot pack.

The Referee found that on one occasion claimant tried bucking firewood with a chain saw but has not attempted to use a chain saw in any way since then. Last summer, claimant helped his son-in-law patch the roof on claimant's house and while he was carrying a five-gallon bucket of tar his right hand gave way and he dropped the bucket.

Claimant has a 7th grade education and has worked all of his life in the woods. For the past 14 years he worked for the employer as a timber faller. As a head cutter, he trained buckers. Claimant has pulmonary emphysema which predated the industrial injury. Claimant lost his right thumb as the result of a prior logging accident and he is somewhat hard of hearing.

The Referee found the record clearly reflected permanent physical residuals from the compensable injury and although claimant's physical impairment appeared minimal it is significant enough that neither Dr. Poage nor Dr. Freudenberg had released claimant to return to his previous work even though he is medically stationary.

Claimant contends he is totally disabled and that with his physical impairment from the injury superimposed on his pre-existing physical conditions and other non-medical factors, he is unable to regularly perform work at a gainful and suitable occupation.

The Referee thought that claimant appeared to be a prime candidate for "odd-lot" permanent total disability because he could not return to the only work he had ever done, had not been trained for any other type of work and had a very limited education. However, even after taking these factors into consideration with his age, his difficulty hearing, his emphysema condition and the missing thumb on his dominant hand and disregarding claimant's low back problems which were unrelated to the compensable injury and had become symptomatic since the entry of the Determination Order, the Referee concluded that claimant had failed to prove permanent total disability. ORS 656.206(3) now requires that a claimant "establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment". The Referee felt that claimant had not made any such reasonable efforts even though he has but minimal physical limitations. Nor did claimant offer any evidence from vocational experts that there were no gainful and suitable occupations available to him.

The Referee concluded that claimant had established, however, that his compensable injury has resulted in both permanent unscheduled disability to his cervical and thoracic spine and permanent scheduled disability from the "referred" partial loss of function of his right arm. Separate awards may be given for both scheduled and unscheduled disabilities arising from the same compensable injury. Separate awards do not necessarily indicate an increase in compensation; the loss of function of a scheduled member must be differentiated from the loss of earning capacity from an unscheduled disability. Foster v. SAIF, 259 Or 26.

The Referee concluded that claimant had lost 15% of the physical function and use of his right arm based upon his occasional loss of sensation and the loss of grip strength. He found that his unscheduled disability was much more severe since it was based on loss of earning capacity and he concluded that claimant's permanent loss of earning capacity from his compensable injury entitled him to an award equal to 90% of the maximum allowable by statute for such disability.

As a secondary issue, claimant contended that the Determination Order erred in establishing December 14, 1977 as the cutoff date for claimant's entitlement to temporary total disability, contending that the proper date was May 30, 1978 when the Determination Order was issued. The Referee found that claimant was entitled to temporary total disability benefits only during the time his disability was temporary; when he becomes medically stationary his entitlement to temporary total disability compensation ends and he becomes entitled to permanent partial disability, if any. However, because of inherent delays in processing the final determination of disability, it is possible that a medically stationary claimant has not been released by his doctor to return to regular employment, therefore, temporary total disability payments must continue until the Determination Order is issued even though this results in an overpayment of temporary total disability compensation.

In this instance, the Referee found that the Determination Order was correct with respect to the cutoff period of the temporary total disability because, even though Dr. Poage's report of December 16, 1977 was incomplete, it did indicate that he last saw claimant on December 14, 1977 and that claimant was then medically stationary. From that date on claimant's disability was permanent. Since Dr. Poage, however, did not release claimant to return to his regular work, the employer continued the payments until the actual issuance of the Determination Order. This resulted in an overpayment of temporary total disability benefits and such overpayment may be credited by the employer against claimant's award for permanent disability.

The Board, on de novo review, concurs in all of the findings and conclusions reached by the Referee except that it finds the medical evidence is not sufficient to justify an award to claimant of 90% of the maximum allowable by law for his unscheduled disability. The medical evidence shows that claimant's physical impairment by and of itself is minimal. When this minimal physical impairment is considered with claimant's age, work background and limited education, the Board concludes that he has suffered a loss of wage earning capacity, however, in the opinion of the Board, that loss would be adequately compensated for by an award of 96° which represents 30% of the maximum allowable by statute.

ORDER

The order of the Referee, dated November 27, 1978, is modified.

Claimant is awarded 96° of a maximum of 320° for 30% unscheduled cervical and thoracic spine disability. This award is in lieu of the award for unscheduled disability granted claimant by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 77-7701 May 18, 1979

JAMES GRIFFITH, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the order of the Referee which directed the Fund to pay claimant 105° for 70% loss of use of the right hand.

Claimant sustained a compensable injury to his right hand on July 16, 1975 when the fourth and fifth fingers of his right hand were caught in a power saw. An open reduction internal fixation of third and fourth finger fractures, repair extensor tendons 3, 4 and 5, debridement of wounds and primary skin closure were performed by Dr. Struckman. Later Dr. Struckman referred claimant to Dr. Gill who, after examining claimant, concluded that claimant's present condition was not acceptable; that claimant still had pain which limited the total use of his hand and the joints were stiff.

On February 13, 1976 Dr. Gill performed a "proximal interphalangeal joint implant arthroplasty, right long and ring fingers, Swanson-type". On August 27, 1976 Dr. Gill again performed surgery releasing the implant arthroplasties of the long and ring fingers. He continued to treat claimant and later referred him for physical therapy. On December 14, 1976 Dr. Gill stated claimant was medically stationary but he had significant functional impairment of a permanent nature in his dominant right hand, consisting of loss of power, particularly in grip and three-point chuck pinch; the most prominently, loss of manipulative dexterity and endurance in the hand.

The claim was closed by a Determination Order dated January 28, 1977 which awarded claimant 60° for 40% loss use of the right hand.

On March 29, 1978 Dr. Coletti examined claimant at the request of claimant's attorney. He concluded that claimant's motion in the fingers had shown little improvement over his condition at the time of Dr. Gill's examination. He stated, in part, "This is not a very workable hand from the standpoint of performing anything but grosser functions and there may be jobs where with special education or training he might be employed."

Claimant testified that he bowled regularly two or three times a week but that he had to use a special light ball which weighed 10 pounds. He stated that his hand pained him almost constantly, he could not make a fist nor would he hold anything that vibrated. He has no strength in the hand and he is required to eat and shave using his left hand. The medical findings made by Dr. Gill generally are consistent with claimant's complaints.

The Referee found that claimant's loss of function was greater than 40% of the maximum and increased it to 70%.

At the hearing a second issue was raised, namely, claimant's entitlement to an award of permanent disability, unscheduled psychiatric and psychological. Claimant's attorney had, on May 30, 1978, sent in a report from Dr. Hickman, dated April 11, 1978, which raised for the first time the issue of unscheduled psychological disability. The report had not been received by the attorney for the Fund at the time of the hearing and the Referee granted the Fund's motion to continue the hearing on the grounds of surprise.

At the later hearing the Referee found that the record contained psychological and psychiatric reports which were irreconcilable. Dr. Paltrow, after examining claimant, at the request of claimant's attorney, diagnosed "traumatic depression neurosis (precipitated by industrial accident July 16, 1975)".

Dr. Hickman had examined claimant earlier at the request of claimant's attorney and he felt that possibly the fact that claimant had not been able to engage in gainful employment since his accident contributed to a significant financial and emotional problem in addition to his physical symptoms.

The Referee interpreted Dr. Hickman's theory to be that claimant's psychological problems were caused, or materially contributed to, by claimant's worrying about the possibility of not being able to return to gainful employment. The Referee was doubtful whether, as a matter of law, a psychological problem which was created, not by an industrial injury itself, but by the strain placed on the claimant through doubt of his ability to return to gainful employment would be compensable.

Dr. Colbach, after examining claimant on behalf of the employer, disagreed with the conclusions reached by Dr. Paltrow and Dr. Hickman; he found no relationship between claimant's psychological and psychiatric problems and his industrial injury.

When Dr. Coletti had examined claimant for his physical problems he also stated in a report dated March 29, 1978 that he did not detect any significant psychological abnormality in claimant.

The Referee concluded that claimant was not entitled to any award of permanent disability for unscheduled psychiatric and psychological disability.

The Board, on de novo review, concurs in the findings and conclusions reached by the Referee.

ORDER

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

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

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant 96° for 30% unscheduled low back disability and compensation for temporary total disability from September 30, 1978 to October 23, 1978.

Claimant suffered a compensable injury on November 7, 1977 when he stepped from his truck and slipped on the running board. He fell, landing on his back. Claimant, who is 26 years old and has a high school diploma, for eight years has been doing carpentry type work involving office furniture, store and bank fixtures and stereophonic cabinets. This type of work requires stooping, bending and lifting.

After his injury, he was given conservative treatment which did not alleviate his pain; he was hospitalized for further study and placed in traction and given physical therapy. Claimant improved to the extent that a myelogram was not necessary. Claimant was discharged from the hospital on January 23, eleven days after his admission.

In February 1978 claimant continued to receive compensation for temporary total disability because he was still having some radiculopathy in the left lower leg with some low back discomfort. In March it was decided that a myelogram should be performed; it was negative. A week later claimant had an epidural venogram which was also negative.

Claimant was referred to the Emanuel Hospital Pain Center and was given a transcutaneous nerve stimulator which apparently gave claimant some relief from his pain. Because claimant was both agitated and depressed he was placed on medication for the purpose of relieving his emotional problems. It was believed that there was a significant psychological component to claimant's pain problem and his discharge summary from the Pain Center indicated that he had not received much benefit from the stay at the Center. His medication was cut down considerably.

On March 22, 1978 Dr. Misko performed a lumbar myelogram which indicated a possible defect at L4-5 anteriorly and perhaps slightly on the right side. EMG studies indicated no evidence of motor unit compromise.

Claimant continued to have problems and was seen by Dr. Tongue who took him off work for three weeks but finally concluded he could find no objective evidence to support the severity of claimant's complaints. Dr. Tongue issued a disability certificate indicating that claimant was under his care between September 30 and October 23, 1978 and had been totally incapacitated during that period of time but had recovered sufficiently to return to work on October 23.

At the present time claimant is seeking work at Boeing where he would be able to sit and solder circuit boards; claimant has had some electrical experience.

Claimant still takes Tylenol III two or three times a week and also takes Elavil. Based upon Dr. Tongue's advice claimant has lost 30 pounds and this apparently has helped his condition.

At the time of his injury claimant was earning approximately $17,000 a year doing cabinet work. His work in the electronic industry will pay him less.

The Referee found that the preponderance of the evidence indicated that claimant had a chronic low back pain syndrome resulting from his industrial injury which had precluded him from returning to his regular occupation. There is no evidence that claimant will require surgery at the present time.

The Referee found that claimant is highly motivated and that he is still very young; nevertheless, claimant will not be able to return to his former occupation unless he does so as a supervisor and this is very unlikely. He concluded that claimant's loss of wage earning capacity as a result of the industrial injury was sufficient to justify an award of 96° which represented 30% of the maximum allowable by statute.

Based upon Dr. Tongue's disability certificate, the Referee concluded that claimant was entitled to additional compensation for time loss between September 30, 1978 and October 23, 1978.

The Board, on de novo review, agrees with the Referee that claimant is entitled to additional compensation for temporary total disability from September 30, 1978 through October 23, 1978, based upon Dr. Tongue's certification. The medical evidence indicates that claimant has suffered some physical disability which precludes him from returning to his former job as a carpenter inasmuch as it involves substantial stooping, bending and lifting. However, Dr. Tongue was unable to find objective evidence to support the severity of claimant's complaints. Claimant has had no surgery. The myelograms did not reveal any permanent disc problem. Claimant seems to have some psychological problems, but he is young and apparently able to adapt to other types of employment which would not require him to make movements which would exacerbate his condition.

The Board concludes that claimant would be adequately compensated for his loss of wage-earning capacity as a result of the industrial injury by an award of 64° which represents 20% of the maximum.

ORDER

The order of the Referee, dated November 29, 1978, is modified.

Claimant is awarded 64° of a maximum of 320° for 20% unscheduled low back disability. This award for permanent disability is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 77-6474 May 18, 1979

DIANNE JAMES, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation to which she is entitled; it was also directed to pay time loss benefits, penalties and attorney's fees in relation to the above claim.

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

ORDER

The order of the Referee, dated November 22, 1978, is affirmed.

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

Board Member Robert L. McCallister dissents as follows:

I disagree with the majority on the issue of compensability

I find the claimant has not proved by a preponderance of the evidence that her work originally caused or materially and permenently worsened her psychological condition. See Weller V. Union Carbide Corporation, 35 Or App 355.

The evidence is uncontroverted that the claimant's psychological condition pre-existed her employment. The employment did not cause the condition. The medical record speaks to symptoms of the admitted pre-existing condition. I find no medical evidence that supports a claim that the symptoms were materially and permanently worsened by employment activity.

I would reverse the Referee and reinstate the State Accident Insurance Fund's denial.

I agree with the majority on all other issues raised in this appeal.

WCB CASE NO. 78-1649 May 18, 1979

In the Matter of the Compensation
of the Beneficiaries of
GERALD MAYES, DECEASED
Grant, Ferguson & Carter, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

The beneficiaries of Gerald Mayes, deceased, hereinafter referred to as claimant, request review by the Board of the Referee's order which approved the defendant's denial of claimant's claim for widow's benefits pursuant to ORS 656.208.

The facts were stipulated as follows. Gerald Mayes was injured on December 12, 1972 while working within the scope of his employment for Boise Cascade, a self-insured employer. The claim was accepted and closed and Mayes requested a hearing on the award made by the Determination Order. On March 16, 1977 Mayes was found to be permanently and totally disabled as of November 3, 1976 by a Referee's Opinion and Order which was affirmed by the Board on February 2, 1978. At the time of the hearing in the above entitled matter, Boise Cascade had appealed the matter to the Court of Appeals and it was pending judicial review. [The Opinion and Order was entered on December 8, 1978. On December 4, 1978 the Court of Appeals had entered its opinion which reinstated the Determination Order of April 13, 1976 granting claimant an additional award of 80° for a total award of 144° for 45% of the maximum allowable by law for unscheduled disability, but the Referee was not aware of this.]

Mayes died in October 1977, survived by his widow, the claimant. Following his death, Boise Cascade terminated any benefit payments and has not paid any benefit payments since the death.

On February 24, 1978 Boise Cascade advised claimant by letter that it was denying responsibility for paying benefits to her and she requested a hearing on February 28, 1978. An amended request for hearing was filed on March 22, 1978 which alleged that the employer unreasonably failed to pay compensation and requested that penalties and attorney's fees be assessed and awarded because of the employer's refusal to pay compensation.

Claimant contended that as the surviving spouse she is entitled to receive benefits as set forth under the provisions of ORS 656.208 if her husband dies during a period of permanent total disability; that ORS 656.313 provides the filing by the employer or the Fund of a request for review or court appeal shall not stay payment of compensation to a claimant; that she is entitled to proceed as the claimant in the claim for the industrial injury sustained by Mayes on December 12, 1972, per the amended request for hearing; that the employer acted unreasonably in terminating her benefits and refusing to pay them and should be assessed penalties as well as attorney's fees even in the event the decision of the Referee and the Board is ultimately reversed on appeal and that the employer is collaterally estopped by the decision of the Referee and the Board from relitigating the issue of permanent total disability, even in the event that it is decided that claimant must proceed by an entirely separate claim.

The employer contends that claimant's claim is an individual right and, therefore, she has a separate claim from that of her deceased husband, Gerald Mayes; that the decision of the Referee and the Board are not res judicata or collateral estoppel as to the issue of Mayes' status of permanent total disability; that such order is not a final order since there has been an appeal taken to the Court of Appeals; that the employer is not obligated to make any payments pending appeal since Mayes died and his widow has a separate claim, and in the event that the Court of Appeals should reverse the decision of the Board and the Referee that claimant is not entitled to any benefits.

The Referee found that claimant's right to death benefits was created directly by ORS 656.208 and was not derived from the rights of her deceased husband. Relying upon Mikolich v. State Industrial Accident Commission, 212 Or 47 (1957), wherein the Oregon Supreme Court held that any decision regarding a claimant's status prior to his death does not bar relitigation of that status at the time of his death under the doctrine of res judicata or collateral estoppel since the dependent is not in privity with the injured employee as to the rights asserted by him, the Referee found that even though Mayes had been declared permanently and totally disabled by the Referee and the Board prior to his death that the employer could relitigate the status of Mayes' permanent total disability as of the date of his death.

The Referee found that there was a possible conflict presented by the provisions of ORS 656.313 which provides that a request for review or appeal shall not stay payment of compensation to a claimant, but interpreted that statute to mean in this case that the employer must pay compensation up until the time of Mayes' death, but that it can still dispute the status of Mayes at the time of his death in a claim brought by his widow pursuant to ORS 656.208.

Having found that the employer may relitigate the extent of permanent partial disability, the Referee, based upon certain medical reports which, pursuant to the stipulation, were to be admitted if the Referee determined that the status of Mayes was not res judicata or collateral estoppel, found that at the time of his death Mayes was not permanently and totally disabled. Therefore, claimant was not entitled to any benefits.

The Referee further found that the employer's denial and refusal to pay compensation after Mayes' death was not unreasonable and did not subject it to the assessment of penalties or the award of attorney's fees.

The Board, on de novo review, finds that at the time of his death Mayes was permanently and totally disabled. ORS 656.208 provides that a widow shall receive death benefits if the injured worker dies during the period of permanent total disability. If Mayes had not died in October 1977 the employer would have been obligated to pay him compensation for permanent total disability until the date of the opinion of the Court of Appeals, December 4, 1978. On that date, and pursuant to said opinion, the employer would be entitled to terminate payment of compensation for permanent total disability. It would continue to pay Mayes compensation for permanent partial disability only if the award of 144° had not previously been paid.

In the opinion of the Board, Mayes' right to compensation for permanent and total disability was vested in him at the time of his death and passed, through survivorship, to claimant. Therefore, the carrier was required to continue to make payments for permanent total disability to claimant from the date of Mayes' death until the date of the opinion of the Court of Appeal which was December 4, 1978.

The Board further finds that the employer's failure to continue to make these benefit payments up until the time the orders of the Referee and the Board had been overturned by the Court of Appeals represents unreasonable refusal to pay compensation to claimant. There is no basis for finding that the provisions of ORS 656.313 do not apply in this case.

The Board concludes that claimant is entitled to the payment of compensation from the date of her husband's death to the date of the opinion of the Court of Appeals and also to additional compensation equal to 15% of interim compensation payable between the aforesaid dates for the employer's unreasonable refusal to pay compensation. Claimant's attorney is entitled to an attorney's fee payable by the employer and its carrier.

ORDER

The order of the Referee, dated December 8, 1978, is reversed.

Claimant's claim for benefits, pursuant to the provisions of ORS 656.208, is hereby remanded to the employer and its carrier to be accepted and for the payment of compensation from the date of the death of claimant's husband, Gerald Mayes, to December 4, 1978, the date of the opinion of the Court of Appeals.

Claimant is also entitled to compensation equal to 15% of the compensation due her between the dates stated above because of the unreasonable refusal by the employer and its carrier to pay claimant compensation as provided by law.

Claimant's attorney is awarded as a reasonable attorney's fee for his services both before the Referee at the hearing and at Board review a sum of $1,000, payable by the employer and its carrier.

SAIF CLAIM NO. PC 276019 May 18, 1979

JUNE PYLE, CLAIMANT
Robert Grant, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to her left hand on November 9, 1970 when she was struck by some lumber; the injury apparently exacerbated a prior condition.

Claimant underwent six surgeries and three Determination Orders were issued before an Opinion and Order of October 29, 1974 granted her compensation for 66-2/3% loss of the left forearm. Claimant's aggravation rights have expired.

On June 22, 1977 a Board's Own Motion Order reopened claimant's claim for compensation commencing on the date she entered the hospital for additional surgery. On August 30, 1977 a transplantation of sections of the sural nerves from both lower legs into the left forearm was apparently unsuccessful in lessening claimant's pain. Further surgery was done on October 6, 1977 with little benefit.

On September 6, 1978 a left dorsal sympathectomy was performed which resulted in a "good permanent sympathetic block to her left arm and hand". By January 29, 1979 psychiatric counseling claimant was receiving appeared to be supportive rather than curative in nature.

Dr. Parrish, in his March 22, 1979 report, described residuals that would be adequately compensated by claimant's award of 66-2/3% loss of the left forearm. He noted, however, that the sural nerve transplants have resulted in neurological deficits in both lower legs and feet and the fact that claimant has undergone 10 surgeries since this injury has understandably resulted in psychological impairment.

The State Accident Insurance Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department felt that claimant was entitled to additional compensation for time loss from August 30, 1977 through March 27, 1979 and to an additional award of compensation equal to 5% of the right foot, 5% of the left foot and 25% unscheduled psychological disability.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 30, 1977 through March 27, 1979, less time worked.

Claimant is also granted compensation equal to 7.5° for 5% loss of the right foot, 7.5° for 5% loss of the left foot and 80° for 25% unscheduled psychological disability. These awards are in addition to all previous awards granted claimant for her November 9, 1970 industrial injury.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-4000 May 18, 1979

DUANE VAN ARSDALE, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Garrett, Seideman, Hemann & Robertson,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer, Boise Cascade Corporation, seeks review by the Board of the Referee's order which granted claimant 20.25° for 15% loss of function of his right foot. The employer contends that claimant failed to meet his burden of proving that he suffered any permanent partial disability to his right leg (foot).

Claimant suffered a compensable injury on September 30, 1977 when he suffered third degree burns of his lower right leg when the leg was immersed in boiling water. The claim was initially closed on March 24, 1978 by a Determination Order which granted claimant compensation only for temporary total disability from September 30, 1977 through January 1, 1978.

The Referee found that claimant suffered third degree burns around the entire lower leg from immediately above the ankle to just below the knee. Split thickness skin grafting was performed on November 7, 1977. The grafts extended into the right ankle. Claimant returned to work on January 3, 1978 and indicated that pain had caused him to miss one day of regular work since his return; it also influenced him to decline working overtime on other occasions.

There is no evidence that claimant has suffered limitation of motion in the ankle or foot; he does suffer numbness of the right leg but it is non-disabling. Claimant suffers increased sensitivity to cold in the burn area.

The Referee found claimant to be a credible witness and concluded that he had suffered permanent impairment of his lower right leg because of disabling pain and increased sensitivity to the cold. He, therefore, granted claimant an award of 20.25° which represented 15% loss function of the right leg.

The Board, on de novo review, finds very little medical evidence to support a conclusion that claimant has suffered any permanent partial disability. Dr. Robertson indicated to the employer that the claimant had no permanent disability. The Referee interpreted Dr. Robertson's statement to mean that claimant would suffer no permanent loss of motion. The letter written by the employer to Dr. Robertson on February 14, 1978 specifically asked the doctor if there was any "permanent impairment". His answer, which was hand-written at the bottom of said letter and returned to the employer, was "no permanent disability".

The Board does find that claimant has some restriction due to pain. Although he has lost but one day of work as a result thereof, nevertheless, he has turned down offers to work overtime.

The medical evidence indicates that the whole area which was burned feels numb and as if "it had a tight band constricting it". This tightness, however, does not interfere with the functioning of claimant's leg [the award was granted on the foot because the burn area was below the knee and the Referee was bound by statute to make the award on the foot rather than the leg].

The Board concludes that claimant does have some leg fatigue which does diminish slightly the functioning of the lower extremity and, therefore, he is entitled to an award equal to 5% loss of the right foot.

ORDER

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

Claimant is awarded 6.75° of a maximum of 135° for 5% loss function of the right foot. This award is in lieu of the award granted by the Referee in his order which in all other respects is affirmed.

WCB CASE NO. 77-6147 May 21, 1979
WCB CASE NO. 77-4829

HAYWOOD BUSBY, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Keith D. Skelton, Employer's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Order Denying Motion

On February 27, 1979 the Referee entered his Opinion and Order in the above entitled matter.

On March 19, 1979 the employer, U. S. Plywood, and its carrier, Liberty Mutual Insurance Company, requested Board review of the Referee's Opinion and Order. Through inadvertence, this letter was not mailed until March 29, 1979 and received by the Board the following day with an attached note explaining the delay. A photostatic copy of the envelope in which the request for review was mailed to the Board shows a postmark date of "29 March 1979".

On May 10, 1979 the employer, Smoke-Craft, Inc., and its carrier, Liberty Mutual Insurance Company, moved to dismiss the request for Board review on the grounds that it was not timely filed.

ORS 656.289(3) provides that the Referee's order shall be final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the Board under ORS 656.295. 656.295(2) provides that the request for review shall be mailed to the Board and copies of the request shall be mailed to all parties to the proceedings before the Referee.

February 1979 had 28 days; the Opinion and Order was entered on February 27, 1979 and the 30th day thereafter was March 29, 1979. This is the date the employer, U.S. Plywood, requested Board review as evidenced by the photostatic copy of the envelope in which the request was ultimately mailed. Therefore, the request was timely made.

ORDER

The motion made by the employer, Smoke-Craft, Inc., and its carrier, Liberty Mutual Insurance Company, to dismiss the request for Board review made by the employer, U.S. Plywood, and its carrier, Liberty Mutual Insurance Company, is hereby denied.

WCB CASE NO. 77-1336 May 21, 1979
WCB CASE NO. 76-6126

GEORGE COOPER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Referring for Consolidated
Hearing

Claimant suffered a compensable injury on November 21, 1967 while in the employ of the City of Salem. His left leg and back were injured and his claim was accepted by the State Accident Insurance Fund. The Claim was originally closed by a Determination Order, dated May 21, 1968, which awarded claimant 10% loss of his left leg and 10% for his unscheduled disability.

Subsequently, claimant was able to return to work for the City of Salem and on March 11, 1976 sustained another injury to the claimant's back and the claim was accepted and closed by a Determination Order dated November 1, 1976 which granted claimant no award for permanent disability.

Later, claimant filed an aggravation claim on the 1967 injury and receiving no response from the Fund, filed a request for hearing asking for penalties and attorney's fees for their failure to act within the 60-day prescribed period. This request for hearing has been identified as WCB Case No. 77-1336.

Claimant also had filed a request for hearing on the adequacy of the Determination Order of November 1, 1976 which was identified as WCB Case No. 76-6126.

On July 18, 1977 the Board received an own motion petition from claimant, by and through his attorney. This petition was accompanied by medical reports from Dr. Bolen dated June 14, 1976 and Dr. John White dated April 15, 1976.

In August 1977 all parties agreed to send claimant to the University of Oregon Medical School for further treatment. The Board was notified of this and further action on the own motion petition was deferred.

On April 9, 1978 the matter was set for hearing before Referee Kirk A. Mulder on the issues of the penalties and attorney's fees on the aggravation claim plus the adequacy of the Determination Order dated November 1, 1976. However, both attorneys and Referee Mulder felt that because of the complexity of the case it would probably be of assistance to the Board to have an advisory hearing on the own motion claim and, if the claim is accepted pursuant to ORS 656.278, to determine the extent of additional permanent partial disability, if any, to be awarded claimant. It was proposed that such hearing be held in conjunction with the hearing on the adequacy of the Determination Order of November 1, 1976.

The Board believes that it would be in the best interests of all parties concerned if claimant's petition for own motion which is tied in with the request for penalties and attorney's fees in the case designated as WCB Case No. 77-1336 be set down for hearing at the same time as the appeal from the Determination Order dated November 1, 1976 (WCB Case No. 76-6126). Therefore, it remands said petition to its Hearings Division, and more specifically, to Referee Kirk A. Mulder, to take evidence on both the appeal and the petition and determine whether or not claimant's present condition is directly related to his 1967 compensable injury and represents a worsening thereof since the last arrangement and award of compensation or is the result of the injury sustained on March 11, 1976.

Upon conclusion of the hearing should the Referee find that claimant's present condition is the result of his 1967 injury and represents a worsening thereof he shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation on claimant's request for own motion relief.

Should the Referee find that claimant's present condition is the result of his industrial injury suffered on March 11, 1976 then he shall enter an appropriate Opinion and Order on the sole issue of the adequacy of the Determination Order entered on November 1, 1976.

SAIF CLAIM NO. HC 409956 May 21, 1979

WILLIAM G. FRICKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on November 29, 1972 while in the employ of Armour Foods, whose carrier was the State Accident Insurance Fund. The claim was closed by a Determination Order dated March 15, 1973 which awarded claimant compensation for temporary total disability only. His aggravation rights with respect to this industrial injury have expired.

On May 11, 1979 the Fund forwarded to the Board copies of medical reports received from Oregon City Orthopedic Clinic concerning treatment they gave claimant in December 1978. The Fund also enclosed a letter from Armour Food Company, stating that it had forwarded certain bills to the Fund and that claimant had last worked on November 28, 1978 and had returned to work on January 2, 1979. In its closing paragraph the employer stated that claimant had been paid for an aggravation of his industrial claim in May 1976.

The Fund stated that it had no objection to the reopening of the claim by the Board if the medical justified such reopening.

The Board, after reviewing the reports from Dr. Hazel and Dr. Cook, concludes that there is sufficient medical evidence to indicate claimant's present need for medical attention is directly related to his injury of November 29, 1972 and represents a worsening of said condition since the last award or arrangement of compensation received by claimant.

ORDER

Claimant's claim for an industrial injury sustained on November 29, 1972 is remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, commencing on November 28, 1978, and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

The claimant has no right to a hearing, review or appeal on this award made by the Board on its own motion.

The State Accident Insurance Fund may request a hearing on this order.

This order is final unless within 30 days from the date hereof the State Accident Insurance Fund appeals this order by requesting a hearing.

SAIF CLAIM NO. TC 280775 May 21, 1979

FLOYD HOWARD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his left eye on November 27, 1970. His claim was closed by a Determination Order dated May 8, 1972 and claimant's aggravation rights have now expired.

Dr. Steele, on December 20, 1978, requested that the Fund reopen claimant's claim, stating he had been treating claimant since September 8, 1978 and that the initial examination indicated a large retinal detachment of the left eye. Claimant was referred to Dr. Michael L. Klein in Portland, for repair if this problem and underwent surgery on September 11, 1978. Claimant's post-operative course has been complicated by failure of the retina to re-attach satisfactorily.

On April 20, 1978 Dr. Steele again wrote the Fund, stating in response to their inquiry of March 26, 1979, that he found claimant to have a healthy right eye with best corrected visual acuity of 20/20. His left eye has had a post-traumatic retinal detachment which was unsuccessfully repaired by surgery and he now has a visual acuity in that eye of 20/1000 with no hope for improvement. It was Dr. Steele's opinion that claimant's present condition relating to his left eye is a delayed by direct result of the industrial injury sustained to that eye on November 27, 1970 and this is the basis for his request to reopen the claim.

On May 9, 1979 the Board received from the Fund copies of the medical reports from Dr. Steele, also one from Dr. Flaxel, who had seen claimant in 1972 prior to the closing Determination Order which was dated May 8, 1972 and awarded claimant no compensation for permanent partial disability. In its letter of transmittal the Fund indicated it would not oppose re-evaluation of claimant's permanent visual loss.

The Board, based upon the supporting medical documentation, which indicates that the claimant's present condition is directly related to his industrial injury of 1970 and represents a worsening since the closure of claimant's claim on May 8, 1972, concludes that the claim should be remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on September 8, 1978, the date claimant was first seen by Dr. Steele, and until the claim is again closed pursuant to the provisions of ORS 656.278, less any time worked.

IT IS SO ORDERED.

The claimant has no right to a hearing, review or appeal on this award made by the Board on its own motion.

The State Accident Insurance Fund may request a hearing on this order.

This order is final unless within 30 days from the date hereof the State Accident Insurance Fund appeals this order by requesting a hearing.

WCB CASE NO. 79-3298 May 21, 1979

J. C. STEWART, CLAIMANT
Slack & Slack, Claimant's Attys.
Neuner, Dole, Caley & Kolberg,
Defense Attys.
Order Referring For Consolidation
Hearing

On April 16, 1979 the Board received from claimant, by and through his attorney, a request that it exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury sustained on October 6, 1967 while in the employ of Douglas Fir Plywood Company whose workers' compensation coverage was furnished by Fireman's Fund Insurance Company.

The claim was accepted and subsequently closed by a Determination Order which claimant appealed. As a result of a hearing held on March 1, 1973 an Opinion and Order, dated August 13, 1973, increased claimant's award to 256° for unscheduled low back disability and 23° for partial loss of the left leg. This award was affirmed by the Board on February 20, 1974 and affirmed by the circuit court for Coos County on April 9, 1974. This was the date of the last award and arrangement of compensation received by claimant whose aggravation rights which respect to this industrial injury have now expired.

In support of claimant's request for own motion relief a copy of a report from Dr N. J. Wilson dated March 29, 1979 was attached; copies of the request and the medical document were also sent to Fireman's Fund and to the Hearings Division. The letter of transmittal, dated April 16, 1979, indicates that under separate cover claimant was requesting a hearing on claimant's entitlement to further medical care and treatment pursuant to ORS 656.245. This request for hearing was identified as WCB Case No. 79-3298 and will be set down for hearing in the future.

On May 9, 1979 the Board received from the carrier a response to claimant's request for own motion relief which opposed granting such relief because claimant's condition had not worsened since the last arrangement or award of compensation and his present problems were merely a "rehash of what he complained of back in 1974 at the time of the entry of his final order." The carrier submitted that the own motion reopening was not justified and that the only issues truly called into question by Dr. Wilson's report could be dealt with in the request for hearing (WCB Case No. 79-3298).

The Board, at the present time not having sufficient evidence before it to make a determination on the merits of claimant's request for own motion relief, hereby remands said request to its Hearing Division with instructions to set the matter to be heard at the same time the issue raised in WCB Case No. 79-3298 is heard.

Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be furnished to the Board together with his recommendation with respect to claimant's request for own motion relief. If he finds that the request for own motion relief is not justified the Referee shall also enter his order relating to the propriety of the denial by the defendant of claimant's request for medical care and treatment pursuant to ORS 656.245.

WCB CASE NO. 77-7207 May 23, 1979

BEN DAVIS, CLAIMANT
David R. Vandenberg, Jr.,
Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which granted him an additional 37.5° for a total award of 52.5° of a maximum of 150° for left hand disability.

Claimant, a 36-year-old timber faller, suffered a compensable injury to his left wrist on February 10, 1977. He was working on an off-season sawmill job when his left wrist was hit by a large chunk of wood which flew with great force from the chipper head. The surgical attempt to remove a fracture fragment was unsuccessful.

In September 1977 claimant took a job supervising a falling crew; this job required claimant to fall timber only about three hours a day and did not significantly bother his wrist. The job lasted three months. In September 1977 Dr. Lilly, claimant's treating physician, reported that claimant had some pain with hard work, some numbness and some limitation of motion, however, claimant said he could handle the chain saw without any particular difficulty. Claimant did not appear to have any pain associated with the fracture fragment.

After the falling job terminated, claimant worked about three months as a welder; his job did not bother his wrist. He then returned to the woods as a fulltime faller and for a while was symptom-free, working six to seven hours a day handling a chain saw. Claimant supported the weight of the chain saw by his left arm which eventually caused it to stiffen, swell and become painful from the top of the hand to the bicep. Because of this claimant quit falling timber and obtained his present job as a truck driver. He is able to tolerate this job because he uses his left arm primarily for steering, relying on his right arm to shift and help occasionally with the steering. Claimant uses his right arm to throw wrappers over the load and cinch them down, using a large cheater bar. Claimant's dominant hand is his left, however, at the time of the hearing he stated that his right arm was stronger than his left arm had been prior to the injury.

Claimant is unable to pick up a presto log with his left hand and the left wrist will swell and is painful if he uses it. He is taking pain medication for his activity-related symptoms. Before his injury claimant was a professional left-handed roper. Now he is learning these roping skills, only this time using his right arm.

Dr. Lilly was of the opinion that the reduced motion along with the pain, numbness and swelling amounted to some permanent partial disability but he recommended no treatment or procedures for removing the bone fragment.

The Referee found that claimant has less use of his left hand due to the diminished motion, strength and endurance associated with disabling pain than he had prior to the industrial injury and he rated claimant's loss of function at approximately 35%. Accordingly, he increased the award of 15° to 52.5°.

The Board, on de novo review, finds the only medical reports in evidence are those of Dr. Lilly and he initially found that claimant had "no significant permanent disability". Later he indicated claimant had a mild pain problem and a relatively mild limitation of motion. The reports from Dr. Lilly which were most favorable to claimant's case gave an estimate of "mild" physical loss of function. This is a scheduled injury, therefore, the evaluation must be made solely on loss of function. The top range of "mild" disability is 20%.

The Board concludes that claimant retains at least 80% use of his left hand, therefore, he would be adequately compensated by an award of 30° which represents 20% loss of the left hand.

ORDER

The order of the Referee, dated October 26, 1978, is modified.

Claimant is awarded an additional 15° for 10% loss of the left hand. This is in lieu of the additional 37.5° granted by the Referee's order but in addition to the 15° awarded claimant by the Determination Order of October 12, 1977.

In all other respects, the Referee's order is affirmed.

WCB CASE NO. 77-7238 May 23, 1979

BARBARA LAMBERSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant requests review by the Board of the Referee's order which granted her an award of 160° for 50% unscheduled low back disability but did not find her cervical problems and conditions to be compensable. Claimant contends that her cervical problems are causally connected to her industrial injury and that she is entitled to an award for permanent total disability.

Claimant worked for the defendant from 1955 until the date of her injury with the exception of a two-year period, 1962 through 1964. During her 20 years with the defendant she performed all types of production work.

On March 17, 1975, when claimant suffered her compensable injury, she was working in the pre-pack department as a stock clerk. Claimant sat on a chair, it collapsed under her and she landed with her buttocks striking the chair and the concrete floor. She finished the shift and then went to Tuality Community Hospital for treatment.

Claimant was off work until the following Monday; she worked through the remainder of that week, then she quit because of numbness in her hand and a general worsening of her condition. She came under the medical care of Dr. Nash on May 1, 1975.

Claimant was initially seen at Tuality Community Hospital by Dr. Leibrecht and had subsequent consultations with Dr. Eilers who reported claimant was suffering from mid-thorax and low back pain.

Dr. Nash examined claimant. She told him that she had been numb all over after the accident and suffered severe pain in the evening of the accident in the dorsal, cervical and lumbosacral regions with some dysesthesias involving the hips. It was Dr. Nash's impression that claimant had suffered a lumbosacral myo-

fascial injury; fracture, linear, non-displaced pedicle L5, right, cervical spondylosis C5 and cervical neuroradiculopathy C6 nerve root on the right.

Dr. Nash on January 16, 1976 performed a decompressive laminectomy L4, subtotal L3 and a medical facetectomy L4-L5 level. He reported on December 7, 1976 that, based upon a re-examination of claimant, he felt she had achieved excellent medical benefit but could only return to productive employment where walking was limited to 15-minute intervals. Claimant was able to sit comfortably for 5-10 minute intervals but she could not engage in any activity which required bending and her lifting should be limited to that from counter height to approximately 10 pounds. He felt her limitations were further modified by non-surgical disabilities.

Claimant was re-examined by Dr. Nash on July 12, 1977. His neurological examination indicated that claimant had achieved maximum medical benefit but she would have continuing deficits which constituted a permanent disability. Claimant could return to productive employment only where walking and lifting were limited but she had no need for further neurological attention. He discharged her as a patient.

On August 12, 1977 claimant was examined by the Orthopaedic Consultants who recommended that claimant's condition be considered stationary and her claim closed. They said she could return to some other occupation, probably within the defendant's system, if she should prove to be willing. They found that the loss of function as it existed at the time of the injury in the low back, as due to the injury, was moderate. They found the neck was obviously symptomatic to claimant and they believed this condition was presumably related to a prior condition and was not considered a part of the present complaint. -211-

On October 3, 1977 Dr. Nash released claimant to work as of October 5, 1977. On November 7, 1977 claimant's claim was closed by a Determination Order which awarded claimant 112° for 35% unscheduled low back disability.

On November 16, 1977 Dr. Nash reported that claimant had neck pain with radiation across the shoulders, and occasional tingling in the second, third and fourth fingers of her hands. Claimant had returned to work for the defendant for four hours on October 6, 1977 but had had to stop because of the above mentioned complaints. His examination of November 16 demonstrated claimant's continuing loss of neck motion and the cervical spondylosis and radiculopathy centered at C6.

Dr. Grimm performed an EMG on November 23, 1977. It was his impression that the EMG was positive from the sample of the right shoulder and upper right arm musculature, for acute and chronic neuropathic changes, especially in the C5-6 nerve roots on the right side. Later Dr. Nash reported that recent x-rays were compatible with spondylosis and narrowing at C5-6 and foramin compromise at C5-6 and C6-7, most marked on the right.

On January 6, 1978 Dr. Nash advised the carrier that he agreed with the Orthopaedic Consultants' report with regard to the claimant's ongoing complaints and findings referable to her low back but stated that claimant also had ongoing complaints of pain in her neck which radiated out into her shoulder which she had indicated to Dr. Nash when he examined her on November 16, 1977 and of which the carrier was advised by a report from Dr. Nash on that date. That report contained Dr. Nash's impression that claimant had signs and symptoms and complaints compatible with a cervical spondylosis and a cervical neuroradiculopathy at C6 on the right. In his January 6, 1978 report Dr. Nash did not recommend additional treatment for claimant but stated claimant had a legitimate complaint as previously documented in his letter of November 1977 referable to the cervical and upper extremity region.

The Referee found that the job which claimant was doing at the time of her injury required substantial use of her arms but it did not require too much walking. Also, she was able to either sit or stand while dividing the stock into useable quantities. Claimant states that she does not know of any job which she could now perform which is available at the defendant's place of employment but that she would try, if allowed, to sit and stand at her option and the job did not require repetitive lifting.

The defendant stated that in the past it had made accomodations for people to work part time and the pre-pack manager of the employer described a job which could be done by claimant while she was sitting or standing at a table of counter height which did not require lifting more than 10 pounds and did not involve any walking. She would have to lift approximately six to eight times during each hour. At the time of her injury claimant was earning $3.67 an hour. The defendant stated that an employee with claimant's work experience was working at that particular job he had described at $4.29 an hour. He did not know whether the job was presently open nor did he have the initial authority to hire employees. Claimant stated that she had formerly performed the job described by the pre-pack manager and that she was now physically unable to do it.

The Referee found that claimant contended that her cervical problems and conditions were caused by her injury, however, the complicated nature of the ailment required expert testimony concerning causation and he did not find such medical evidence in the record to support a causal relationship between claimant's cervical problems and her industrial injury.

He did find that the preponderance of the medical evidence indicated claimant suffered from a chronic low back strain as a result of her industrial injury which presently limits her employability. The medical evidence does not support a finding of permanent total disability, in the opinion of the Referee, but does indicate she has now such limitations that she can only do light type work, therefore, she has suffered a greater loss of earning capacity than that for which she was granted an award equal to 35% of the maximum. He increased the award from 35% to 50%.

After de novo review, the Board finds sufficient medical evidence to support a conclusion that claimant's cervical problem was compensable.

Most of the medical evidence in this record is based upon reports from Dr. Nash and these reports indicate that claimant's neck problems have been treated by Dr. Nash from the beginning and were always considered by him to be a part of claimant's industrial injury of March 17, 1975. The carrier made no distinction between claimant's back problems, lumbar or cervical. It paid for all claimant's medical expenses which included treatment for both cervical and lumbar spine problems. It never issued a partial denial.

Dr. Nash did not recommend any additional treatment for claimant but did feel that she had a legitimate complaint with reference to her cervical and upper extremity region, based upon claimant's complaints that she had a pain in her neck which went up into her head and out into her shoulders and also had a tingling feeling in her second, third and fourth fingers on both hands. Dr. Nash felt that such signs and symptoms and complaints were compatible with a cervical spondylosis and a cervical neuroradiculopathy at C6 on the right as previously documented.

On May 15, 1978 Dr. Thomas, a radiologist, performed a multiple level myelogram which, among other things, found in the cervical region, a moderate ventral defect at C5-6 and a small ventral defect at C4-5. There were bilateral, lateral defects with nerve root effacement at C5-6 bilaterally, slightly more on the left and a small left nerve root effacement at C4-5. Dr. Thomas' impression was degenerative changes and possible herniated disc at C5-6 with bilateral nerve root effacement. Mild nerve root effacement consistent with either degenerative change or disc at C4-5 on the left. At the hearing claimant testified that she had had some problems in her neck and her low back before her injury but she also maintained that her neck was injured as a result of her fall on March 17, 1975.

Had there been an issue of the compensability of claimant's neck problems raised at any time, even at the hearing, the matter could have been resolved; however, it was never raised by the carrier nor its attorney nor by the Referee at the hearing. The only mention of causal relationship of claimant's cervical problems to her industrial injury of March 17, 1975 was contained in the Referee's order issued after the record was closed.

Although the Board feels that claimant's cervical problem is compensable, they find that there is no medical evidence that claimant has suffered any permanent disability of this area. Unscheduled disability is evaluated by loss of earning capacity; in this case, the Board concludes that the award of 50% of the maximum sufficiently compensates claimant for the loss of wage earning capacity as a result of her low back injury.

ORDER

The order of the Referee, dated October 16, 1978, is modified.

Claimant's cervical condition is causally related to her industrial injury of March 17, 1975.

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

WCB CASE NO. 78-3819 May 24, 1979

FREDERICK BROWNE, CLAIMANT
Carney, Probst & Cornelius,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which awarded claimant 128° for 40% unscheduled head, neck, left shoulder and low back disability.

Claimant sustained a compensable injury on February 4, 1976. A myelogram taken on April 15, 1976 indicated a need for back surgery and on May 3, 1976 an anterior decompression and fusion was performed by Dr. Hill. Claimant made an excellent recovery and was discharged from the hospital on May 7, 1976.

Dr. Hill stated that claimant would not be able to return to his previous occupation which involved heavy manual labor and recommended referral to the Division of Vocational Rehabilitation for rehabilitation. Claimant is 44 years old and has an eighth grade education. He has had no other formal or vocational education or training and his employment background consists solely of heavy manual work.

At the Callahan Center claimant, on September 17, 1976, recited a history of pain in the left shoulder and under and above the left collar bone, in the neck and between the shoulder blades. Claimant's injury occurred when he was tripped on a hose and fell from his truck nine feet to the blacktop pavement. Claimant struck his low back and left shoulder on the steel steps while falling.

Since his surgery claimant has received no physical therapy or exercise program. He has been on some medication. He testified that he worked on August 23, 24 and 25, 1976 at Portland Transfer Company wheeling 100-pound sacks of peas on a dolly. After two days of this type of work his neck and shoulder hurt so badly he could not continue. Claimant has not worked since August 25, 1976.

Claimant also consulted Dr. Hill for an episode of "passing out" but Dr. Hill advised him there was nothing more that he could do. Claimant made no further appointment with Dr. Hill. He also testified that his symptoms were aggravated by bowling and lifting; 60 pounds was about his limit. Also, prolonged standing, sitting and walking aggravated his neck and left shoulder pain.

Claimant has been a truck driver for about 18 years and for nine of these years he operated a portable wash unit mounted on a truck which he used to wash heavy equipment. Claimant has also done loading and unloading furniture, was a cook in the merchant marine service, did janitorial work and, as a teenager, worked in the woods and also at a service station. He has known no extended periods of unemployment in his adult life.

Psychological reports indicate that claimant has a rather long history of maladjustment dating back to his childhood. He was apparently in a lot of trouble when he was a youth and interpersonal relationships have been rather difficult for him during his adult life. At the time he was examined by Dr. May, a clinical psychologist, on September 27, 1976, claimant was found to be greatly overfocused and pre-occupied with physical symptoms, having a lot of hypochondriacal and psychosomatic type complaints. After claimant had completed his evaluation program at Callahan Center he was offered a job as a custodian at that facility which he accepted. For six months he was able to perform the job without much difficulty and when he quit it was not due to physical limitations on the job but rather it was due to his inability to find transportation to and from work. Claimant indicated that had he been able to find transportation he would have continued working.

Dr. Vessely examined claimant and concluded that he had nothing to offer claimant to alleviate the multitude of symptoms of which claimant was complaining. He felt claimant had a lot of symptoms which were out of proportion to his findings but he thought claimant should be encouraged to continue his occupation as a janitor and he recommended an active exercise program as well.

Dr. Harris examined claimant and stated the basis for claimant's problems of dizziness, headaches and syncope was not evident at the examination. He found no gross neurological abnormalities but he could not rule out the possibility of an intercranial problem, cardiac arrhythmia or other disease. He could find no etiology for claimant's syncopal episodes except to assume that perhaps claimant was having a vasomotor reaction to the headache pains that he experienced! He did find a very strong emotional overlay and, based on the medical history, found that the syncope problem arose after the industrial accident.

On June 1, 1977 the claim was closed by a Determination Order which awarded claimant 48° for 15% unscheduled head, neck and shoulder disability.

Claimant entered Portland Pain Clinic for a short period of time and received relief from most of his pains, except his headaches and dizzy spells. He did not fall at any time nor did the dizziness cause him any trouble. Dr. Russakov's impression, was, based on lack of any positive data to explain the dizziness and also the fact that the dizziness had never created any hazardous situations for claimant, that the symptoms were emotional in origin and probably related to his feeling of inadequacy. He thought claimant was moderately to severely disabled with a residual functional capacity to do a maximum of light work activity, but taking into consideration the emotional aspect as well found claimant totally unemployable.

Claimant was examined by the physicians at the Orthopaedic Consultants on October 31, 1977. At that time claimant weighed 260 pounds, a gain of some 45 pounds from shortly after his industrial injury. The physicians rated claimant's impairment to the low back as minimal and as to the neck it was rated as mildly moderate. They found no evidence of impairment in the right hand. They did not feel claimant could return to the same occupation without limitations in view of the fact that he had had cervical interbody fusion but they did believe he could return to that occupation with certain limitations, to-wit: no excessive movements of the neck or excessive bending of the low back or heavy lifting.

On May 10, 1978 the claim was again closed by a Determination Order which awarded claimant an additional 16° for 5% unscheduled neck and low back disability giving him a total of 64°.

The Referee found that the evidence did not preponderate that claimant's alleged "passing out" episodes were causally related. Claimant was injured in February 1976 and had his surgery in May of that year. The first allegation of "passing out" appeared to be on September 6, 1976 according to the history related to the physicians at Callahan Center. None of the doctors have been able to establish any etiology of the alleged following syncope episodes. Claimant has a severe functional component, but, according to the Referee, he has also had a history dating back to childhood of interpersonal problems. The Referee found that the preponderance of the evidence did not causally relate claimant's psychopathology to his industrial injury.

The Referee found that the preponderance of the evidence did support a finding that claimant's anterior neck fusion and low back strain precluded him from returning to his usual occupation or any other occupations which require heavy lifting on a regular basis. Claimant has only an eighth grade education and has not done well in either the written or oral intelligence tests. He had a limited employable potential before his industrial injury and that potential has been reduced by the injury, therefore, his ability to compete on the open labor market for wages has been reduced accordingly.

The Referee concluded that the awards which claimant had received which equaled 20% of the maximum allowable by statute did not adequately compensate claimant for his loss of wage earning capacity and he increased said awards by 40%, giving claimant a total of 60% unscheduled disability.

The Board, on de novo review, concurs with the conclusion reached by the Referee that the preponderance of the evidence does not support a finding of causal relationship between claimant's psychopathology and the industrial injury of February 4, 1976. However, the Board, based upon the medical evidence and the testimony in the record, finds that claimant's disability is not so great as to render the evaluation of his motivation to return to active employment valueless.

The Board finds that claimant has shown little motivation to return to work. He has made several attempts, admittedly, to return to work, but the attempts have been of short duration and not always has the termination of such employment been due to claimant's physical problems. Claimant testified that he was physically able to do the janitorial work at Callahan Center; it was only because he was unable to get transportation to and from the Center that he quit.

The Board finds, based upon the medical evidence and the lay testimony, that claimant has lost a greater portion of his wage earning capacity than is represented by the awards which total 20% of the maximum, however, it does not feel that claimant has lost 60% of his wage earning capacity. There are still certain segments of the labor market to which claimant could return in his present physical condition taking into consideration, in addition to his physical condition, his age, his work background and his adaptability for other types of employment. The Board concludes that claimant would be adequately compensated for the loss of his wage earning capacity resulting from the industrial injury of February 4, 1976 by an award equal to 112° which represents 35% of the maximum allowable by statute for unscheduled disability. This represents an increase of 15° over and above the previous awards received by claimant for his disability.

ORDER

The order of the Referee, dated November 24, 1978, is modified.

Claimant is awarded 112° of a maximum of 320° for 35% unshceduled head, neck, left shoulder and low back disability. This award is in lieu of the award granted claimant by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-1369 May 24, 1979
WCB CASE NO. 78-2603

JAMES BUCHANAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
Cavanaugh & Pearce, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the Employer

Reviewed by Board Members Wilson, Phillips & McCallister.

The employer, Owen Chevrolet, and its carrier, Universal Underwriters, requets Board review of the Referee's order which set aside its denial of January 26, 1978 and remanded claimant's claim to it for acceptance and payment of compensation as provided by law and directed it to pay claimant's attorney a sum of $800 as a reasonable attorney's fee. The Referee's order approved the denial by the Fund dated May 22, 1978, but directed it to pay claimant an amount equal to 25% of the temporary total disability compensation which should have been paid to claimant from January 27, 1978 to May 22, 1978 and to pay claimant's attorney an attorney's fee of $200.

Claimant went to work as a body repairman for Owen Chevrolet in December 1976. Prior to this time claimant had had no back or leg problems. On April 22, 1977, as he was helping move the bed from a pickup truck, he felt a "twitch" in his back. About an hour later he experienced back pain but he continued working. Four days later he saw Dr. Corrado, a chiropractor, complaining of pain in the lower thoracic and lumbar area which Dr. Corrado diagnosed as a dorsal-lumbar sprain. Claimant missed one-half day of work due to the April 22, 1977 injury.

Claimant testified that following Dr. Corrado's treatment the back pain subsided, but approximately a week later his hip and leg commenced to hurt. These symptoms continued but they did not prevent him from working nor did he seek further medical treatment.

Claimant was laid off by Owen Chevrolet due to lack of work and became employed at Maaco as a body mechanic for approximately one month. Claimant alleged that he continued to experience hip and leg pain. On September 2, 1977 claimant was employed at Sandy Auto Body doing the same type of work he had done at Owen Chevrolet. On November 10, 1977 claimant was hospitalized to receive treatment for alcoholism. While in the hospital claimant complained of an eight-month history of pain in his right hip which radiated into the leg. He was seen by Dr. Utterback and received conservative treatment. At the time he left the hospital claimant testified he was almost symptom-free.

On December 7, 1977 claimant returned to work at Sandy Auto Body. He stated he felt pretty good for the first two weeks that he worked, however, thereafter he commenced hurting very badly and during the last part of December he could hardly walk. He stated he experienced pain across the low back and down his legs to the ankle and that his hip socket felt dry. He said this was the first time that he had experienced this type of difficulty and it was the worst pain he had ever suffered. Claimant quit work on December 23, 1977.

On December 26 claimant was seen by Dr. Sah who referred him to Dr. Dinneen, an orthopedic surgeon, who performed a myelogram and later a partial laminectomy and discectomy.

On January 17, 1978 Dr. Dinneen wrote to Universal Underwriters and requested that claimant's claim for his April 22, 1977 injury be reopened. On January 26 Universal issued its denial, stating that claimant's condition was not an aggravation of the April 1977 injury, but was a new injury.

On January 26, 1978 claimant talked with a representative of Owen Chevrolet who told him that his claim would not be reopened. He consulted an attorney who advised him to file a claim for a new injury relating to his work at Sandy Auto Body. On January 31, Dr. Dinneen wrote to Universal, stating that a prior comment that he had made that claimant had sustained a completely new injury was not correct. He had assumed from the claimant's complaints that claimant had a bulging and/or small ruptured disc on the earlier date and that this extended itself onto the later date. He stated further:

> "I believe it would have to be arbitrarily predetermined in these situations to call it either a new or an old injury.
>
> "It is actually a continuation of a tendency, and actually there is no 'injury' in the usual sense of the word. The message I tried to convey to Mr. Walsworth was that it was a new incident. The idea that it is a completely new injury is, of course, too simplistic."

On February 1, 1978 claimant's counsel wrote to Owen Chevrolet, with a copy to Universal, requesting that they "open an aggravation claim" for claimant. On April 16, 1978 Dr. Corrado reported that he had seen claimant on April 26, 1977 for lower thoracic and upper lumbar sprain which had been caused while claimant was unloading a pickup truck bed. Dr. Corrado stated, based on his recollection and notes, that the primary injury was to the lower thoracic and upper lumbar area which did affect the intercostal nerves radiating into the lateral lower thoracic and rib cage. He could not recall any symptoms or signs referring to the lower lumbar vertebral column, a lumbar disc syndrome or radicular pain extending to the extremities.

The Fund denied claimant's claim for a new injury on May 22, 1977, stating it appeared that his back condition first occurred in April 1977 and progressively worsened without a new incident.

The evidence indicated that while claimant was working for Maaco he was having some sort of health problem and he had a problem walking. Claimant missed substantial time from work while at Maaco which one witness stated claimant had told her was because of a back problem. The owner of Sandy Auto Body testified that while claimant worked for him he noticed claimant limped, favoring his right leg. He stated that claimant's work required bending and lifting. He said that claimant had been a good worker up to the time that he left his employment.

The Referee found claimant's claim against Sandy was not barred for failure to timely file a claim. ORS 656.265 provides that the employer shall be given notice no later than 30 days after the accident. Subsection (4) thereof provides certain exceptions to his bar, one of which is where the employer has not been prejudiced by the failure to give notice. The burden is on the employer to show that he was prejudiced by the late filing and the Referee found that the employer had not shown that it was prejudiced by the late filing.

The Referee found that the evidence in the present case showed that following his injury in 1977 claimant first developed back symptoms followed by radiating pain into his hip and leg. She found that claimant's testimony was credible that the latter symptoms did not occur until approximately a week after the injury and this explained why those symptoms were not related to Dr. Corrado by claimant.

The Referee found that although claimant continued to work his symptoms persisted and were continuous although they varied at times in intensity. She found that the lay testimony indicated that claimant walked with a limp and complained of back problems prior to and from the inception of his work at Sandy Auto Parts. There was no evidence of an incident or injury which had occurred while claimant was employed at Sandy.

The Referee applied the rule stated in 4 Larson, Workmen's Compensation Law, Section 95.12 that the last injurious exposure rule shall be applied in successive injury cases and places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability except if a 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 injury, then the insurer on the risk at the time of the original injury remains liable for the second. She found that Owen Chevrolet and its carrier, Universal Underwriters, were responsible for claimant's present condition.

On the question of penalties and attorney's fees due to delay on the part of the Fund in denying the claim, the Referee found that the Fund had not paid compensation to claimant within 14 days after it had notice or knowledge of the claim nor did it furnish claimant with written notice of acceptance or denial of the claim within 60 days after said notice or knowledge. Notice and knowledge of the claim was had on January 27, 1978 when claimant went to the employer's premises with his claim form yet no compensation was paid to claimant and the denial was not issued until May 22, 1978. The Referee concluded that this was unreasonable delay and that claimant was entitled to penalties and attorney's fees.

The Referee found that Universal had already received a doctor's report requesting reopening which constituted a claim for aggravation prior to claimant's attorney's letter asserting a claim for aggravation, therefore, she concluded that Universal was not required to issue another denial of the same claim. However, claimant's attorney was entitled to an attorney's fee for prevailing on the denial of claimant's claim by Universal Underwriters.

On de novo review, the majority of the Board finds that if the incident of April 22, 1977 resulted in any injury at all, such injury was trivial. There is no medical evidence to support more than a back sprain and the relationship of that back sprain to claimant's employment at Owen Chevrolet is questionable.

The claimant testified that he recited the "pickup bed" incident because he could not think of anything else which could have caused his back symptoms. Claimant missed a half a day of work due to the December 22, 1977 incident. He continued to work although he claimed that his hip and leg pained him, however, the pain was not sufficent to prevent him from continuing to work at his job and to work at Maaco after he was laid off by Owen.

Claimant was not terminated by Owen because of any physical inability to do his work, but rather due to lack of work available. Claimant did some complaining at Maaco, but there is no indication that he lost any substantial time from work and what time he did lose could not be directly attributable to any particular injury. Claimant was hospitalized but it was for a non-work-related problem.

As far as the new injury claimant alleged he sustained while working for Sandy, the majority of the Board finds no evidence to support a conclusion that claimant sustained any new injury. At best, there was merely a recurrence of the first injury, the origin of which is doubtful.

The majority of the Board finds that both the denial by Universal Underwriters and the denial by the Fund should be approved. The majority of the Board concurs with the Referee's determination that the Fund should pay penalties and attorney's fees as assessed and awarded by the Referee because of their failure to comply with the provisions of ORS 656.262(4) and 656.262(5). They agree that there was no need for Universal to issue another denial after receiving claimant's attorney's request.

ORDER

The order of the Referee, dated September 1, 1978, is modified.

The denial by Universal Underwriters, dated January 26, 1978, is approved.

Claimant's attorney is not entitled to the sum of $800 as a reasonable attorney's fee to be paid him by Universal Underwriters.

In all other respects the Referee's order is affirmed.

WCB CASE NO. 78-3049 May 24, 1979

EDWARD COX, CLAIMANT
Don G. Swink, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an additional award of 80° for 25% unscheduled low back disability. Claimant had been granted 32° for 10% unscheduled low back disability by a Determination Order dated April 7, 1978.

Claimant cross-appeals, contending that he is permanently and totally disabled.

Claimant, a driver for Tri-Met, sustained a compensable injury on October 17, 1977 when, while getting into the driver's seat of his bus, he twisted and injured his back. He was treated by Dr. Patton, an osteopathic physician, who diagnosed a left sacroiliac and lumbar strain superimposed on a prior lumbar fusion and degenerative osteoarthritis. Dr. Patton found claimant to be medically stationary and released him for work on December 16, 1977. He felt claimant had no more permanent disability than he already had prior to this injury.

Claimant had sustained a compensable injury to his back in 1966 which required a two-level fusion. In 1969 claimant commenced working for Tri-Met as a driver. Since that time claimant has suffered an industrial injury to his lower back in 1973 and to his right elbow in 1974. He recieved an award of 48° for 15% back disability, but received no award of permanent disability for his elbow injury.

Claimant was examined by Dr. Huesch, an orthopedic surgeon, at the request of Dr. Patton. He was also examined by Dr. Pasquesi at the request of the Fund. Both doctors found claimant to be medically stationary and stated that a great deal of his impairment was attributable to his prior industrial injury.. In March claimant was referred to the service coordinator and in April the claim was closed.

Claimant was evaluated at Callahan Center in May 1978. He was found to be very cooperative and well motivated. At the conclusion of his evaluation claimant was referred to the screening team for job search assistance or specialized on-the-job training. It was thought that claimant might be able to drive pilot cars, which he had intended to do after he retired. Claimant apparently received no assistance from vocational rehabilitation.

Claimant tried to drive his pickup to Bend to determine if he could make such a trip, but was forced to stop three or four times between Government Camp and Bend to rest. Based on this experience claimant felt he would be unable to drive pilot cars.

All the doctors who have treated and/or examined claimant agree that claimant cannot return to his former job as a bus driver, but believe that he possibly could return to a modified job which would enable him to sit and stand at his choice. Claimant attempted to find modified work with the bus company, but was unable to obtain it. Furthermore, Tri-Met would not rehire claimant because he had not been released for full time work.

Claimant's primary work background has been driving truck or bus. Dr. Pasquesi says claimant needs a job which requires no repetitive bending, stooping, twisting or requires prolonged sitting in one position or lifting over 30 pounds. Dr. Pasquesi rated claimant's impairment as 10% as it related to his 1977 industrial injury. Dr. Patton, who originally thought claimant had sustained no permanent impairment, agreed with Dr. Pasquesi's assessment.

The Referee found that claimant, who was now 61, still had the same chronic low back pain with a sitting tolerance of 15-30 minutes. He takes medication, wears a back brace and requires palliative care. Apparently his 1966 back fusion is solid. Claimant has a 5th grade education, a 7th grade vocabulary and a 4th grade reading comprehension. The tests which were given to him indicated he qualifies for no occupational aptitude patterns and has a low normal IQ. Although claimant has a vocational handicap he has been considered ineligible for retraining because of his age.

The Referee, taking into consideration these factors and Dr. Pasquesi's assessment of the 10% impairment attributed to claimant's 1977 injury, concluded claimant had sustained an additional loss of wage earning capacity. Claimant was able, despite his many other injuries, to work steadily until he was injured in 1977. The 1977 injury has precluded claimant from returning to his former job.

The Referee, therefore, increased claimant's award of 10% to 25% which made a total of 35% of the maximum for his unscheduled disability and the Referee stated that claimant should be considered as having a total award of 50% of the maximum for unscheduled back disability (evidently he took into consideration the prior award of 15% for claimant's 1973 low back injury).

The Board, on de novo review, finds that the Referee should not have considered the award made for the 1973 back injury. ORS 656.214(5) provides:

> "In all other cases of injury resulting in permanent partial disability, the number of degrees of disability shall be a maximum of 320 degrees determined by the extent of the disability compared to the worker before such injury and without such disability."

The courts have interpreted this subsection to distinguish unscheduled disabilities from scheduled disabilities insofar as consideration of accumulative awards are concerned. ORS 656.222 applies only to scheduled disabilities.

The Referee found that claimant's loss of wage earning capacity justified an award equal to 35% of the maximum allowable by statute. The Board finds that claimant has made every effort to find something within his limitations to be able to provide for himself; he did not want to ask for compensation. He has a limited vocabulary, limited education, and a low-normal IQ. He is considered ineligible for retraining because of his age although it is conceded that he does have a vocational handicap.

Although claimant had had prior injuries, some of them serious, he had been able to work quite regularly and it was not until the incident of October 17, 1977 that he found that he was unable to continue working in the occupations in which he had had experience, namely, truck driving and bus driving.

The Board concludes that the claimant is entitled to compensation for the loss of wage earning capacity he suffered as a result of his October 17, 1977 injury that is greater than represented by an award for 35% of the maximum.

The Board does not find that the medical evidence in this record supports claimant's contention that he is permanently and totally disabled. However, the medical evidence does indicate that claimant is entitled to an award equal to 50% of the maximum to compensate him sufficiently for the loss of wage earning capacity sustained as the result of his 1977 injury. The limitations of movement placed upon claimant by Dr. Pasquesi alone preclude him from a large segment of the labor market and even prior to the 1977 injury claimant's employment potential was somewhat limited.

The Board concludes that claimant should be awarded an additional 48° for 15% unscheduled disability. This gives claimant a total of 160° for 50% unscheduled low back disability resulting from his October 17, 1977 industrial injury.

ORDER

The order of the Referee, dated October 30, 1978, is modified.

Claimant is awarded an additional 48° of a maximum of 320° for 15% unscheduled low back disability. This award is in addition to all previous awards which claimant has been granted for his October 17, 1977 industrial injury.

Claimant's attorney is awarded as a reasonable attorney's fee a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

In all other respects the Referee's order is affirmed.

WCB CASE NO. 78-5361 May 24, 1979

THREASA NELSON, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Rankin, McMurry, Osburn, Gallagher
& VavRosky, Defense Attys.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the employer, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-5361 May 24, 1979

ROBERT MICKLES, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order dated May 17, 1978 whereby claimant had been awarded temporary total disability compensation from January 17, 1978 to April 14, 1978 only.

The question before the Referee was whether the claim was prematurely closed and should be reopened for further treatment or, in the alternative, the extent of permanent partial disability.

Claimant suffered a compensable injury on January 17, 1978 when he slipped and fell while working as a waiter. Dr. Gripekoven, an orthopedic surgeon, diagnosed an acute lumbar strain. He opined that no permanent impairment would result.

On March 20, 1978 claimant was examined by Dr. Parsons, a neurosurgeon, who diagnosed lumbar strain. He found no evidence of nerve root compression and indicated that if the symptoms did not improve a myelogram should be done. Claimant indicated he did not desire to undergo a myelogram. Dr. Parsons told claimant that should the pain fail to improve and he changed his mind about the myelography claimant should contact him. He doubted claimant's problem was a lumbar nerve root compression and felt the pain was on a muscular basis and should improve.

Claimant, however, did not respond to bed rest and physical therapy and returned to the care of Dr. Gripekoven whom he had seen on April 14, 1978. At that time Dr. Gripekoven, referring to Dr. Parson's findings of no significant neurological abnormalities, stated that he found few significant objective findings on his examination of claimant. It was his opinion that claimant's condition had "plateaued" and he could be considered medically stationary. The doctor indicated that neither physical therapy nor bed rest had given claimant any relief, therefore, only further observation is necessary. He felt claimant could be employed on a full time basis, however, he should avoid heavy bending, lifting, or repetitive stooping for an indefinite period until his symptoms have improved.

Claimant has a Bachelor's Degree in Physical Education and is presently working on his Master's on a part time basis. Ultimately, he hopes to obtain an administrative job. His work experience has been primarily as a waiter and teaching tennis. Since his injury claimant has applied for several jobs. A couple of months prior to the hearing claimant went to work as a clothing salesman for J.C. Penney on a part time basis.

Claimant testifies he has constant pain in his back and in the back of his legs; that prolonged sitting bothers him and he has difficulty sleeping.

The Referee found that claimant was entitled to medical services for conditions resulting from his injury. He found it appropriate that claimant, if he desires further medical care and evaluation, should avail himself of the opportunity under the provisions of ORS 656.245 and it was not necessary to reopen the claim to allow claimant such treatment and evaluation. If the further treatment requires time loss, then the claim could be reopened based upon that evidence. The Referee concluded that at present there was insufficient medical evidence to make a decision on reopening.

The Referee found that the medical evidence did not establish any permanent impairment. He found Dr. Gripekoven's recommendation for avoiding certain activities was based on the assumption that the condition would improve and Dr. Parsons was in agreement. Therefore, the Referee concluded that claimant had failed to prove that he had sustained any permanent disability as a result of the incident of January 17, 1978 and that he was not entitled to any additional time loss benefits beyond those awarded him by the Determination Order of May 17, 1978.

The Board, on de novo review, notes that Dr. Gripekoven, both in his report to the carrier on April 14, 1978, which preceeded the Determination Order, and in his report of September 12, 1978, which was subsequent thereto, indicated that claimant should avoid certain activities for an indefinite period until his symptoms improved (emphasis supplied). This indicates to the Board that, in Dr. Gripekoven's opinion, claimant was not "medically stationary" as such words are used as a term of art in Workers' Compensation Law. Dr. Gripekoven evidently believed that claimant's symptoms would improve.

The Board concludes that the claim, therefore, was prematurely closed and should be remanded to the employer and its carrier to be accepted and for the payment of compensation, as provided by law, until the claim is properly closed pursuant to the provisions of ORS 656.268.

ORDER

The order of the Referee, dated October 13, 1978, is reversed.

The Determination Order, dated May 17, 1978, is set aside and claimant's claim is remanded to the employer and its carrier to be accepted and for the payment of compensation, as provided by law, commencing on January 17, 1978, and until the claim is closed pursuant to ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee a sum equal to 25% of any additional compensation claimant shall receive as a result of this order either for temporary total disability or permanent partial disability or both, payable out of said compensation as paid. If claimant shall receive compensation only for temporary total disability, the fee shall not exceed $750; if claimant receives permanent partial disability as well as temporary total disability the maximum shall be $3,000.

WCB CASE NO. 78-4704 May 24, 1979

EARLENE R. SHORT, CLAIMANT
Joseph C. Post, Claimant's Atty.
Bruce A. Bottini, Defense Atty.
Order Of Dismissal

On April 12, 1979 a Referee entered his order affirming the denial issued by the carrier.

On May 14, 1979, according to the United States Postal Service postmark on the envelope addressed to the Workers' Compensation Board, claimant requested review of the Referee's order.

More than 30 days have passed from the date of the issuance of the Referee's order, therefore, the order is final by operation of law and claimant's request for review must be dismissed. ORS 656.289(3).

IT IS SO ORDERED.

WCB CASE NO. 78-4594 May 24, 1979

GORMAN R. SMITH, CLAIMANT
Guy A. Randles, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which approved the employer's denial dated July 11, 1978 of his claim for aggravation.

Claimant, at that time a 59-year-old welder, suffered a compensable injury to his left iliac crest on May 15, 1972 when a steel plate fell against his side. He was seen by several doctors and it was determined that there was no left thigh nerve injury nor was there a possibility of a femoral hernia.

Dr. Mason, at the Callahan Center, diagnosed a healed contusion of claimant's left anterior ilium, left hip and leg with questionable residual neuralgia and marked emotional overlay with exaggeration of symptoms and disability. He found no degenerative arthritis of the left hip secondary to the contusion. Dr. Gritzka, claimant's treating physician, agreed with Dr. Mason.

The claim was closed by a Determination Order dated June 18, 1973 whereby claimant was awarded 30° for 20% loss of the left leg.

Claimant did not require medical attention until April 1974 when he was examined by Dr. Kayser, who found claimant's hip and leg pain out of proportion to the objective findings. He did say, however, that claimant might have a slight problem with a nerve root compression which he attributed to claimant's spinal fusion from a previous industrial injury.

Dr. Seres examined claimant in May 1974. He felt that claimant did not need further medical care.

Claimant did not seek further medical treatment until January 1977 when he again saw Dr. Seres who reiterated his earlier opinion and attributed claimant's symptoms to degenerative arthritic changes in his back.

In February 1978 claimant was examined by Dr. Frank B. Smith who detailed claimant's present complaints and symptoms and concluded that they suggested an aggravation to the condition caused by an injury sustained in 1956. In 1960 claimant had a spinal fusion as a result of this injury. Dr. Smith specifically stated that claimant's symptoms and findings could not be related to the industrial injury of May 15, 1972.

In May 1978 claimant was seen by Dr. Sirounian who diagnosed a possible causalgia of the left lower leg and asked that the claim be reopened. He suggested that another medical opinion be obtained. The carrier, in July 1978, arranged for claimant to be examined by Dr. Pasquesi.

Dr. Pasquesi had examined claimant just before the Determination Order of June 18, 1973 and in his report of August 1978 he stated that claimant's condition was no worse than it had been at the time of claim closure.

On July 11, 1978 the carrier denied claimant's claim for aggravation on the basis that there was no evidence to support it.

The Referee found that claimant had not worked since his 1972 injury. However, she found no medical evidence to demonstrate that claimant's condition had worsened since the claim was closed in June 1973. Dr. Sirounian had said that claimant could benefit from treatment but he had not seen claimant prior to 1978. Dr. Pasquesi had examined claimant subsequent to Dr. Sirounian and the Referee found that he was in a better position to determine whether claimant's condition had worsened.

The Referee felt that if Dr. Sirounian's treatment was benefiting claimant such treatment could be provided under the provisions of ORS 656.245. She found no medical verification for claimant's testimony that his leg condition had worsened.

The Referee concluded that claimant had failed to establish that he had suffered an aggravation of his 1972 industrial injury and she upheld the denial.

The Board, on de novo review, concurs with the findings and conclusions of the Referee. Dr. Pasquesi unequivocally stated that claimant's condition was no worse at the present time than it had been at the time of claim closure. He was the physician who was in the best position to make such an evaluation because he had first examined claimant just prior to the entering of the Determination Order on June 18, 1973 and again in August 1978.

ORDER

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

WCR CASE NO. 78-474 May 24, 1979

VICTOR A. VANDERSCHUERE, CLAIMANT
John R. Sidman, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
MacDonald, Dean, McCallister & Snow, Employer's Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which found that claimant failed to present any evidence that an aggravation claim had been filed or that it had been denied, therefore, he could not prevail and dismissed the proceedings.

The claimant suffered a compensable injury to his low back on May 25, 1971. A laminectomy and discectomy at L4-L5 level was performed on September 14, 1972. Claimant recovered and was released to return to work on March 23, 1973 and the claim was closed by a Determination Order dated March 20, 1973 which awarded claimant 32° for 10% unscheduled low back disability.

Claimant testified he continued to work at his former occupation as a mechanic for approximately one year but his symptoms increased so he became a self-employed dairy farmer.

On May 28, 1974 claimant was again admitted to the hospital complaining of low back pain sustained while he was squatted down removing the inflations from one of his dairy cows. The claim was not reopened but the Fund accepted responsibility for the exacerbation. In October 1974 claimant notified Dr. Nash he was not using any medication and was able to perform all of his work by utilizing modified techniques. Dr. Nash stated that claimant's symptoms had been completely resolved.

On June 26, 1977 claimant was admitted to Tillamook Hospital with acute low back symptoms which had occurred when he and two other persons attempted to roll a sick cow which was lying on its side into a normal recumbent, prone position. This activity caused a recurrence of claimant's low back pain.

The Referee found no evidence as to what information relative to the June 26, 1977 incident was furnished to the Fund but that on January 10, 1978 claimant had requested a hearing which could be construed as a request for hearing on aggravation. On March 14, 1978 another request for hearing was filed setting forth substantially the same issues and enclosing a report from Dr. Nash, dated January 11, 1978, addressed to claimant's attorney. There also was a copy of a letter alleged to have been directed to the Fund claiming aggravation. The transmittal letter alleged, "This [request for hearing] is a claim for aggravation, but because of the time factor, claimant cannot follow the procedure prescribed in ORS 656-273 [sic]. Claimant's aggravation time expires March 19, 1978".

A supplemental request for hearing was filed on March 31, 1978 which alleged that claimant's aggravation claim had been denied on March 23, 1978.

The Referee found that although the copy of the letter alleged to be an aggravation claim was attached to the second request for hearing, that document was not offered or admitted into evidence and the fact that it was appended to the request for hearing did not elevate it to the status of evidence. At best, it could be only construed as part of the pleadings.

The Referee stated that if he were to assume that a claim had been filed, there was no evidence that it was ever denied. Although the supplemental request for hearing alleged a denial had been issued on March 23, 1978, the alleged denial was not offered into evidence.

The Referee concluded if a request for hearing was filed as a substitute for an aggravation claim, it was ineffectual. Claimant had stated he could not follow the statute because the time was running out within which he could file his claim for aggravation. The Referee stated that ORS 656.273(2), made the filing of a claim for aggravation mandatory; if it was not filed the claim could not be allowed. Had claimant filed a claim for aggravation instead of a request for hearing on January 10, 1978 the Fund would have been required to accept or deny within 60 days, well within the aggravation period. The Referee went on in great detail as to the procedural problems but never determined the merits in his order.

The Board, on de novo review, finds that the Referee raised issues not raised or discussed by the parties at the hearing, namely whether a claim for aggravation was filed and, if so, whether the carrier denied such claim based upon certain assumptions which are not necessarily supported by fact. He has dealt solely with a procedural aspect of this case and dismissed it without allowing either party to present its case on the merits therof.

The Board concludes that this hearing has not been completely and sufficiently developed or heard by the Referee, therefore, pursuant to the provisions of ORS 656.295(5), the matter should be remanded to the Referee to make a determination on the merits of this case.

ORDER

The order of the Referee, dated November 17, 1978, is hereby remanded, pursuant to the provisions of ORS 656.295(5), to the Hearings Division of the Workers' Compensation Board, and more specifically to Referee Page Pferdner, to make a decision on the merits of the above entitled matter and to enter his Opinion and Order thereon.

WCB CASE NO. 78-1308 May 24, 1979

ARCHIE E. WHITMAN, CLAIMANT
Robert S. Gardner, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests Board review of the Referee's order which found claimant to be entitled to compensation for permanent total disability as of October 26, 1978, the date of his order.

Claimant suffered a compensable injury on January 28, 1976 when the peeler core truck he was driving was struck by a log truck. Claimant was immediately taken to the Albany General Hospital and his injuries were diagnosed as scalp laceration and contusion of the forehead. Claimant was discharged and subsequently admitted to New Lincoln Hospital in Toledo where he was treated by Dr. Luce and also seen by Dr. Kent and Dr. Mason.

Dr. Mason, claimant's primary treating physician, upon being deposed concluded that claimant would not be able to do any physical type labor due primarily to subjective back symptoms and his established past history of back problems and injuries. He stated his opinion that claimant was permanently and totally disabled and such disability was related to the industrial injury. Depositions were also taken from Dr. Ackerman and Dr. Post.

Dr. Scheinberg saw claimant on December 23, 1976; claimant was at that time complaining of pain in the low back and right knee. Objective findings were minimal to substantiate the subjective symptoms related to the right knee but Dr. Scheinberg did note tenderness with direct pressure over the patella. As noted in Dr. Scheinberg's report, claimant had been hospitalized at least ten times prior to January 25, 1977 and extensive conservative treatment was afforded claimant. Traction and therapy apparently did not seem to benefit claimant but his medical problems made effective rehabilitation impossible. The vocational rehabilitation file was closed on February 2, 1977 because claimant felt he was permanently disabled and unable to become employed.

On April 8, 1977 the claim was closed by a Determination Order which awarded claimant compensation equal to 112° for 35% unscheduled low back and neck disability and 7.5° for 5% loss of the left forearm.

On May 6, 1977 a left ulnar nerve study was performed; it was normal. On June 6, 1977 claimant was admitted to the Good Samaritan Hospital in Portland for an evaluation. His claim was reopened and compensation for temporary total disability was commenced and continued through November 14, 1977. While in Good Samaritan Hospital, Dr. Post, on a consultation basis, found bilateral trochanteric bursitis. He stated that claimant's ability to return to work depended primarily on his spinal problem. The final diagnosis of lumbar spondylosis, with hypertension as a secondary diagnosis, was made by Dr. Gutnisky at the time claimant was discharged from Good Samaritan Hospital.

Claimant was also examined by Dr. Harwood, chief medical consultant for the Fund. He reviewed most of claimant's medical history and found claimant's predominant complaints apparently were in the thighs in the region of the hamstring muscles on most of the range of motion movements. He felt that claimant had sustained a musculoligamentous strain in the sacral region which was superimposed on his previous spinal fusion (claimant had had a fusion in 1958 and another fusion at a different level in 1961), but that his obesity was not only an aggravating factor but a somewhat causal factor of degenerative osteoarthritis, which, apparently had been worsened by the above and aggravated by a pre-existing lumbar spondylosis. He did not feel that the Fund was responsible for the degenerative osteoarthritis nor the obesity conditions. He felt that claimant's condition was medically stationary.

Claimant's claim was again closed by a Second Determination Order dated February 8, 1978 which granted claimant compensation for additional temporary total disability from June 5, 1977 through November 14, 1977 but no additional compensation for permanent partial disability.

Dr. Post had stated that the trochanteric bursitis was unlikely to be a source of long-term disability and that claimant's spinal problems were much more significant. He saw claimant after the issuance of the Second Determination Order because of claimant's complaints of increasing symptoms in his left foot which would become numb and his left leg which would collapse. He also was complaining at that time of chronic back and bilateral leg pain, worse on the left. Dr. Post found no specific neurological deficit which would require surgical intervention.

Dr. Ackerman's deposition, upon which the Referee apparently relied heavily, contained his opinion that claimant was suffering from an organic brain syndrome, probably post-traumatic. It was Dr. Ackerman's conclusion that claimant was neither malingering or "gold-bricking". After taking into consideration claimant's age and physical condition, Dr. Ackerman stated that it was "extremely unlikely anyone would hire him [claimant]".

The Referee concluded, based on all the direct examinations of Dr. Ackerman, that all of claimant's incapacities were job-related in Dr. Ackerman's opinion, although the cross-examination might raise doubts about the onset of the mental problems and neurosis as to the specific date. However, the Referee's impression was that Dr. Ackerman related the problems to the last injury of January 28, 1976. The evidence indicates that claimant had functioned for a long time prior to his particular incident.

There was additional testimony received from persons who were acquainted with claimant. The Referee did not detail all of the injuries, treatment, and miseries suffered by claimant both before and after his January 28, 1976 injury. He felt that would unduly lengthen his order.

He did find that claimant was credible as was his wife who corroborated claimant's contentions that he was physically incapable, on account of back and leg pain, from doing any work of a suitable and gainful type on a regular basis.

The Referee felt that the opinions of Dr. Post and Dr. Mason were sufficient to convince him that claimant's low back and cervical problems were brought to a totally disabling category by the injury sustained on January 28, 1976. He found that the headaches suffered by claimant were associated with the cervical condition and that Dr. Ackerman supported the contention that claimant could neither return to his prior jobs nor be retrained for any other type of employment.

The Referee concluded that the collision on January 28, 1976 destroyed claimant, who had worked up to that incident despite prior injuries. He did not reject Dr. Scheinberg's testimony which indicated that claimant had lost approximately 50% of the use of his back due to the lumbar problems but stated that it must be weighed with all the medical testimony and that the testimony of Drs. Mason, Post and Ackerman were more persuasive. He held that since Dr. Ackerman was a psychologist his written reports were not admissible as "medical" or "vocational" reports, however, the deposition of Dr. Ackerman, without the attachments, constituted evidence from a psychologist.

The Board, on de novo review, reaches the same conclusion as the Referee, namely, that the medical evidence is sufficient, when considered with claimant's age, work background education and adaptability for retraining, to justify a conclusion that claimant is now permanently and totally disabled.

Claimant cross-appealed, stating that his permanent total disability should have commenced earlier than the date of the Referee's order. The Board finds no justification for this contention.

ORDER

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

Claimant's counsel is awarded as a reasonable attorney's fee for his services at Board review the sum of $350, payable by the State Accident Insurance Fund.

SAIF CLAIM NO. AC 408279 May 24, 1979

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

Claimant suffered a compensable injury to his right ankle on November 17, 1972. The claim was last closed by stipulation on April 25, 1977.

On April 25, 1979 Thomas Martens, M.D., admitted the claimant to the Good Samaritan Hospital at Corvallis, Oregon for surgery, consisting of compression arthrodesis, right talocrural joint. The claimant requested that his claim be reopened. Aggravation rights under the above claim expired on June 3, 1978.

The Fund forwarded copies of various documents, including the operative report of Dr. Martens of April 25, 1979, to the Board together with a cover letter indicating it would not oppose reopening.

The Board, after consideration of the evidence before it, concludes that the claim should be reopened.

ORDER

Claimant's claim is remanded to the State Accident Insurance Fund for reopening of his claim commencing on April 25, 1979 and until the claim is closed pursuant to ORS 656.278.

SAIF CLAIM NO. ZC 213127 May 25, 1979

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

Claimant suffered a compensable injury to her low back on October 24, 1969 when she caught the dead weight of an obese patient and fell to the floor with her. She saw several doctors who generally felt she had a functional overlay problem. After an attempt at vocational rehabilitation her claim was closed on July 8, 1970 with time loss benefits only.

Claimant saw Dr. Tsai in 1971 who said claimant's low back complaints went back several years prior to the injury. By Stipulation, dated February 17, 1972, she was granted compensation for 15% unscheduled disability. She aggravated her back in 1973 and a laminectomy was done on April 6, 1973. Her condition did not improve and an interbody spinal fusion was done in February 1974. After retraining, her claim was closed on December 23, 1975 with an additional award of 5% for 20% total. A July 29, 1976 Stipulation granted an additional 20%.

Claimant was involved in an automobile accident in February 1976 and aggravated her back. The Fund reopened her claim for additional time loss as of November 22, 1976.

Claimant was hospitalized in March 1978 where Dr. Hanbery explored the nerve roots at L4-5-S1 and did not find them compressed. Dr. Brown indicated that the earlier fusion had failed and he performed a posterior-lateral fusion which is now felt to be solid.

Claimant, at present, has few complaints and it is felt that she could perform light work. She is physically able to perform the work she was trained for.

The Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department finds that claimant has finally attained a good surgical result and has a satisfactory vocational outlook and, therefore, she has been adequately compensated by the award for 40%. Claimant is entitled to compensation for time loss from November 22, 1976 through April 18, 1979.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 22, 1976 through April 18, 1979, less time worked.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of February 16, 1979.

WCB CASE NO. 78-4973 May 25, 1979

BURLIN FOWLER, CLAIMANT
Spence, O'Neal & Banta, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the Determination Order dated June 27, 1978 granting claimant 7.5° for 5% partial loss of his right leg. Claimant contends his disability is greater.

Claimant suffered a compensable injury on August 2, 1977 while employed as a choker setter. The injury occurred when claimant slipped and fell. He continued working on steep ground setting chokers for approximately one month at which time he was seen and released for work by an osteopathic physician. Claimant was then laid off and worked on a construction job for one day and was laid off again. He drew unemployment and in late October 1977, due to a clicking, snapping and instability in his knee, sought medical care from Dr. Woolpert, an orthopedic Surgeon, who performed a medial meniscectomy in February 1978.

Claimant made good improvement after the surgery and in May 1978 Dr. Woolpert made a closing report, stating claimant had some atrophy, excellent range of motion, no significant pain and no significant swelling. In general claimant had no problems of any significance. Dr. Woolpert did note that claimant commented that walking on steep ground for more than an hour or two would cause his leg to become fatigued. Based upon that complaint the doctor felt claimant should not return to work in the woods but concluded that he was capable of doing other types of work. He described claimant's disability as minimal.

In June 1978 claimant obtained his present job pulling veneer on the green chain. This job, although requiring fast repetitive twisting and bending movements, required no heavy lifting. Claimant is on his feet during the entire shift except for regular breaks. He works 10 hours a day four days a week. Claimant stated that a couple days a week he has some discomfort at the end of his shift, however, claimant's foreman testified that claimant has made no complaints concerning his leg and did not appear to be limited and disabled in any way. In fact, the foreman was not aware that claimant had a knee injury until he was told about it by an investigator for the Fund. Claimant has lost no time from his present job because of his leg problems nor is he taking medication nor seeking medical attention.

Claimant's only complaint is that he has some loss of strength which he feels keeps him from returning to work in the woods. Apparently, Dr. Woolpert agrees that he should not return to work in the woods but still maintains that the disability is minimal.

The Referee found that claimant continued to work after the injury as a choker setter on steep ground and did not voluntarily leave his employment. According to the medical evidence claimant's symptoms at that time were significantly worse than they were after his surgery. He was unable to understand how claimant was able to work better in the woods before the surgery than he was at the present time. Based upon Dr. Woolpert's assessment of claimant's disability, the Referee felt that claimant had been adequately compensated for his loss of function of the right leg by the award of 7.5°.

The Board, on de novo review, finds that although Dr. Woolpert did state that claimant's disability was minimal, nevertheless, he felt that claimant should not return to work in the woods. Such an opinion would indicate claimant had suffered more than just minimal loss function of his right leg as a result of the injury. Assuming, however, that claimant's loss of use of the leg is minimal, it should be rated at the top of the range for minimal disability. Therefore, the Board concludes that claimant is entitled to an award equal to 15° for 10% loss function of the right leg.

ORDER

The order of the Referee, dated November 14, 1978, is modified.

Claimant is awarded 15° of a maximum of 150° for 10% partial loss of his right leg. This award is in lieu of the award granted by the Determination Order dated June 27, 1978, which had been affirmed by the Referee in his Opinion and Order.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

CLAIM NO. C604-10309 HOD May 25, 1979

FRANK GILLENWATER, CLAIMANT
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Own Motion Order

On April 17, 1979 claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on November 24, 1969 while in the employ of Gunderson Brothers Engineering Corporation. The carrier on the risk at the time was Liberty Mutual Insurance Company.

The claim was accepted and closed by a Determination Order dated January 26, 1970 whereby claimant was awarded compensation for time loss only. Claimant's aggravation rights expired on January 25, 1975.

On April 24, 1979 claimant was advised by the Board that it would be necessary to furnish it a current medical narrative report establishing that his present physical condition has worsened since January 26, 1970 and that his present condition was attributable to the injury of November 24, 1969.

On May 2, 1979 the Board received a report from Dr. Bruce B. Pace, a chiropractic physician, who had seen claimant on April 11, 1979 for the purpose of evaluation and treatment for injuries claimant sustained in an on-the-job accident on April 10, 1979.

On May 4, 1979 the Board furnished the carrier a copy of the report of Dr. Pace. The carrier was asked to advise the Board of its position with respect to claimant's request within 20 days.

On May 9, 1979 the carrier, by and through its attorney, advised the Board that its claim file for claimant's November 24, 1969 injury contained a report from Dr. Tilden, a chiropractic physician, dated November 26, 1969 which indicated claimant sustained a low back strain; also a report from Dr. Tilden, dated January 14, 1970 indicating release of claimant to return to regular work as of December 8, 1969 with no permanent disability, and the Determination Order dated January 26, 1970 which granted claimant time loss benefits only.

The carrier objected to the request, stating that the claim was 10 years old, it involved a minor low back strain with very little, if any, objective evidence of injury. In their opinion claimant apparently has had a recurrent low back strain which needs chiropractic treatment which occurred "on the job" by his treating physician's own words. The carrier disclaimed responsibility for any further medical care and treatment and asked the Board to deny claimant's request for own motion relief.

The Board, after reading all of the medical documentation, finds absolutely nothing to connect claimant's present condition with his 1969 injury. Dr. Pace's report indicates he was treating claimant for an on-the-job accident which occurred on April 10, 1979 and in his report he refers to a prior low back injury which claimant sustained while working at FMC Marine and Rail Equipment in November 1969; however, there is nothing contained in his report which indicates that claimant's condition has worsened since the Determination Order was issued on January 26, 1970.

The Board concludes that 10 years have passed and there is no evidence of any intervening treatment for claimant's condition until he was seen by Dr. Pace in April 1979. Therefore, the Board concludes that there is no justification for granting claimant's request for own motion relief at this time.

ORDER

Claimant's request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury sustained November 24, 1969 is hereby denied.

JAMES F. HOLMES, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Newhouse, Foss, Whitty & Roess, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Referee's order which granted claimant 80° for 25% unscheduled disability.

Claimant, a 32-year-old directional cutter, suffered a compensable injury to his low back and left hip on April 11, 1975 when he slipped off of a log. On August 27, 1975 Dr. Matteri performed a partial laminectomy, foraminotomy and excision of nucleus pulposus at L5-S1 on the left. Claimant returned to the same job for the defendant on October 27, 1975. Except for a period of ten days in April 1978 claimant has missed no time from work.

Claimant's claim was closed on June 8, 1978 by a Determination Order which granted claimant an award of 32° for 10% unscheduled disability.

The claimant has intermittent pain in his back and leg which flares up when he overdoes such activities as walking, standing on concrete or riding on a rough road. He must be careful of his footing while walking on uneven terrain. His work involves the falling of trees which requires him to move from tree to tree, sometimes over rough ground. He uses two saws. He and another employee carry a jack weighing 140 pounds as part of their job.

Claimant has a high school education and has completed two years of college. He worked as a surveyor for defendant for six years before becoming a head directional cutter.

Claimant rests his back at work during the day. Over-exertion produces a left leg "charley-horse". When he suffers a flare-up he wears his back brace. This inhibits his movements and rubs sore spots on his body.

The Referee concluded that should claimant lose his present job he could be expected to have some difficulty securing another because of his symptoms, history of back injury and the telltale laminectomy scar. On the other hand, claimant's successful return to his same employment was evidence of a rather good result from the surgery. The treating doctor has described claimant's physical impairment as minimal. Claimant has a good education and, in addition to logging, has worked as a surveyor. After considering all of the factors bearing on claimant's earning capacity, the Referee concluded that claimant would be entitled to 25% of the maximum allowable for an unscheduled disability. The Referee stated that claimant would be entitled to substantially more if he were not successfully employed in his same occupation.

The Board, on de novo review, finds no medical evidence that would justify the increase made by the Referee. Dr. Matteri, claimant's treating physician, described claimant's residual disability as of April 11, 1978 as "minimal". Claimant has 14 years of education; he is only 32 years old. He is doing the same type of work that he did prior to his injury and he has missed very little work as a result of that injury since his return after surgery. The evidence indicates he is able to put in a 12-hour day and there is nothing in the record which would suggest that claimant is now precluded from any segment of the broad range of industrial occupations because of his injury.

Claimant has an exemplary work record. He is well-educated and highly motivated. He has proven he can do his job as a directional cutter which is a very strenuous and heavy form of employment. These factors indicate that he has suffered only a small loss of wage earning capacity.

The Board concludes that the award granted by the Determination Order adequately compensates claimant for his loss of wage earning capacity which resulted from his industrial injury.

ORDER

The order of the Referee, dated December 21, 1978, is reversed.

The Determination Order, dated June 8, 1978, is reinstated in its entirety.

CLAIM NO. C604-13464 May 25, 1979

PATRICIA ENGLISH KEZAR, CLAIMANT
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Claimant's Attys.
Own Motion Order

On February 2, 1979 an Own Motion Determination was entered in the above entitled matter whereby claimant was granted compensation for temporary total disability from March 20, 1978 through October 22, 1978 and 32° for 10% unscheduled disability.

On February 8, 1979 the Board received from claimant, by and through her attorney, a request to reconsider the Own Motion Determination, stating that claimant's medical condition was not currently medically stationary. Claimant, at that time, was receiving treatment from Dr. Hauge who was awaiting authorization from the carrier to allow him to hospitalize and perform surgery on claimant. The letter from claimant's attorney also questioned the jurisdiction of the Board to enter an Own Motion Determination in this case, however, that is not before the Board and is only mentioned to indicate the cause for the delay in the action being taken on this matter.

After the exchange of correspondence between counsel for claimant, counsel for the carrier and the Board relating to the jurisdictional question, the Board was advised on May 14, 1979 that the carrier would not resist further medical treatment being afforded claimant by Dr. Hauge nor would it oppose any proposed surgery.

The Board, having read Dr. Hauge's report, which was based upon his examination of claimant on December 27, 1978, concludes that the motion to reconsider should be granted and the Own Motion Determination dated February 2, 1979 should be set aside and held for naught. It further concludes that claimant should be granted compensation, as provided by law, commencing on December 27, 1978, the date claimant was first examined by Dr. Hauge, and until the claim is closed pursuant to provisions of ORS 656.278.

ORDER

The Own Motion Determination, entered on February 2, 1979, is hereby set aside.

Claimant's claim is remanded to the carrier to be accepted and for the payment of compensation, as provided by law, commencing on December 27, 1978 and continuing until the claim is closed pursuant to the provisions of ORS 656.278.

The compensation for temporary total disability awarded claimant by the Own Motion Determination of February 2, 1979 has been paid. The carrier is entitled to offset any payments made to claimant for permanent partial disability as a result of the Own Motion Determination against compensation for temporary total disability awarded by this order.

Claimant's attorney has been awarded a reasonable attorney's fee pursuant to the Stipulated Order of Dismissal dated August 24, 1978.

CLAIM NO. D53-135664 May 25, 1979

ALFRED J. MERRITT, CLAIMANT
Own Motion Order

Claimant sustained a compensable injury on September 22, 1969; the claim was last closed by a Determination Order of October 22, 1976 which granted him compensation for time loss only.

On January 25, 1979 Dr. R. D. Cook indicated claimant had been having back pain for the past couple of months. On March 30 Dr. Cook stated that the pain was rather disabling and he felt it was a continuation of claimant's previous complex back syndrome. Claimant requested that his claim be reopened for the 1969 industrial injury. His aggravation rights have expired.

On April 19, 1979 the Board advised the carrier of claimant's request and asked it to advise the Board within 20 days of its position with regard to said request.

On May 18, 1979 the carrier informed the Board that it was currently paying time loss benefits from March 5, 1979 based upon a note to it from Dr. Cook. It had no objection to reopening the claim.

The Board, after consideration of the evidence before it, concludes that the claim should be reopened.

ORDER

Claimant's claim is remanded to Employers Insurance of Wausau for reopening of his claim commencing March 5, 1979 and until the claim is closed pursuant to ORS 656.278.

SAIF CLAIM NO. 947153 May 25, 1979

VERNIE L. MEWHINNEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left leg on January 30, 1945. Due to lack of circulation in the lower part of the leg, an amputation was done.

No medical reports were submitted until December 2, 1959 when Dr. Grover stated claimant was suffering from stump irritations and he indicated claimant should have a new prosthesis. This was taken care of in February 1960.

A stump revision and neurectomy of the left peroneal nerve were done in December 1961 and the claim was reopened for time loss benefits. The claim was reopened and closed in 1968 and again in 1974 when claimant again underwent surgery. Medical records indicated Dr. Grover was unable to fit claimant with a suitable prosthesis.

Claimant was examined by Dr. McKillop on May 2, 1979. He felt it was very unlikely that claimant could ever be satisfactorily fitted with any prosthesis. He suggested redoing the socket in the prosthesis to relieve it as much as possible. He felt the claim could be closed.

The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted compensation for time loss from May 7, 1974 through May 2, 1979. It finds that because the treating physician cannot provide claimant with a useable prosthetic appliance, claimant no longer has useful function of his left leg. Based on this, claimant is entitled to compensation for 100% loss function of the left leg.

ORDER

Claimant is hereby entitled to compensation for temporary total disability from May 7, 1974 through May 2, 1979, less time worked.

Claimant is granted compensation equal to 100% loss of the left leg by separation. This award is in lieu of, and not in addition to, the award granted for 100% loss function of the left foot granted in 1945.

SAIF CLAIM NO. AA 784379 May 25, 1979

IRENE C. PANEK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to her left lower leg on February 10, 1960 while working for the Marion Motor Hotel. Surgery was performed in April 1960 and claimant made a sufficient recovery to enable her claim to be closed on April 26, 1961 by an order which granted claimant 70 days of temporary total disability benefits and an award equal to 15% of her left foot. Claimant had previously received an award equal to 35% of her left leg at or above the ankle for a June 5, 1952 fracture of her tibia and fibula.

Since the initial closure of the 1960 industrial injury, there have been several surgeries and the claim has been reopened and closed several times. In September 1968 the claim was closed and claimant was granted an additional 5% of her left foot which brought her current award for the 1960 injury to 20% of the left foot and the total award for this lower extremity to 55%. ORS 656.222

The claim was reopened for further treatment on November 7, 1977. Initially, the Fund denied further benefits but subsequently made payment and on February 2, 1978 claimant's treating physician recommended complete bed rest to allow her latest ulcer to heal.

On April 6, 1978 Dr. Bietz, who had been treating claimant, advised the Fund that he had examined claimant on March 6, 1979 and the ulceration at the medial malleous was now healed and the situation was stable but excessive ambulation or inattention to the care of the medial malleous could result in recurrent ulceration and breakdown of the tissue. He recommended that claimant not be on her feet more than two or three hours at a time and then spend an equal amount of time resting.

On April 13, 1979 the Fund requested a closing evaluation and the Evaluation Committee of the Workers' Compensation Department recommended to the Board that the claim be closed with an award of compensation only for temporary total disability from February 2, 1978 through April 6, 1979.

The Board concurs.

ORDER

Claimant is awarded compensation for temporary total disability from February 2, 1978 through April 6, 1979. This is in addition to any previous awards which claimant may have recieved as a result of her February 10, 1960 industrial injury.

SAIF CLAIM NO. PB 94443 May 25, 1979

LINCOLN H. PENCE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury in the nature of a fractured left tibia and fibula on November 9, 1964. The claim was initially closed on July 12, 1965 with an award equal to 15% loss function of the left foot. On June 19, 1974 claimant was granted an additional award of compensation equal to 55% loss of function of the left foot. Claimant's aggravation rights have expired.

The claim was reopened on January 9, 1977 for further medical care and treatment and was closed again by an Own Motion Determination dated December 11, 1978 which gave claimant additional compensation for temporary total disability from June 18, 1977 through November 6, 1978.

On April 23, 1979 the Board by an Own Motion Order reopened the claim. Claimant's request to reopen had been supported by a report from Dr. Ross dated January 22, 1979 which indicated claimant had infection of the left leg. Time loss benefits were to commence as of the date Dr. Ross hospitalized claimant for treatment for his lower left leg.

Claimant was admitted to the Rogue Valley Memorial Hospital on January 22, 1979 and received treatment for a recurrent stasis ulceration, left leg, with secondary infection. On April 27, 1979 Dr. Ross found claimant to be medically stationary with no additional impairment. The Fund asked for a closing evaluation.

On May 11, 1979 the Evaluation Committee of the Workers' Compensation Department recommended to the Board that claimant be granted an additional award only for temporary total disability from January 22, 1979 through April 27, 1979, inclusively.

The Board concurs in this recommendation.

ORDER

Claimant is granted compensation for temporary total disability from January 22, 1979 through April 27, 1979, inclusively. This award is in addition to all previous awards claimant has recieved for his industrial injury sustained on November 9, 1964.

SAIF CLAIM NO. KB 167249 May 25, 1979

HELEN M. SMITH, CLAIMANT
Yturri, Rose & Burnham, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 26, 1979 claimant, by and through her attorney, requested the Board to reopen her claim for an industrial injury sustained on December 7, 1965. By an affidavit attached to the request, claimant stated that she has continually had problems with her back since the injury. She indicated that in the fall of 1978 it was necessary that she undergo an operation of her lower back which was a direct result of her industrial injury.

Medical reports in the file indicate claimant underwent a myelogram on September 27, 1978 which revealed a large ruptured disc at L4, L5 which was "compatible" with the auto accident in which claimant was involved in 1965. Surgery was performed on October 6, 1978.

On May 15, 1979 the Board informed the Fund of claimant's request and asked it to advise the Board of its position within 20 days.

On May 17, 1979 the Fund indicated it would not oppose a reopening of claimant's claim.

The Board, after consideration of the evidence before it, concludes that the claim should be reopened.

ORDER

Claimant's claim is remanded to the State Accident Insurance Fund for reopening of his claim commencing on September 27, 1978 and until the claim is closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 76-2479 May 25, 1979

PAUL A. SMITH, CLAIMANT
James Tate, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award for permanent total disability effective May 30, 1978, the date claimant was found to be unsuited for rehabilitation services.

Claimant, a 62-year-old pond man, suffered a compensable injury on July 17, 1975. He was pulling a log with a pike pole which slipped causing claimant to jerk his back. Claimant worked one day following the injury and has not worked since.

He was treated by Dr. Willeford who referred him to Dr. Hazel, an orthopedic surgeon, and subsequently both doctors treated claimant. Dr. Hazel found claimant had a right sciatic problem similar to a condition he had had in 1972 and he found marked limitation of back motion and hypesthesia in the lateral aspect of the foot. It was his opinion that claimant had right sciatica, secondary to degenerative disc disease superimposed on an acute injury.

In January 1976 Dr. Pasquesi, after examining claimant, diagnosed a chronic lumbosacral instability with right sciatic radiation of pain; healed compression fracture of L1 with 25% loss of height. Dr. Pasquesi, who had examined claimant in 1972, was of the opinion that there was considerable more limitation of motion when he examined claimant in 1976. He felt that claimant should not do work which required repetitive bending, stooping and twisting nor lifting more than 25 pounds. Furthermore, his work should allow him to sit and stand as necessary. He rated impairment equal to 36% of the whole man. Dr. Hazel essentially concurred.

Dr. Hazel felt that claimant could do sedentary work, that he had had symptoms as early as 1972 but apparently recovered until the 1975 injury aggravated his underlying condition.

Dr. Willeford agreed that the 1975 injury was the primary cause of aggravation of the pre-existing degenerative joint disease and he felt little or no improvement could be expected. He said that claimant should be limited to employment which would not aggravate his back condition.

Field Services offered claimant vocational assistance services but claimant declined to avail himself of it because he felt he was unable to work at anything and was too old to be retrained. This was in 1976. In 1978 claimant requested vocational services but at that time his counselor found him ineligible, stating that retraining was not feasible based upon claimant's age, inability to drive more than 10 miles, or to do any prolonged sitting or standing. In addition claimant's poor education and excessive wage needs were considered.

Claimant testified that after his 1972 injury he was off six weeks but had worked steadily thereafter until he was injured in 1975. He states that since his 1975 injury he is no longer able to fish, hunt nor do prolonged sitting or standing. He has constant sharp pain in his lower back. Claimant hasn't looked for any work but he does scan the papers for jobs which he feels he could do although he doesn't know of any job which he could perform, according to the Referee.

The Referee found that the evidence indicated claimant was permanently and totally disabled from returning to his pre-injury work and that there was no other specific job available which he could now perform. Claimant had no prior training or experience on which to draw and the retraining for lighter work in view of claimant's age and education was impractical. Claimant, in the opinion of the Referee, had not made a reasonable effort to obtain employment but it was so apparent under the circumstances that there was no suitable and gainful employment available which claimant could perform that the Referee concluded claimant was permanently and totally disabled.

The Board, on de novo review, finds that claimant, since his industrial injury of July 1975, has been rather dictatorial with respect to returning to work. Field Services endeavored to give him vocational assistance but he refused them. Two years later he requested said assistance but at that time he was found to be ineligible because of his age and education and so forth.

On September 23, 1977 Dr. Willeford advised the Fund that he was still treating claimant intermittently for his degenerative back disease; he felt that claimant was still disabled from doing the type of work he previously had done. Due to his physical and psychological condition, he didn't know how well claimant would do on a retraining program but he felt that claimant should be encouraged to try to pursue another type of endeavor leading to gainful employment which would not aggravate or worsen his back condition. Dr. Hazel advised claimant's attorney on June 29, 1977 that claimant was "100% totally disabled to work as a pond monkey in a lumber mill hopping from log to log, pushing on logs with a peavey pike. He of course is much less disabled for a sedentary job. I believe that he would have to be adjudged to be at least 25 to 35% disabled of the whole body with loss of physical function to the whole body on the basis of his persistent pain and persistent neurologic deprivation."

Claimant says that he hasn't looked for work and he doesn't know of any jobs that he can perform but there is no evidence that he has ever tried to do any job which would be within his physical and mental capacities. He apparently lacks motivation to return to the labor market and yet his disabilities are not so great that motivation need not be considered in determining his disability.

The Board concludes that claimant has suffered a substantial loss of wage earning capacity as a result of his injury. After considering his work background, his educational background and his age, it concludes that claimant has lost approximately 60% of his potential wage earning capacity as a result of the industrial injury. Claimant's contention that he is permanently and totally disabled is not supported by the medical evidence in the record. At best the medical evidence substantiates that claimant cannot return to his former job as a pond man.

The Board concludes that claimant is entitled to an award of 192° for 60% unscheduled low back disability.

ORDER

The order of the Referee, dated September 27, 1978, is modified.

Claimant is awarded 192° of a maximum of 320° for 60% unscheduled low back disability. This award is in lieu of the award for permanent total disability effective May 30, 1978, which was granted by the Referee's order which in all other respects is affirmed.

SAIF CLAIM NO. HD 299528 May 25, 1979

ANDREW J. TRAMMELL, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on March 24, 1971 while working as a meat packer for Armour and Company. His claim was accepted and closed by a Determination Order dated April 10, 1972 and claimant's aggravation rights with respect to his March 24, 1971 industrial injury have expired.

Since the initial award by the Determination Order of June 8, 1976 claimant's claim has been reopened and closed several times and the last award and arrangement of compensation was by a Stipulated Order approved by Referee William J. Foster on October 18, 1976 whereby claimant was awarded 250° for unscheduled low back disability.

On May 25, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim. The request was supported by two medical reports from Dr. Cherry who has treated claimant continuously since his initial injury in 1971 and is still treating him.

The Board did not have sufficient evidence at that time to make a determination on the merits of claimant's request and referred the matter to its Hearings Division to hold a hearing and determine whether or not claimant's request for own motion relief was justified.

After a hearing on May 15, 1978 Referee George W. Rode submitted a transcript of the proceedings together with his recommendation to the Board. The Board by an order dated June 20, 1978 accepted and adopted as its own the Referee's recommendations and remanded claimant's claim to the Fund to be accepted and for the payment of compensation, as provided by law, commencing on December 15, 1976 and until the claim was closed pursuant to ORS 656.278.

On August 15, 1978 Dr. Cherry requested the Fund to enroll claimant in the program at the Pain Clinic. On November 16, 1978 claimant was examined by Drs. Ebert, Kimberly and Ragsdale. The examination indicated claimant favored his right leg. On heel walking a slight foot drop, bilaterally, was observed. Motor and sensory examination was normal but a severe degree of functional interference with the examination was noted, manifested by refusals and inconsistencies on the part of claimant.

Claimant was then examined by the physicians at Orthopaedic Consultants who recommended that claimant return to the same occupation with limitations or obtain some other type of occupation. Claimant was admitted for evaluation and treatment at the Northwest Pain Center on January 30, 1979. Dr. Seres, Dr. Newman, and Dr. Brodie diagnosed claimant's condition to be mechanical low back pain without evidence of nerve root compression. It was felt that claimant was poorly motivated for pain rehabilitation and was resisting returning to any type of employment.

On April 19, 1979 the Fund requested a closing evaluation. The Evaluation Committee of the Workers' Compensation Department recommended to the Board that claimant's claim be closed with no additional award for permanent partial disability but additional compensation for temporary total disability from December 15, 1976 through February 9, 1979.

The Board concurs in the recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from December 15, 1976 through February 9, 1979. The request for claim closure indicates that this compensation for temporary total disability has been paid to claimant.

In the Own Motion Order dated June 20, 1978 it was provided that claimant's attorney should be allowed as a reasonable attorney's fee for his services, a sum equal to 25% of the compensation which claimant should receive as a result of that order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-7233 May 29, 1979

VANCE A. BAUNE, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly & Barnett, Claimant's Attys.
Bruce A. Bottini, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which approved the Determination Order dated November 1, 1977 whereby claimant was awarded 16° for 5% unscheduled neck disability.

Claimant suffered a compensable injury to his neck on February 23, 1977. At that time claimant was a 64-year-old truck driver and had slipped and fallen head first off a loading dock. Claimant was taken to Providence Hospital emergency room where x-rays of the head, neck and right shoulder were taken and then he was released to go home.

Claimant was first seen by Dr. Butler, an orthopedic surgeon, who diagnosed pre-existing osteoarthritis of the cervical spine; pre-existing ossification of the rotator cuff, right shoulder, history of trauma to the head, neck, shoulder and eye with no fractures; contusion of the lower eyelid; mild cervical strain; and, diplopia, etiology undetermined. He told claimant not to work for one month. Claimant was referred to Dr. Dennis, a neurosurgeon, who found no objective neurological damage.

Dr. Edward W. Davis, also a neurosurgeon, examined claimant on April 21, 1977. He felt claimant still had some residuals of a cervical sprain; he was unable to outline claimant's sensory impairment in any anatomical pattern but believed that it was also probably related to his sprain. He did not think it was of any significance. He did not believe claimant had any nerve root compression and he felt that he should have a satisfactory recovery. He recommended that Dr. Butler examine claimant again from an orthopedic standpoint.

Dr. Butler could find nothing abnormal and by July 1977 felt that claimant, having received some treatment from an osteopathic physician, would just have to wait out the symptoms. He cautioned claimant not to let anyone manipulate his neck, however, claimant began chiropractic adjustments in 1977. The chiropractor was optimistic. In September 1977 Dr. Butler felt claimant was medically stationary with neck strain superimposed upon pre-existing osteoarthrits to a very mild degree. Because of lack of atrophy, Dr. Butler did not feel claimant's left arm and hand were as weak as he said they were.

On September 13, 1977 Dr. Butler advised the carrier that he felt claimant was medically stationary and did not need any further medical care and treatment. Claimant's impairment was rated as very mild. The carrier requested a determination, stating that claimant had a required retirement age of 65 and had become 65 in March 1977.

On November 1, 1977 a Determination Order awarded claimant 16° for 5% unscheduled neck disability.

On November 1, 1977 Dr. Beeson, a chiropractic physician, stated that he did not agree with Dr. Butler's opinion that claimant was medically stationary. On November 21, 1977 Dr. Butler re-examined claimant and found he still had some areas of hypesthesia in the right anterior shoulder region with spotty areas of hypesthesia in both arms and hand, but they were very spotty and for the most part claimant had good sensation. Based on his findings, Dr. Butler stated he felt the award of 5% for permanent partial disability to the body as a whole was reasonably fair from objective findings.

On March 27, 1978 Dr. Gritzka examined claimant and expressed his opinion that claimant had advanced cervical spondylosis with nerve root encroachment, probably an anterior bar and pressing the anterior cord. Based on the history claimant had given to him, he found claimant was asymptomatic prior to the industrial injury of February 1977. He felt that the degenerative changes in the cervical spine probably antedated claimant's industrial injury. However, he felt the industrial accident was a material contributing cause which rendered the antecedant condition symptomatic. He recommended that the claimant have an electromyelographic evaluation and myelograms. He thought claimant would probably be a candidate for surgical anterior interbody fusion, at least at C5-6. He felt claimant had approximately 15% permanent partial physical impairment.

Dr. Butler also saw claimant in May 1978 and continued to estimate his partial impairment at 5%. He found from an objective standpoint no specific loss of use of the left arm; he also reversed his prior recommendation and lifted restrictions relating to claimant's truck driving. He felt that the claimant definitely was back to his pre-injury status.

On June 20, 1978 the carrier informed claimant that if claimant intended the medical report from Dr. Gritzka to be considered as a request to reopen his claim that it was denying said request. This letter advised claimant of his right of appeal from said denial.

On July 7, 1978 Dr. Davis again examined claimant and found no evidence of nerve root compression. He said that contrary to his previous report he no longer felt that claimant required any surgical procedure. He felt claimant had a pre-existing osteoarthritis of the cervical spine and that the injury of February 1977 did, indeed, aggravate his arthritic problems and he was still suffering with a cervical sprain and aggravation of his arthritis. Dr. Davis believed that claimant's condition was medically stationary and that no further medical treatment was indicated. He said he would rate claimant's permanent partial impairment of the whole man at 15% resulting from the industrial injury.

At the hearing a film taken of claimant performing certain activities was admitted. Also claimant and his wife testified that claimant had planned to work until 70 driving truck or possibly operating a driver training school to obtain additional income. The employer contended that claimant was planning to retire at 65 regardless of whether he had suffered an injury. The Referee found that speculation on either possibility was not necessary to enable him to determine the case.

The Referee was impressed by the film and felt that they confirmed the belief expressed by Dr. Butler and disputed the opinion of Dr. Gritzka. He concluded that claimant could do many things which he testified he could not do, therefore, claimant had not met his burden of proving that he had suffered any greater disability than that for which he had been awarded by the Determination Order of November 1, 1977.

The Board, on de novo review, finds that the evidence as a whole indicates claimant is entitled to an award for loss of wage earning capacity slightly greater than that awarded by the Determination Order. The Board concludes an award of 48° for 15% would compensate claimant for such loss resulting from his industrial injury.

Claimant had contended that his claim was prematurely closed and that he was not medically stationary at the time of the closure on November 1, 1977. The evidence indicates that Dr. Butler found claimant to be medically stationary; Dr. Beeson disagreed. The medical evidence supports the opinion expressed by Dr. Butler.

ORDER

The order of the Referee, dated November 30, 1978, is modified.

Claimant is granted an additional 32° of a maximum of 320° for unscheduled neck disability. This award is in addition to the award made by the Determination Order dated November 1, 1977 which was approved by the Referee's order.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-4829 May 29, 1979

DOROTHY M. HORNER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Keith D. Skelton, Defense Atty.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the employer, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-3511 May 29, 1979

GERALD L. KENNISON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order dated April 21, 1978 awarding claimant 64° for 20% unscheduled low back disability.

Claimant, a 36-year-old housekeeping aide, suffered a compensable injury to his low back on April 24, 1975 while lifting furniture.

As a result of this injury claimant was treated and/or examined by 13 doctors and also evaluated by a clinical psychologist prior to the first closure of his claim. On June 23, 1976 a Determination Order awarded claimant compensation for time loss only. All of claimant's treatment had been conservative.

The claim was reopened and closed again on August 16, 1976 with additional compensation for time loss. It was again reopened and on October 18, 1976, following a myelogram and discogram, Dr. Misko performed a laminectomy L5-S1 disc, left with removal of degenerative disc. Dr. Carr subsequently performed a spinal fusion.

None of the many doctors who have examined and/or treated claimant found objective evidence of disability. In May 1976 Dr. Fuller, after performing a psychological evaluation, concluded that claimant had no disabling psychological problem and was able to ignore his pain if he was interested in what he was doing or believed that he was not being observed.

Claimant was seen at the Northwest Pain Center and received some temporary improvement as a result of his stay there. The reports, however, indicate claimant was poorly motivated to return to work. Dr. Yospe, in his discharge summary, dated June 17, 1977, indicated that claimant's "secondary gain" contributed extensively to his pain behavior.

Claimant was then seen by Dr. Rollins, a vocational rehabilitation consultant. Dr. Rollins believed that vocational assistance would not be helpful in the light of claimant's lack of motivation to return to gainful employment. He concluded that claimant was not kept from returning to gainful employment because of a physical inability to work, but "because he chooses to remain unemployed and home-bound".

On April 21, 1978 a Third Determination Order awarded claimant compensation for 64° for 20% unscheduled low back disability.

The Referee concluded that claimant had been adequately compensated for his loss of wage earning capacity attributable to his industrial injury of April 24, 1975, by the award of 64° granted claimant by the Third Determination Order dated April 21, 1978. He based this conclusion upon the medical evidence which consistently indicated that claimant could return to some types of gainful and full time employment and the varied work background of claimant as well as his apparent lack of motivation to either return to the labor market or be retrained for some job which was within his physical and mental capacities.

The Board, on de novo review, concurs in the conclusion reached by the Referee. It believes, however, that the personal comments made by the Referee at the hearing and in his Opinion and Order were unnecessary, inappropriate and serve only to clutter the record.

ORDER

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

WCB CASE NO. 78-3272 May 29, 1979

ABDULLAH A. MUHAMMAD, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

The claimant seeks review by the Board of the order of the Referee which affirmed the Fund's denial of May 9, 1978 for claimant's claim for a compensable injury.

The claimant was employed by the Oregon Bureau of Labor as a Civil Rights Investigator and alleges he suffered a compensable injury on February 23, 1978 when he got into a state motor pool car, turned it on, stepped on the gas and the car leaped forward and struck a parked truck.

The claimant was taken directly from the accident to the hospital by ambulance with multiple contusions, chest injury to his ribs, right knee and laceration of his forehead.

On February 23, 1978 the claimant had received a written reprimand for using a desk in the conference room and a co-worker testified that she saw the claimant leaving the building around 11:30 p.m. looking grim and sad.

The claimant testified he was working on the case of Paula Adams and had called Spear Beverage Company for an appointment for that afternoon to discuss her case of discrimination. Paula Adams testified that the claimant had called her at 10 a.m. and told her he was going to Spears that day and talk with them.

Claimant testified he went to Lois Balke, who was in charge of motor pool sign-outs for the employer, around 11:30 a.m. She informed the claimant there would not be a car available until 2:00 p.m. She gave claimant a green motor pool ticket which, on its face, indicated the case number claimant was working on and his destination.

Mr. Rupp from the Department of Motor Vehicles testified that the claimant had an invalid drivers' license on February 23, 1978 which had been suspended on October 6, 1977 for an automobile accident of May 22, 1977 in which the claimant was an uninsured motorist. The claimant never surrendered his drivers' license voluntarily nor did the police ever pick it up which was the normal procedure. The notification of license suspension was sent by registered mail to claimant and was signed for by a Mrs. A.A. Muhammed. The claimant testified he was not aware of the suspension, he didn't sign for it, nor was he married.

The claimant's conduct was subsequently investigated by the Bureau of Labor and it was recommended that the claimant be terminated and he was.

The defendant contends the claimant was angry and was going home for the day and that his misconduct was so gross as to take him outside of his employment. . .

The Referee found it was unbelieveable that the claimant was unaware of his drivers' license being suspended, and also felt that the claimant's testimony was impugned by the investigation conducted which indicated no defect in the car in which the claimant was injured.

The Referee concluded that the preponderance of the evidence is that the claimant intended to take the motor pool car against specific instructions and to use it outside of the scope of his employment. He affirmed the Fund's denial of May 9, 1978.

The Board, on de novo review, reverses the findings and conclusions reached by the Referee. The testimony was unrefuted that on February 23, 1978 the claimant was a regular full time employee of the Oregon Bureau of Labor, the claimant was injured during normal working hours and he was injured in a vehicle owned by the employer and on the employer's premises. It was further unrefuted that the claimant was on a job-related mission which was related to two managerial personnel.

Therefore, the Board concludes that the claimant has proven by a preponderance of the evidence that he sustained a compensable industrial injury which arose out of and in the scope of his employment.

ORDER

The order of the Referee, dated July 21, 1978, is hereby reversed.

Claimant's claim for an industrial injury occurring on February 23, 1978 is hereby remanded to the State Accident Insurance Fund for acceptance and the payment of compensation as provided by law, commencing on the above date.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services both at the hearing and before the Board on review a sum equal to $1,000, payable by the Fund.

WCB CASE NO. 78-4311 May 29, 1979

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

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which directed it to accept claimant's claim and pay compensation, as provided by law.

Claimant is a maintenance carpenter who has worked for the defendant for at least 26 years. Defendant's operations have included operating a sawmill, a planer mill, dairy farms, maintaining dairy and beef herds and operating a central dock. Claimant has done various types of maintenance and construction work at these different facilities which involve both light and heavy work, mostly the latter.

Claimant has had difficulty with his low back for the last 15 to 20 years and approximately once a year he goes to a chiropractor for relief. He has never filed a claim for compensation, but he believes that the heavy lifting at work has caused his back problem.

In the fall of 1977 claimant was putting up some new, part steel and part wood, fences and corrals for the beef cattle. He developed back symptoms while setting the fence posts. For the first time these symptoms included pain in the left hip and leg. Claimant saw a chiropractor. He also made an appointment to see Dr. Bert, an orthopedic surgeon, who had previously treated claimant for unrelated conditions.

The Referee found the claim compensable based on Dr. Bert's affirmative answer to the question whether claimant's work "originally caused or materially and permanently worsened" his condition.

The Board, on de novo review, reverses the finding of the Referee. When claimant filed his Form 801 on March 20, 1978 he alleged he was suffering from an occupational disease as a result of his "usual and customary work", and that his low back was affected. The claim was denied by the Fund on June 1, 1978 on the grounds that the pre-existing degenerative osteoarthritis was not the result of claimant's work. Claimant has had problems with his low back for the past 15 to 20 years, however, he has continued working with such problems and probably the strongest evidence in favor of claimant's claim that he has an occupational disease would be Dr. Bert's statement on January 27, 1978 that what claimant had was an "exacerbation" of a problem that has been intermittent for years. Claimant had the symptoms while working for the defendant and continued to work after he had been advised by Dr. Bert that he should consider lighter type work.

Dr. Bert had reported on February 28, 1978 that claimant's job had aggravated a pre-existing degenerative arthritis and was contributing to his disability; however, when he was asked to explain what he meant by this statement he said that he meant some of claimant's work activities caused some of the symptoms he was having; he agreed that "spondylosis", as a general term, described degenerative changes due to osteoarthritis and he was saying, in effect, that claimant's usual and customary work would cause his spondylosis to become increasingly symptomatic. He could not state that claimant's work activity caused the degeneration of his spine, as the causes of degenerative arthritis are complex and include heredity factors, traumatic factors, and medically unknown factors. He did believe that claimant would continue to experience symptoms of back pain if he performed his usual and customary work.

The Board concludes that claimant has failed to carry his burden of proof with regard to the issue of causation in terms of compensability of his symptoms. The denial by the Fund must be affirmed.

ORDER

The order of the Referee, dated December 20, 1978, is reversed.

The denial issued by the Fund on June 1, 1978 is hereby affirmed.

WCB CASE NO. 77-6429 May 29, 1979
WCB CASE NO. 78-3737

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

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the order of the Referee which affirmed the Fund's denial of claimant's claim. On March 15, 1978 a hearing was held in this matter. Following this first hearing Referee McLeod resigned without ever writing his Opinion and Order. At the option of the parties, a second hearing was held on September 5, 1978 before Referee Page Pferdner.

The claimant was employed by the Oregon Highway Division as a Highway Maintenance Worker I and alleges he suffered a compensable injury on August 29 or 30, 1977 around 4:00 p.m. when he took the last load of brush to the dump. The claimant dumped his load and a sideboard fell off the truck. The claimant climbed into the wet bed of the truck to replace the sideboard, slipped, and fell injuring his back. He drove the truck back to the yard and no one was around so he went home.

The claimant testified his back was bothering him but he went to work the next morning at the regular time of 6 a.m. Shortly after the claimant got to the job site he realized he wasn't going to be able to make it and had someone drive him back to the yard. Mr. Simmons, the foreman, was at the yard and the claimant told him about the injury which had occurred the day before and Mr. Simmons helped the claimant fill out an 801 form and his time card.

The 801 form indicates the injury occurred at 10:00 a.m. and claimant testified he wrote that time in because he thought the time requested was the time the form was filled out.

Each employee with the employer fills out his own time card and also keeps a personal diary. Claimant's time cards, submitted into evidence, indicate that on August 29 claimant worked from

6:00 a.m. to 4:30 p.m. On August 30 it shows 6:00 a.m. to noon. On August 31 claimant did not fill out a time card but one appears filled out by someone else, indicating time worked at 1-1/2 hours.

At the second hearing Dr. Schwerzler, claimant's treating physician, testified that when he examined claimant on September 1 claimant had marked degree of pain, and a great deal of objective muscle spasms. Dr. Schwerzler felt that the history given to him by the claimant of the industrial injury was consistent with the severity of pain claimant had when examined by him. A diagnosis of spondylosis was made of claimant back in 1967 and this injury was superimposed upon that spondylosis condition.

Claimant filed his claim on August 31, 1977 which was denied by the Fund on October 10, 1977. Claimant has been unable to work since this injury and is presently drawing welfare.

The Referee found that if claimant had alleged the injury occurred at 10:00 a.m. as indicated on the 801 form the claim would have been found to be compensable. However, he felt there was no logical way to put the pieces of this jigsaw puzzle together. He concluded claimant had failed in his burden of proof and affirmed the Fund's denial.

The Board, on de novo review, would reverse the findings and conclusions reached by the Referee. The Board finds claimant did not fail in his burden of proving he sustained a compensable on-the-job injury. There is no rebuttal to claimant's testimony of how the injury occurred. Claimant reported the injury to his foreman within 24 hours, filled out the 801 form promptly and sought medical attention; the objective findings by the doctor upon examination substantiated the history claimant gave to him.

Further the Board finds that even though claimant was confused about the date of his injury, he was positive about the time and his time cards corroborate his testimony. On August 29 claimant worked until 4:30 p.m.; this was the day of the injury which occurred at 4:00 p.m. and when he returned to the yard no one was around. He did report to work the following day, August 30, and due to back problems returned to the yard, he testified, around 9:30 a.m. and filled out the 801 form and improperly wrote in 10:00 a.m. for time of injury. The time card he filled out that day had noon as the time claimant ceased work as he was told to put that time on the card by his foreman. Claimant testified he then never returned to work and saw the doctor on September 1. The time card for August 31 was not filled out by claimant and indicates he worked 1-1/2 hours and does substantiate his testimony that he did not work that day nor thereafter.

The Board concludes the preponderance of the evidence fully supports the happening of the accident as it was testified to by the claimant.

ORDER

The order of the Referee, dated October 4, 1978, is reversed.

Claimant's claim for an industrial injury he sustained on August 29, 1977 is hereby remanded to the State Accident Insurance Fund for acceptance and the payment of benefits as provided by law.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services at the hearing and before the Board on review in the amount of $800, payable by the Fund.

WCB CASE NO. 77-7887 May 29, 1979

DEAN WEBSTER, CLAIMANT
Willard E. Fox, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of that portion of the Referee's order which granted claimant 112° for 35% unscheduled disability. It contends the award is excessive.

Claimant, a 20-year-old utility man, at the defendant's Salem plant, suffered a compensable injury to his back on March 18, 1977. He was first seen by Dr. Porter who referred him to Dr. Poulson, an orthopedic surgeon. Dr. Poulson has been claimant's primary treating physician.

On September 19, 1977 Dr. Poulson stated that it was his opinion there was no permanent impairment because when he had seen claimant on July 18 and again on August 23, 1977 there was full range of motion of the dorsal lumbar spine. He went on to say that claimant does have some disability based on pain which he considered mild. He said he had advised claimant to try a lighter type of work because any time he is involved in a physically stressful situation he is going to have pain.

A Determination Order, dated December 1, 1977, awarded claimant compensation for temporary total disability and 16° for 5% unscheduled disability for his low back injury.

In March 1978 Dr. Poulson felt there was no impairment nor lack of motion, but claimant did have disability based on mild pain. He later reported that there was no impairment at this time but claimant did have disability based on recurrent pain occasionally when he does heavy work. He felt that claimant would be capable of doing light work.

A Second Determination Order dated April 4, 1978 awarded claimant additional temporary total disability.

In May 1978 Dr. Poulson reported to the employer that claimant had fully recovered from the lumbar strain sustained on March 18, 1977. He found underlying degenerative disc disease which could give rise to symptoms if claimant did repetitive heavy lifting. He reported the strain was concurrent with the degenerative disc disease and that the trauma of the industrial accident aggravated the underlying degenerative process.

Dr. Poulson's reports indicated that claimant was permanently precluded from heavy work, but not necessarily from lighter work. Claimant is a high school graduate and had attended Chemeketa Community College for one term and the University of Oregon for one term. Since claimant was 13 years of age he had worked after school for his father who installed and maintained lawns. During high school claimant worked part time at night at a pizza parlor. After he graduated from high school he worked as a plumber's apprentice for a year while continuing to work part time at the pizza parlor.

He had worked for the employer some 11 months prior to his injury.

The evidence was quite clear that claimant is a very active and industrious young man. It also revealed that claimant had had a prior back problem while working for the employer. The prior back injury occurred in October 1976 and was sufficiently severe to require medical attention from Dr. Porter. Dr. Porter diagnosed claimant's condition as an acute lumbar strain. However, claimant testified that this condition did not cause him to lose time from work and that it had been relieved to the extent that he was now able to throw heavy bales of hay from a truck bed up into a hayloft without any adverse affect on his back.

Claimant testified that prolonged sitting and prolonged stationary standing caused him pain as does repetitive bending and twisting. He has no problem walking.

The defendant argues that claimant has an underlying pathological condition which is subject to intermittent exacerbation by activity but that the symptomatology is transitory and that the underlying pathology itself has not worsened. Defendant relies upon the rulings of the Oregon Court of Appeals in Weller v. Union Carbide Corp., 35 Or App 355, and Stupfel v. Edward Hines Lumber Company, 35 Or App 457.

The Referee found that even though Dr. Poulson did not specifically say that claimant's industrial injury of March 18, 1977 caused a worsening of his underlying pathology, that the difference between claimant's condition before and after the injury supported the inference referred to by the Court in Weller.

He found the employment caused a worsening of the underlying injury or disease. Prior to claimant's industrial injury, overstressing his back did not cause claimant to be disabled; however, after the injury whenever claimant's back was subjected to stress it did cause him to be disabled. Before the injury claimant was able to continue on the job performing his regular duties whereas after the injury he was subjected to repeated inability to stay on his regular job or perform light duty assignments.

The Referee found claimant's appearance at the hearing to be very impressive and suggestive of good intelligence. He thought that claimant, with his educational background, could probably be expected to secure work compatible with his physical limitations and, failing that, would presumably be found eligible for retraining. However, the Referee found that the claimant had suffered financial loss of earning capacity because of his limited work experience, all of the work which he had done previously required some physical exertion and, therefore, he was precluded from returning to such type of employment. Therefore, the Referee concluded that claimant was entitled to a greater award of compensation and awarded 112° for 35% unscheduled disability which was in lieu of any prior awards.

The Referee found that the refusal of Field Services to refer claimant was not arbitrary, or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. OAR 436-61-060(2)(d). This issue was not raised on appeal.

The Board, on de novo review, agrees with the Referee's assessment of the refusal by Field Services Division of the Workers' Compensation Department to refer claimant to an authorized program of vocational rehabilitation.

However, based upon the medical evidence, primarily the reports made by Dr. Poulson relating to claimant's condition, and also taking into consideration the testimony of the Field Services Coordinator who found claimant had educational background and skills sufficient to obtain employment within his physical capacity, the Board concludes that an award equal to 64° which represents 20% of the maximum for unscheduled disability adequately compensates claimant for the loss of earning capacity which has resulted from his March 18, 1977 industrial injury.

The Board agrees completely with the Referee's statement that if job placement is unsuccessful or if claimant is unable to handle the work made available to him, a re-assessment of his interests and aptitudes should be made by the Field Services Division.

ORDER

The order of the Referee, dated December 20, 1978, is modified.

Claimant is entitled to an award equal to 64° of a maximum of 320° for 20% unscheduled low back disability. This award is in lieu of the award made by the Referee's order, which in all other respects is affirmed.

WCB CASE NO. 77-5980 May 30, 1979

JOHN D. MIZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order

On February 16, 1979 the Board entered its Order on Review in the above entitled matter. On March 9, 1979 claimant, by and through his attorney, petitioned the Board for reconsideration of said order and because the time within which an appeal had to be filed was rapidly expiring, claimant's attorney requested the Board to issue an order staying the appeal time pending determination of the petition for reconsideration.

On March 14, 1979 the Board issued its order staying the Order on Review dated February 16, 1979 until such time as it could give full consideration to claimant's petition for reconsideration.

The Board, having now given consideration to claimant's petition and having received no response thereto from either the State Accident Insurance Fund or Employee Benefits Insurance, concludes that there is nothing contained in claimant's various motions made in support of the petition for reconsideration which would justify any change in the Order on Review entered in the above entitled matter on February 16, 1979.

ORDER

The claimant's petition to reconsider the Order on Review entered in the above entitled matter is hereby denied and the Order on Review entered on February 16, 1979 is hereby republished in its entirety.

WCB CASE NO. 78-1052 May 30, 1979

RUTH A. NORRIS, CLAIMANT
Paul C. Paulsen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which affirmed the Determination Order of January 26, 1978 which awarded claimant time loss only. Claimant contends she is not medically stationary and is entitled to further medical care and treatment and the payment of temporary total disability or, in the alternative, an award for permanent partial disability.

Claimant, age 37, was employed by Hospital Service Corporation as a laundry worker pressing sheets. This job required striking an activating lever with her left hand to feed the sheets into rollers. This repetitive striking of the lever caused a bump to develop on the back of her left hand with resultant swelling.

On August 4, 1977 claimant saw Dr. Leavitt. He diagnosed tendinitis of the left thumb, extensor tendons.

On August 22, 1977 claimant was examined by Dr. Bachhuber who found peripheral ecchymosis involving the dorsum of the left hand and wrist. He aspirated the lesion extracting a small amount of thick blood.

Dr. Goodwin examined her on October 6, 1977 and saw an enlargement over the distal part of the shaft and neck of the second metacarpal. This finding indicated a traumatic episode of bumping or hitting her hand. Treatment consisting primarily of physical therapy was provided.

Claimant was released for regular work on October 3, 1977. In a report dated October 13, 1977 based on an examination of September 29, 1977 Dr. Bachhuber reported claimant had again developed ecchymosis with swelling over the dorsum of the second metacarpal. The doctor felt this may have been self-induced. On October 20 Dr. Bachhuber found no objective evidence of significant impairment and released claimant to work. He felt she was exaggerating her complaints for secondary gain.

On October 13 claimant had attempted to return to work, but her hand became painful and she left and was thereafter terminated.

Dr. Nathan, a hand specialist, examined claimant on November 28, 1977. The examination revealed all findings normal with no evidence of permanent impairment. On December 27, 1977 Dr. Bachhuber concurred with Dr. Nathan's findings and opinion.

The Determination Order of January 26, 1978 granted time loss only.

Claimant's hand problems continued to be symptomatic. She was examined on May 1, 1978 by Dr. Button. This examination revealed diffuse generalized soft tissue swelling confined to the metacarpal shaft area over the long finger. Diagnosis was chronic proliferative tenosynovitis dorsum of the left hand. He reported claimant was presently unable to work. He did not think the diagnosed condition was self-inflicted.

On May 24, 1978 Dr. Syphers examined claimant on behalf of the Fund. He found claimant highly motivated and felt Dr. Button's diagnosis may be correct but factition also was a possibility.

Claimant testified that the physical therapy treatment in the whirlpool caused her hand to turn black and blue. The Jobst glove prescribed was too tight and caused her hand to throb.

The Referee found it hard to believe that during the course of one year, without additional injury, the site of claimant's injury could travel from the extensor tendons of the left thumb to the shafts of the 3rd and 4th metacarpals.

The Referee concluded claimant's present problems were self-induced and he affirmed the Determination Order.

The Board, on de novo review, concludes the Referee should be reversed. The Board finds that because neither Dr. Bachhuber nor Dr. Goodwin could establish a reasonable explanation for claimant's continued symptoms they concluded them to be factitious. Dr. Button did establish a diagnosis. In addition, Dr. Button found claimant unable to work because of the symptoms claimant was experiencing from the causally related condition he had diagnosed. Dr. Syphers substantially agreed with Dr. Button's findings.

The Board concludes that at the time of hearing claimant's condition was not medically stationary nor was she medically stationary at the time of claim closure. Therefore, the Determination Order must be set aside and claimant is entitled to compensation for temporary total disability commencing August 8, 1977 until closure is authorized.

ORDER

The order of the Referee, dated October 14, 1978, is hereby reversed.

The Determination Order of January 26, 1978 is found to be premature and is hereby set aside.

Claimant's claim is remanded to the Fund for acceptance and the payment of compensation as provided by law, commencing on August 8, 1977 and until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee the sum of 25% of the increased compensation granted by this order, not to exceed $750.

SAIF CLAIM NO. FC 260252 May 31, 1979

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

On November 14, 1978 claimant requested the Board to reopen his claim for further benefits related to an industrial injury of August 10, 1970. The claim was apparently last closed on December 12, 1972 and claimant's aggravation rights have expired.

On January 12, 1979, the Board requested claimant to furnish it with current medical reports establishing that his condition caused by the injury had worsened since the claim was last closed. A report from Dr. Marble, dated February 21, 1979, was received which indicated claimant had seen him for back and leg complaints. He felt claimant's post-traumatic arthritis was progressive and was fully related to the industrial injury. He found claimant's back problems were minimal and recommended a leg brace and medication at the present time.

On March 13, 1979 the Board forwarded copies of claimant's letter request and Dr. Marble's report to the Fund and asked it to advise the Board within 20 days of its position with regard to claimant's request. On March 14 the Fund indicated it was having claimant examined by the Orthopaedic Consultants and would advise the Board of its position when their report was received.

The Orthopaedic Consultants examined claimant on April 26, 1979 and found him medically stationary regarding his leg and back condition. They felt that he probably could not return to his former occupation even with limitations. They found the loss of function of the back to be minimal and they related it to his gait secondary to the left knee injury.

On May 18, 1979 the Fund indicated, based upon the report of the Orthopaedic Consultants, that claimant was entitled to any necessary treatment under the provisions of ORS 656.245 but it would oppose the reopening of his claim.

The Board, after fully considering the evidence before it, concludes that claimant can be afforded all the necessary medical care and treatment under the provisions of ORS 656.245. The request for own motion reopening should be denied at this time.

ORDER

Claimant's petition for reopening of his claim for an injury sustained on August 10, 1970 is hereby denied.

WCB CASE NO. 78-4513 May 31, 1979

RICHARD S. SHORT, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which approved the Fund's denial on May 18, 1978 of claimant's claim for aggravation.

Claimant suffered a compensable injury in November 1972 while carrying filing cabinets. Claimant had injured his low back in 1964 and had undergone a laminectomy, however, he made a successful recovery, had returned to work and worked regularly until the injury of November 1972. This injury was diagnosed by Dr. Stainsby as "recurrent protruded intervertebral disc" at L4-L5 on the left side.

After a myelogram claimant underwent a hemilaminectomy at L4-5 and L3-4 on the left with the removal of extremely large extruded intervertebral disc at L4-5 on February 14, 1973. At the time pain in claimant's left leg unrelated to his low back pain was diagnosed.

The claim was closed by a Determination Order dated May 30, 1975 whereby claimant was awarded 30° for 25% unscheduled low back disability and 52.5° for scheduled left leg disability. These awards were affirmed by the Board.

The Referee found that after the November 1972 injury claimant apparently did not return to work for the defendant but in April 1973 went to work for Simpson Strong Tie where he worked until September 1977 when he left voluntarily. This was approximately a year before claimant claimed his condition commenced to worsen, although he stated that he had "normal" sore symptoms, drop foot and a toe problem continuously. At the time the claimant voluntarily left Simpson he was earning at least $18,000 a year, plus expenses and the use of an automobile. During the spring of 1978 claimant commenced working for Madden Lumber Supply where he made up to $1,200 a month. While working for Madden claimant lost no time from work as a result of his back or leg. He again voluntarily left his employment for a new venture at Panel Crete of Oregon. Claimant is a partner in this venture. The Referee found that claimant had suffered no involuntary convincing loss of earning capacity.

The Referee further found that the evidence was not persuasive that claimant's activities have been curtailed. Claimant is extremely interested in dancing and has joined a dancing club since his divorce. Claimant testified that he did a little dancing prior to joining the club six or seven months prior to the hearing. At the present time, although he is able to work all week without interruption, he takes medication prior to dancing on Friday nights to relieve the pain that he has in his left leg. He states he is willing to undergo this discomfort in order to meet people.

The Referee found that the event which eventually sent claimant to Dr. Stainsby for additional medical treatment and resulted in the medical report from Dr. Stainsby, offered in support of claimant's claim for aggravation, occurred between jobs at a dance where claimant experienced cramps and a charley horse in his left leg.

The Referee found that claimant's testimony concerning how much medical attention he had received recently was also speculative. In any event, Dr. Stainsby merely stated, according to the Referee, that claimant's present problems were a continuation of his previous industrial injury. The Referee found no evidence that claimant had suffered a worsening of his condition since the last award or arrangement of compensation on May 30, 1975. Dr. Stainsby does say that there is a possibility claimant may need surgery in the future. He also suggests that claimant may have some vascular problems.

A report from Dr. Davis, a neurosurgeon, who examined claimant in June 1978, indicates no worsening and, in some ways, contradicts Dr. Stainsby's opinion that future surgery may be required.

The Referee concluded that the preponderance of the evidence indicated that claimant's previous awards have adequately compensated him for his condition as it now exists. There is no evidence that the condition has worsened and, according to the Referee, only a new activity, dancing, has caused him some discomfort; claimant is willing to endure that discomfort to satisfy his enjoyment of such activity.

The reports from both Dr. Stainsby and Dr. Davis indicate no need for further medical services nor entitlement to additional compensation; however, claimant is entitled to medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires if such bills are properly presented. The bills to which claimant referred at the hearing, in the opinion of the Referee, were just as logically attributable to problems arising from claimant's dancing.

The Board, on de novo review, agrees with the findings and conclusions of the Referee insofar as they relate to the compensability of claimant's claim for aggravation. There has been no medical evidence sufficient to justify a finding that claimant's condition has worsened since May 30, 1975.

However, the Board disagrees with the conclusion reached by the Referee that the medical bills to which claimant alluded at the hearing were not the responsibility of the Fund. After claimant was examined by Dr. Stainsby on February 10, 1978, Dr. Stainsby ordered a CT scan of claimant's spine which showed a narrowing of the spinal column in the lumbar area. It was based upon this diagnostic procedure that Dr. Stainsby formed his conclusion that claimant would eventually need a total laminectomy. Although this conclusion is speculative, nevertheless, the bills were for diagnostic purposes and directly related to claimant's industrial injury and, therefore, the responsibility of the Fund under the provisions of ORS 656.245.

ORDER

The order of the Referee, dated November 27, 1978, is modified.

The denial of claimant's claim for aggravation made by the Fund on May 18, 1978 is approved.

The Fund is directed to pay all medical services for conditions which resulted from his industrial injury for such period of time as the injury or the process of the recovery requires.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the amount of the medical bills submitted to and paid by the State Accident Insurance Fund which relate to claimant's industrial injury of November 1972, payable out of said compensation as paid, not to exceed a maximum of $100.

CLAIM NO. 131-62310 May 31, 1979

DEAN D. TEEL, CLAIMANT
Own Motion Determination

Claimant sustained an acute cervical strain on February 22, 1971 while working for Hughes & Ladd, McConnell. After a short hospitalization he returned to work on February 27. The first Determination Order, dated March 23, 1971, granted claimant only temporary total disability benefits.

On June 8, 1976 the claim was reopened for treatment of residual pain and osteophyte formation. The Second Determination Order, dated July 2, 1976 again granted benefits for temporary total disability only.

The claim was again reopened on January 23, 1979 for surgery consisting of anterior disc extraction and interbody fusion C5-6. The morning following this surgery claimant suffered a stroke which resulted in left hemiplegia. On February 16, 1979 he suffered a second stroke and died.

Dr. Dumke, on March 8, 1979, felt there was no relationship between the claimant's surgery and his stroke.

On March 1, 1979 the carrier requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department recommended that the claim be closed with compensation awarded claimant's beneficiaries for time loss from January 4, 1979, the date claimant was hospitalized for a myelogram, through February 16, 1979, less time worked. Because claimant's industrial injury date is prior to October 5, 1973, compensation for permanent partial disability cannot be awarded for his unrelated death.

The Board concurs in the recommendation of the Evaluation Division. However, claimant's family has the right to pursue a claim on the relationship of claimant's surgery to his death.

ORDER

The beneficiaries of the workman are hereby granted compensation for temporary total disability from January 4, 1979 through February 16, 1979, less time worked.

WCB CASE NO. 77-5958 June 4, 1979

In the Matter of the Compensation
of the Beneficiaries of
JOHN I. BROWN, DECEASED
Schoube & Marvin, Claimant's Attys.
SAIF, Legal Services & Souther,
Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

The beneficiaries of John I. Brown, deceased, hereinafter referred to as claimant, requested review by the Board of the Referee's order which affirmed the Fund's denial dated July 27, 1977 of claimant's claim for Workers' Compensation benefits.

Claimant's deceased husband, hereinafter referred to as Brown, had been a pilot for Flightcraft. He was also a partner in Lees-Brown, Inc. which had leased an aircraft to Flightcraft. Brown piloted other aircraft for Flightcraft in addition to the one leased to Flightcraft by Lees-Brown, Inc. Other pilots used the Lees-Brown aircraft to fly charters for Flightcraft. The contract between Lees-Brown, Inc. and Flightcraft provided that Lees-Brown, Inc. was responsible for all of the maintenance and repairs of the leased aircraft. The lease agreement was orally modified to provide that Flightcraft would assume responsibility for 100-hour checkup and any other repairs requested by Lees-Brown. Lees-Brown was also to furnish fuel for the leased aircraft.

The Referee found that it was not unusual for Brown to work nights and weekends nor for him to fly charter flights on holidays.

On the weekend of April 30-May 1, 1977 Brown was scheduled to be off work. He was asked to fly a charter flight into Victoria, British Columbia on Friday, April 29 which he did and returned to Portland on the following day. The next day, Sunday, May 1, Brown flew to Cottage Grove and picked up his wife. On the return flight Brown noticed some problems with the plane and advised claimant he was going to have to check them out.

Claimant and the deceased lived in Vancouver near the Evergreen Airport. They had a tie-down space for their aircraft at Evergreen. Brown also purchased his gasoline at the Evergreen because the price was a little cheaper than elsewhere. One of Brown's obligations under his contract was to furnish fuel for the aircraft.

On Sunday evening Brown had been notified Flightcraft wanted him to take a charter into Vancouver, British Columbia on Monday, May 2, 1977. Brown and a co-pilot left Portland about 7:00 a.m. with the Lees-Brown, Inc. aircraft and returned about 6:30 p.m. He again noted a problem he had first noticed on a trip back from Cottage Grove relating to a loose plate on the plane's naselle. Brown told his co-pilot that he was going to take care of it before he took the plane out again.

When Brown and the co-pilot reached Portland Monday evening, Brown learned he had a charter flight to Redmond the following day; he was scheduled to pick up some people in Redmond about 1:15 p.m. which meant he would have to leave Portland around noon. Instead of driving home in his pickup which he had parked at the Flightcraft parking lot, Brown flew the Lees-Brown, Inc. aircraft home Monday evening and crashed while landing at the Evergreen Airport resulting in fatal injuries.

Claimant filed a claim for Workers' Compensation benefits which was denied by the Fund on July 27, 1977. Claimant argues that her husband was flying the plane to Evergreen Airport that night so that he could make the repair of the inspection plate (this was the problem which had been noted since the trip to Cottage Grove) and refuel the plane for the charter flight scheduled to Redmond on the following day. Claimant argues that this would be a benefit to Flightcraft and therefore the accident occurred in the course and scope of her husband's employment.

Flightcraft argues that it is pure conjecture as to why Brown flew his aircraft to Vancouver Monday evening. It also argues that it was of no benefit to them since they were also deprived of the sale of gasoline and the opportunity of performing the maintenance service themselves even though the expense would have been billed to Lees-Brown, Inc.

The Referee found that if Brown had been taking the aircraft to the Evergreen Airport in Vancouver solely for the purpose of refueling and fixing the small inspection plate, this would be for his benefit as co-owner of the aircraft. It would be much cheaper for him to fix the inspection plate than to have Flightcraft's repair shop do it and he could purchase his gasoline at Evergreen at a lower rate than anywhere else. Since the lease agreement with Flightcraft provided that the maintenance expenses were Lees-Brown, Inc.'s responsibility and the evidence indicated that Lees-Brown, Inc. was also responsible for refueling the aircraft, Brown would be saving money in each instance.

The Referee concluded that Brown had had a business interest of his own to serve when he took the aircraft to Evergreen for refueling and making the minor repairs.

The Referee found that if Brown were not taking the aircraft home for refueling or repair, then he must have been taking it home for his own personal purpose, and in that event, assuming that the coming and going rule applied, his death would not have been within the course and scope of his employment. He concluded that the denial should be affirmed.

The Board, on de novo review, concurs with the conclusion reached by the Referee. The Board finds that the applicable law is the "going and coming" rule which precludes compensability of injuries or deaths that occur while the worker travels to and from work. Claimant had attempted to establish compensability of her claim by invoking the "dual-purpose" rule. She attempted to create an impression that Brown was somehow engaged in the business of Flightcraft at the time of his fatality because he had intended to refuel the aircraft and repair a loose inspection plate. The Board finds no evidence that Brown had planned to refuel his plane at the Evergreen Airport or to make the necessary repairs. In the absence of such evidence, Brown's trip home becomes a "going and coming" matter explainable on the basis that he flew home because of the relative lateness of the conclusion of his working day and to avoid traffic and shorten his travel time.

Assuming Brown was intending to refuel the aircraft and repair it and that such activities were related to "business" the business was not that of Flightcraft but of Brown who was the co-owner of the plane involved. Under the terms of the agreement to lease the plane to Flightcraft, Brown, through Lees-Brown, Inc., was obligated to assume responsibility for purchasing fuel and keeping the plane adequately fueled for flying and for taking care of minor repairs. The Referee correctly concluded that if Brown had taken the plane home to refuel it and make minor repairs then he had only a business interest of his own to serve and there was no benefit to Flightcraft.

ORDER

The order of the Referee, dated June 1, 1978, is affirmed.

CLAIM NO. A 734855 June 4, 1979

HOWARD O. MANSKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant had sustained a compensable injury to his wrist in May 1959. The claim was accepted, closed and claimant's aggravation rights have expired.

On May 1, 1979 claimant requested the Board to exercise its own motion jurisdiction and reopen his claim for his wrist condition which has worsened through the years. He indicated that Dr. Woolpert had operated on it in March 1979.

On May 9, 1979 the Board advised claimant that it would consider his request upon receipt of Dr. Woolpert's medical report.

The record indicates that Dr. Woolpert began seeing claimant in 1978 for pain and numbness in the right hand. He performed a median and ulnar nerve release on February 7, 1979 and by a letter of March 9, 1979 he related the right wrist condition and subsequent surgery to claimant's 1959 industrial injury.

On May 11, 1979 the Board forwarded copies of the medical reports to the Fund and requested it to advise the Board of its position with regard to claimant's request within 20 days.

The Fund, on May 24, 1979, informed the Board that it did not oppose reopening claimant's claim.

The Board, after full consideration of the evidence before it, concludes that claimant's claim should be reopened as of the date of surgery performed by Dr. Woolpert.

ORDER

Claimant's claim for a right wrist condition resulting from his May 1959 industrial injury is hereby remanded to the Fund for payment of compensation commencing February 7, 1979, the date claimant underwent surgery, and until the claim is closed pursuant to ORS 656.278.

SAIF CLAIM NO. ZC 153689 June 5, 1979

HAROLD CURRY, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 21, 1979 the claimant, by and through his attorney, petitioned the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury sustained in October 1968 while claimant was shoveling wet cement for the City of Salem Street Department.

The injury was to claimant's lower back and claimant was first seen by Dr. Anderson who hospitalized claimant and placed him in traction. In June 1969 Dr. Raaf performed a laminectomy and fusion. Later it was recognized that claimant had a pseudoarthrosis of the spinal fusion between L4-5 although the fusion at L5-S1 was solid. A repair of the fusion was done on June 5, 1974.

On February 3, 1979 claimant underwent additional back surgery involving the fusion and also a removal of a large prolapsed intervertebral disc at L4-5. Claimant, in his petition, states that the aforesaid surgery and the medical bills therefor were all due to and related to his industrial injury of October 1968. In support of his petition claimant furnished the Board with medical reports from Dr. Cherry, Dr. Berkeley and St. Vincent Hospital and Medical Center.

On March 27, 1979 the Board advised the Fund of claimant's request (the petition indicated that the Fund had been furnished copies of the request and the medical documentation in support). On April 11, 1979 the Fund replied, stating that the claimant was scheduled to be examined by the Orthopaedic Consultants on May 15, 1979 for clarification of the Fund's responsibility for claimant's present condition. It asked that the Board's consideration of claimant's request be delayed until the report was received.

On May 29, 1979 the Fund furnished the Board a copy of the Orthopaedic Consulants' report, dated May 14, 1979, and stated that it would not oppose a claim reopening.

The Board, based upon the opinion expressed by the physicians at the Orthopaedic Consultants that claimant's present condition is related to the original injury and his subsequent treatments for such injury and in view of the findings reported at the last operation that the surgery was properly indicated, concludes claimant's request to reopen his claim is medically justified.

ORDER

Claimant's claim for an industrial injury sustained on October 25, 1968 is hereby referred to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on February 3, 1979, the date claimant had his most recent surgery, and until the claim is closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in connection with this reopening a sum equal to 25% of the compensation claimant shall receive for temporary total disability as a result of this order, payable out of said compensation as paid, not to exceed $750.

SAIF CLAIM NO. A 999130 June 5, 1979

WILLIAM H. HARRINGTON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On June 12, 1963 claimant, an employee of the State Highway Department, sustained a compensable injury to his back and ribs when he fell from a bridge structure. Claimant's claim was accepted and closed and claimant's aggravation rights have expired.

Claimant received intermittent medical care between the date of his claim closure and 1972 but was able to work regularly for his employer.

On July 5, 1978 claimant commenced losing time from work due to his back complaints and he voluntarily quit his job on the advice of his treating physician, Dr. K. Clair Anderson, who told claimant that his work was aggravating his problem.

The Fund was requested on August 1, 1978 to reopen claimant's claim by his employer, the State Highway Department. The Fund furnished the Board with medical reports from Dr. Chen Tsai, Dr. Anderson and the Orthopaedic Consultants. The latter examined claimant on January 22, 1979. The Fund also advised the Board that it would not oppose the reopening of the claim if the Board concluded that the medical evidence which the Fund had supplied it justified reopening.

On April 23, 1979 the Board issued an Own Motion Order remanding claimant's claim for the June 12, 1963 industrial injury to the Fund to be accepted and for the payment of compensation, as provided by law, commencing on August 1, 1978, the date the claim was sent in by the employer, and until the claim was closed pursuant to ORS 656.278, less time worked.

On May 1, 1979 the Fund requested a determination of claimant's condition. The Evaluation Division of the Workers' Compensation Department, after considering claimant's 30-year work history and heavy labor, his 10th grade education, his age and the residual functional capacity for light work, recommended that the claim be closed with an award for temporary total disability from July 5, 1978 through January 22, 1979, inclusively, less time worked, and to an award equal to 15% for unscheduled low back disability based upon the maximum for unscheduled disability in effect on June 12, 1973.

The Board concurs basically with the recommendations; however, its Own Motion Order of April 23, 1979 commenced the payment of compensation for temporary total disability on August 1, 1978 rather than July 5, 1978. January 22, 1979 is the date that the physicians at the Orthopaedic Consultants found claimant's condition to be medically stationary. The record indicates that the Fund has paid claimant compensation for temporary total disability from August 1, 1978 through April 30, 1979, the day preceeding the request for an own motion determination.

ORDER

The claimant is awarded compensation for permanent partial disability equal to 15% of the maximum allowable for unscheduled disability which, at the time of claimant's industrial injury, was 145°. Claimant is also awarded compensation for temporary total disability from August 1, 1978 through April 30, 1979, less time worked.

WCB CASE NO. 78-6634 June 5, 1979

DELBERT KING, CLAIMANT
Carney, Probst & Cornelius,
Claimant's Attys.
Lang, Klein, Wolf, Smith,
Griffith & Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which sustained the defendant's denial of claimant's claim for aggravation, but awarded claimant 60° for 40% loss of his right leg and 7.5° for 5% loss of his left leg. Claimant is not contending his claim is an aggravation claim, but is a claim for reopening for further medical care and treatment and temporary total disability. He contends that the Referee should not have ruled upon the extent of disability. Further, based on the carrier's unreasonable denial of his request to reopen his claim, it should be assessed penalties and an attorney's fee.

This claim has a long history. Claimant, a construction carpenter, developed bilateral knee symptoms over a period of years. Claimant filed claims against three employers and subsequently this employer was found to be responsible for his condition.

Claimant, after undergoing an osteotomy and completing a vocational rehabilitation program as a building inspector, returned to work as a carpenter on April 28, 1978 with a different employer. Dr. Eisendorf, claimant's treating physician, recommended that the claim be closed because claimant's condition was medically stationary as of April 28, 1978. On May 20, 1978 Dr. Eisendorf reported that claimant's return to work as a carpenter had resulted in a marked exacerbation of claimant's symptoms. Claimant at first had not been required to kneel, but at that time his work required that he kneel. Dr. Eisendorf reported claimant was temporarily totally disabled and would be unable to do that type of work.

A Determination Order dated July 7, 1978 closed the claim. It awarded claimant temporary total disability from March 1, 1977 through April 28, 1978 and compensation equal to 5% loss of his left leg, 15% loss of his right leg. Claimant appealed this Determination Order on August 10, 1978.

On August 7, 1978 Dr. Case opined claimant's claim should be reopened for treatment. He felt claimant needed a patellar tendon transfer, which would be scheduled as soon as the claim was reopened. He noted claimant still had indications of chondromalacia of the right patella which incapacitated him for a week. This report was sent to the carrier and received by it on August 14, 1978. On August 15, 1978 Dr. Case performed an arthrogram of the right knee which revealed a posterior capsular tear and partial rim tear around the mid portion of the medial meniscus.

On August 18, 1978 the carrier, based on claimant's request for reopening of his claim and commencement of temporary total disability, refused to do so on the basis that claimant had violated his physician's orders by returning to work as a carpenter. Claimant requested a hearing on this denial on August 22, 1978.

Dr. Eisendorf, in his closing examination, reported claimant could not do any kneeling. On September 12, 1978 he reported that whether claimant violated his orders by returning to work as a carpenter, he felt that it was reasonable for him to resume doing some type of work and it appeared that there was nothing else available. Therefore, he felt it was reasonable for him to try it on a limited basis. He opined claimant's work had not resulted in a new injury, but claimant's knee problems were a continuing one.

The Referee found claimant failed to prove an aggravation claim. Further, because claimant failed to prevail on the aggravation claim, he found an award of penalties and attorney's fees were not in order. He did not find claimant's return to work constituted injurious practices.

The Board, on de novo review, agrees with the Referee. The claimant has failed to establish by a preponderance of the evidence a causally related worsening of the condition arising from the compensable injury. The worsened condition is a medial meniscus problem which we find, based on the medical evidence, has not been shown to be related to the accepted injury. On March 2, 1977, prior to the last arrangement of compensation, Dr. Case performed an arthrogram on claimant's right knee. The results of that diagnostic procedure were negative. Subsequently, and still prior to the last arrangement of compensation, that is November 30, 1977, Dr. Case performed a complete medical examination of claimant.

He found claimant's condition to be medically stationary. He noted that claimant had no evidence of meniscus involvement, no tenderness and was able to walk without a limp.

A Determination Order was issued July 7, 1978. The claimant appealed from that order. In the meantime the claimant returned to Dr. Case with additional complaints involving the right knee. On August 15, 1978 Dr. Case and Dr. Sayler performed an arthrogram on the right knee. This diagnostic procedure revealed:

> "There is good visualization of the internal structures of the knee. There is a posterior capsular tear and partial rim tear around the mid portion of the medial meniscus. The meniscus per se appears intact. Thecondyles [sic] and patellar cartilage as visualized appears intact and no other bony abnormality is noted."

It is evident based on this finding that the condition which gave rise to the surgery and the worsening of claimant's condition is a new and different injury and/or problem from that of the compensable injury or disease. Although it is the medical profession upon whom we rely for answers to questions of medical causation there are situations wherein the evidence, on its face, is so clear that a lay person can draw a logical conclusion from the medical reports. This is such a case. The claimant has not established by a preponderance of the evidence a worsening of his causally related right knee condition sufficient to support an aggravation claim under ORS 656.273.

ORDER

The order of the Referee, dated November 22, 1978, as amended by the supplemental order dated December 6, 1978, is affirmed.

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

CLAIM NO. D53-118028 June 5, 1979

FRED L. MONROE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Own Motion Order

Claimant, by and through his attorneys, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on June 26, 1967. In his request, claimant indicated that as a result of the injury he was blind in the right eye until March 13, 1978 when Dr. Robert Page performed surgery to remove a cataract; at that time Dr. Page discovered that the cornea had been pushed over obstructing the pupil. It was removed and placed in the correct position and claimant's vision was restored.

In an attached medical report by Dr. Page, dated October 27, 1978, he stated that there was no question in his mind that claimant's dislocated and cataractous lens was the result of a prior injury.

On May 16, 1979 the Board advised the carrier of claimant's request and asked it to inform the Board within 20 days of its position thereto. The carrier responded on May 23, 1979, stating it would make prompt payment of claimant's medical bills in connection with his March 13, 1978 surgery; however, it found no basis for reopening claimant's claim at that time.

The Board, after fully considering the evidence before it, concludes that claimant's claim should be reopened as of March 13, 1978, and until it is closed under the provisions of ORS 656.278.

Claimant's attorney should be granted an attorneys' fee for their services a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

IT IS SO ORDERED.

SAIF CLAIM NO. EC 148830 June 5, 1979

JACK RUTHERFORD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 12, 1977 an Own Motion Determination was entered in the above entitled matter which granted claimant compensation for temporary total disability from September 17, 1975 through September 30, 1977, less time worked. This award was granted claimant for a compensable injury which he sustained on August 10, 1968 and was entered pursuant to the provisions of ORS 656.278 inasmuch as claimant's aggravation rights had expired.

Subsequent to the entry of the Own Motion Determination, substantial exchange of correspondence transpired between the Board and claimant and claimant's doctor, Edward J. Lackner. Claimant was seeking to reopen his claim for further medical care and treatment on the grounds that his present condition was related to the industrial injury of August 10, 1968 and represented a worsening thereof since the claim was closed by the Own Motion Determination dated December 12, 1977.

On February 1, 1979 an Own Motion Order was entered reciting basically the same facts stated in this order and adding that the Board had requested Dr. Lackner to provide it with a current medical evaluation of claimant's physical and mental conditions. Dr. Lackner was asked to give his opinion of whether such conditions were attributable to the industrial injury and represented a worsening of claimant's condition since December 12, 1977. Dr. Lackner replied that claimant's condition had materially worsened, his pain had increased and he was more depressed. He also said that claimant had been hospitalized for pelvic and cervical traction in San Jose on January 3, 1978; however, Dr. Lackner neglected to recommend any specific treatment which would require reopening of claimant's claim. Dr. Lackner failed to recommend any specific medical treatment which justified a finding that claimant's present condition had worsened. If the medical care and treatment which claimant required was related to the 1968 industrial injury, such medical care and treatment could be afforded claimant under the provisions of ORS 656.245. The Own Motion Order of February 1, 1979 denied the request to reopen the claim.

On April 20, 1979 Dr. Lackner, in behalf of claimant, again requested the Board to reopen claimant's claim. In support of this request he furnished the Board a lengthy narrative report which endeavored to indicate that claimant's present condition was directly related to the industrial injury and represented a worsening. He stated that claimant's peptic ulcer disease required a follow-up upper GI series and then a referral to a gastrointerologist for treatment. He also stated that claimant's cervical spine condition is related to the earlier industrial disease. On November 21, 1979 the Honorable Charles S. Crookham, Circuit Court Judge for the County of Multnomah, State of Oregon, entered a judgment order whereby, inter alia, he found that claimant's peptic ulcer and neck conditions were unrelated to his industrial injury of October 10, 1968. Therefore, the issue of compensability of these two conditions is res judicata.

Dr. Lackner also stated that with regard to claimant's lumbar spine problem, which had previously been found to be a compensable injury, there was no doctor willing to operate in this area, therefore, the only alternative medical treatments were limited mainly to symptomatic relief such as physical therapy, acupuncture, transcutaneous nerve stimulator, transcendental medication, hypnosis, etc.

This letter was forwarded to the Fund on May 4, 1979 and on May 17 the Fund responded, stating that the treatment suggested by Dr. Lackner for claimant's low back condition could be provided under the provisions of ORS 656.245 and that the other conditions, namely the peptic ulcer and the cervical spine had previously been found to be unrelated to his industrial injury. The Fund opposed reopening of the claim.

The Board, after giving consideration to Dr. Lackner's letter of April 20, 1979 and also after reviewing the previous correspondence on this matter which is not inconsiderable, concludes that the Fund should immediately schedule claimant for a thorough examination by an orthopedic physician who practices in the area in which claimant now lives. Based upon this examination, the doctor shall furnish the Board and the State Accidence Insurance Fund a full medical report which indicates whether or not claimant's present lumbar spine condition is related to his October 10, 1968 industrial injury and, if so, does it represent a worsening thereof since the last award or arrangement of compensation which was on December 12, 1977. The Board further concludes that all the expenses of this examination shall be borne by the State Accident Insurance Fund.

Upon receipt of this medical report the Board will determine whether claimant's request to reopen his claim should be allowed.

IT IS SO ORDERED.

WCB CASE NO. 77-5353 June 5, 1979

JAMES SILSBY, CLAIMANT
Hoffman, Morris, Van Rysselberghe
& Giustina, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order on Remand

On July 21, 1978 the Board entered its Order on Review in the above entitled matter which modified the Referee's Opinion and Order, dated January 28, 1978, by changing the beginning date of compensation from May 19, 1977 to October 26, 1977; denying claimant penalties awarded by the Referee for the Fund's allegedly unreasonable denial of the claim and unreasonable refusal to pay compensation and reducing the amount of the attorney's fees awarded by the Referee from $1,000 to $500. It affirmed the Referee's order on the issue of compensability of claimant's claim for aggravation.

Both claimant and the Fund requested judicial review of the Board's order and on April 2, 1979 the Oregon Court of Appeals rendered its Decision and Opinion which affirmed the Board's Order on Review in all respects except "the date upon which compensation was first due and concerning temporary total disability".

In this case the claimant requested the Fund to reopen his claim for aggravation on May 19, 1977, however, Dr. Stainsby's letter, dated October 26, 1977, provided the first medical verification of aggravation of claimant's compensable industrial injury. The Board had held that the period of compensation began on the date of Dr. Stainsby's letter, relying upon the provisions of ORS 656.273(6) which provide:

> "A claim submitted in accordance with this section shall be processed by the direct responsibility employer or the State Accident Insurance Fund in accordance with the provisions of ORS 656.262, except that the first instalment of compensation due under subsection (4) of ORS 656.262 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."

The Court of Appeals interpreted the above statute to mean that the claim for increased disability due to aggravation was compensable during the period of that increased disability, although the first payment of compensation would not be due until 14 days following receipt of verification.

The Court held that ORS 656.273(6) is procedural; it relates to when compensation payments must actually be paid, not to what period of time the payments must cover (emphasis supplied by the Board).

The Court found evidence that claimant "was totally off the job only in connection with his myelogram in March 1977. However, he made no claim for disability payments prior to May 19, 1977."

On May 30, 1979 the Board received a Judgment and Mandate from the Court directing it to modify its order in conformance with its Decision and Opinion. The Board understands this to require it to use May 19, 1977 as the date upon which the payment of compensation to claimant commenced.

ORDER

The Order on Review entered in the above entitled matter on July 21, 1978 is amended by deleting the date "October 26, 1977" from the third paragraph on page three of said Order on Review and substituting therefor the date "May 19, 1977".

In all other respects the Order on Review is reaffirmed and republished.

WCB CASE NO. 78-3819 June 7, 1979

FREDERICK BROWNE, CLAIMANT
Carney, Probst & Cornelius,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Order on Review

On May 24, 1979 the Board entered its Order on Review in the above entitled matter. In the 14th line of the 5th paragraph on page four of said order, the figure "15°" should be deleted and the figure "15%" substituted therefor.

In all other respects the Order on Review is reaffirmed and republished.

WCB CASE NO. 77-3947 June 8, 1979

DEWEY COOMBS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order on Remand

On May 31, 1978 the Board entered its Order on Review which affirmed and adopted as its own the Opinion and Order of the Referee dated October 2, 1977, as amended on November 3,1977.

The sole issue before the Referee at the hearing was whether the Board acted within its authority when it issued its Own Motion Determination on May 18, 1977, pursuant to the provisions of ORS 656.278, and if it was not so acting, did the claimant have the right of appeal from the Third Determination Order issued on January 30, 1976. Initially, the claimant had requested an appeal from that Determination Order but subsequently, pursuant to a stipulation, an order was issued on January 27, 1977 reopening the claim for payment of temporary total disability and for medical care and treatment and dismissing claimant's request for a hearing.

The Fund, on April 14, 1977, requested a closing determination and the Evaluation Division of the Board recommended compensation for temporary total disability from July 2, 1976 through March 21, 1977 and 9.6° for 5% loss of the right arm. The Board adopted this recommendation and issued the aforesaid Own Motion Determination which stated claimant had no right to a hearing, review or appeal of the award. ORS 656.278(3).

The Referee concluded, based upon the findings made at the hearing before him, that the Board acted within its authority in issuing the Own Motion Determination order pursuant to ORS 656.278. True, the claimant had a right to appeal the adequacy of the Third Determination Order within one year from the date of its entry which was January 30, 1976 because the claim had been reopened on August 20, 1973, prior to the expiration of claimant's aggravation rights on May 11, 1975. However, the claimant stipulated to withdraw his request for hearing and the Fund agreed to reopen the claim for payment of temporary total disability benefits from July 2, 1976. The Referee concluded that the stipulation which was after the expiration of claimant's aggravation period was nothing more than a voluntary reopening and because it was issued after claimant's aggravation rights had expired the claim had to be closed pursuant to ORS 656.278.

The Referee denied claimant relief he requested in his request for hearing dated June 14, 1977 (the appeal from the Third Determination Order of January 30, 1976).

After the Board affirmed the Referee's order the claimant sought judicial review. On March 19, 1979 the Oregon Court of Appeals rendered its decision and opinion which reversed the Board and the Referee and instructed the Board to enter an order which would set aside the Own Motion Determination, dated May 18, 1977, and allow claimant to have his claim which was opened by the stipulation dated January 27, 1977 closed pursuant to ORS 656.268.

On May 31, 1979 the Board received the judgment and mandate from the Court of Appeals and hereby issues its order in conformance therewith.

ORDER

The Own Motion Determination, dated May 18, 1977, is hereby set aside and claimant's claim for an industrial injury initially sustained on July 17, 1967 is remanded to the State Accident Insurance Fund to be processed pursuant to the provisions of ORS 656.268.

The Board's Order on Review, dated May 31, 1978, is reversed.

WCB CASE NO. 78-4047 June 8, 1979

PATSY GREINER, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith,
Griffith & Hallmark, Employer's Attys.
Cheney & Kelley, Defense Attys.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-4981 June 8, 1979
WCB CASE NO. 78-4982

JUNE LYTER, CLAIMANT
Carl H. Brumund, Claimant's Atty.
SAIF, Legal Serices, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim for aggravation (WCB Case No. 78-4982) to it for the payment of compensation due claimant, as provided by law, with the date for commencement of temporary total disability compensation to be designated by Dr. Melgard. The Referee's order also granted the Fund's motion to dismiss the request for hearing in WCB Case No. 78-4981 on jurisdictional grounds.

Claimant, a nurse's aide, suffered a compensable injury to her neck on March 5, 1973. On January 2, 1976, pursuant to a stipulated order, claimant was granted an award equal to 35% for neck, cervical spine and right shoulder disability. This was the date of the last award or arrangement of compensation for claimant's March 1973 industrial injury.

At the hearing, the claimant's attorney, using a pain scale of 0 to 10, attempted to illustrate the changing intensity of claimant's pain. Claimant stated that the most severe pain she had ever suffered was when she had a kidney problem. She rated this as 10. Claimant rated her pain when her injury occurred in March 1973 as 5 and her pain in January 1976 as 3 to 4.

In January 1976 claimant was training to become a teacher's aide through an authorized program of vocational rehabilitation. Part of her duties were playing with children on the playgrounds. Usually claimant experienced pain with such activities during the last two or three hours of her six-hour shift. Claimant stated she was able to do all of her household chores after work although she would have pain with more strenuous housework. When the pain became severe claimant would take medication.

In the summer of 1977 claimant had noticed an increase in her pain with corresponding decrease in the number of activities she was able to perform. Claimant rates her present pain at 6, which it has been since the summer of 1977. It was necessary for the Referee to determine whether the testimony of claimant was believable and, if so, if her pain was disabling. In this case, he concluded that the testimony regarding pain came from the claimant whom he had observed to be a sincere witness and whom he did not feel overstated her case. There was no testimony offered to the contrary and there was no showing that claimant's testimony needed to be viewed with caution.

The Referee concluded that the pain was disabling by comparing what claimant was able to do in January 1976, the date of the last award and arrangement of compensation, with what she is able to do at the present time and the diminution of the claimant's abilities was due to the limiting affect of more persistent and severe pain.

A claim for aggravation must be supported by medical evidence. Dr. Melgard, a neurosurgeon, had treated claimant since shortly after the industrial injury. In August 1977 he noted that claimant had continuing neck pain and in September 1977 he requested the claim be reopened for further evaluation. A month later, although surgery was not contemplated, Dr. Melgard indicated that claimant needed to be hospitalized for intensive, conservative treatment. However, by May 1978 Dr. Melgard was of the opinion that claimant should be seen by Dr. Tiley, an orthopedic physician for his opinion regarding the feasibility of fusion. Dr. Tiley, after seeing claimant, recommended continued conservative care.

The latest medical report in the record was Dr. Melgard's report of October 1978 which was after the hearing and indicated that claimant's neck condition ". . . may be getting worse". He thought that the possibility of a fusion should be discussed further with Dr. Tiley. He found claimant was not medically stationary and hope still existed for improving her condition with treatment or surgery.

The Referee concluded that claimant's condition had worsened. The medical evidence taken as a whole established an injury-related worsening of claimant's neck condition. He remanded her claim for aggravation to the Fund. He did not award penalties based on the rationale that the Fund's denial was reasonable due to a lack of clear definitive medical evidence supporting the aggravation claim at the time the claim was denied, or even up to the time of the hearing.

The Board, on de novo review, finds that claimant was enrolled in a vocational rehabilitation program in January 1976. She was in that program at Chemeketa Community College, taking courses to enable her to be a teacher's aide, specializing in early childhood education and she completed the program in March 1978. However, there is no evidence that claimant, at the time she completed her authorized program of vocational rehabilitation, was not medically stationary and the Board finds no evidence in the record that, after completion of this authorized program of vocational rehabilitation claimant's disability was ever re-evaluated and a Determination Order entered again closing claimant's claim pursuant to ORS 656.268.

Therefore, the Board concludes that claimant's claim for her March 1973 neck injury should be remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant completed her authorized vocational rehabilitation program and until her claim is closed pursuant to the provisions of ORS 656.268.

ORDER

The order of the Referee, dated December 20, 1978, is modified.

Claimant's claim is remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant completed her authorized vocational rehabilitation program, and until the claim is closed pursuant to ORS 656.268.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 78-1649 June 8, 1979

In the Matter of the Compensation
of The Beneficiaries of
GERALD MAYES, DECEASED
Grant, Ferguson & Carter, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Order Of Abatement

On May 18, 1979 the Board issued its Order on Review in the above entitled matter. On June 5 the Board received from the employer, by and through his attorney, a motion for reconsideration, clarification and motion to hold order on review in abeyance.

The Board concludes in order to allow the claimant, by and through her attorney, to respond to the motion and to allow the Board sufficient time to fully consider the motion and the response thereto that the Order on Review dated April 18, 1979 should be temporarily set aside and held in abeyance until an order based upon the employer's motion and the claimant's response thereto is issued.

ORDER

The Order on Review, entered in the above entitled matter on May 18, 1979, is hereby temporarily set aside and held in abeyance pending the issuance of an order based upon the employer's motion for reconsideration and clarification of siad order and the claimant's response thereto.

The employer's request to present oral arguments on the issues set forth in his motion is denied.

WCB CASE NO. 78-3989 June 8, 1979

MICHAEL P. PINSON, CLAIMANT
Michael D. Callahan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the Fund, and said request for review now having been withdrawn,

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

WCB Case NO. 78-123 June 9, 1979

DAVID E. WILBURN, CLAIMANT
Pozzi, Wilson, Atchison, et al,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the November 16, 1977 Determination Order which granted time loss only; claimant had received 32° for 10% unscheduled disability from a prior Determination Order. Claimant's request for medical care and further time loss in connection with the January 1978 hospitalization was also denied.

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

ORDER

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

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

Entered at Salem, Oregon and copies mailed to:

David E. Wilburn, 10107 SE Harold, Portland, OR 97266
Pozzi, Wilson, Atchison, Kahn & O'Leary, Attorneys, 910 Standard Plaza, Portland, OR 97204
Victor Yuckert, P.O. Box 20173, Portland, OR 97220
State Accident Insurance Fund, Claims Div., Salem, OR 97312
SAIF, Legal Services, 400 SE High, Salem, OR 97312

Board Member Kenneth V. Phillips dissents as follows:

The claimant's psychological condition was found to be compensable by an Opinion and Order of June 4, 1974 and the claim was remanded to the carrier for acceptance and medical treatment as recommended by Dr. Hickman, a clinical psychologist. The psychological diagnosis of Dr. Hickman was depression and schizophrenia.

Claimant commenced psychotherapy which continued throughout 1977. The Fund wanted an independent psychological evaluation and claimant was seen by Dr. Parvaresh. Dr. Parvaresh felt, within a reasonable medical probability the concussion claimant suffered at the time of his industrial injury could have aggravated his anxiety neurosis. He found claimant's condition was stationary and rated his disability at 10% of the whole man.

Dr. Hickman was not provided a copy of Dr. Parvaresh's report and on November 16, 1977 a Determination Order granted claimant no further award for permanent partial disability; this closure occurring without the approval or concurrence of the treating physician.

By a report of January 5, 1978 Dr. Hickman opined that claimant's condition was very unstable. Claimant had worked for this employer for nine years full time but since this industrial accident he was unable to be gainfully employed and was permanently and totally disabled.

On January 12, 1978 claimant was hospitalized at Woodland Park Hospital for grand mal seizures and psychosis. On January 13 claimant's behavior became so bizarre that he was transferred to the mental health clinic under the care of Dr. Duncan, a psychiatrist. Dr. Duncan's discharge diagnosis was depressive reaction with paranoid features, mental retardation by history and seizure disorder. Albeit claimant had other physical conditions then diagnosed.

On May 23, 1978 Dr. Duncan reported at hospitalization that claimant was actively attempting suicide. Dr. Duncan concurred with Dr. Hickman that claimant was in need of psychiatric treatment and without this care, claimant's symptoms would return. In his opinion, claimant's head injury did materially contribute to claimant's depression, paranoia and an inability to return to work. Claimant's condition was stationary but would probably never reach his pre-injury state to enable him to return to his job.

Dr. Duncan testified at the hearing that at the time of claimant's hospital discharge he was disabled and barely able to care for himself. There is no evidence that claimant ever suffered these emotional symptoms to such a degree prior to this industrial injury. Claimant did, however, have pre-existing brain damage. Dr. Duncan unequivocally testified that the accident of July 1971 was a material contributing factor to the state claimant was in when hospitalized in January 1978, based upon all of the medical reports in the record. It was unlikely claimant's condition would change very much in the future.

In summation, it is clear that claimant's hospitalization in January 1978 has been related to claimant's psychological condition arising from his industrial injury. It is true claimant had other physical problems found while hospitalized that are unrelated, but this does not detract from the opinion of Dr. Duncan who treated the claimant. Dr. Duncan's testimony is uncontradicted. Therefore, claimant's hospitalization, commencing January 13, 1978, is compensable and claimant is entitled to compensation for temporary total disability and payment of his medical expenses.

To find that claimant's compensable psychological condition has caused no permanent impairment and therefore no loss of wage earning capacity is contrary to the evidence. Even Dr. Parvaresh, who examined the claimant at the request of the Fund, rated claimant's psychological impairment at 10% of the whole man.

Taking into consideration claimant's pre-existing mental retardation, his inability to physically perform any heavy manual labor and his psychological condition related to this injury, I find this claimant to be permanently and totally disabled.

WCB CASE NO. 78-3040 June 11, 1979

THEODIS E. POE, CLAIMANT
J. Rion Bourgeois, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund seeks review by the Board of the order of the Referee which granted claimant an award of 75% of the maximum for unscheduled disability. Claimant cross-requests review by the Board contending the award is inadequate.

The claimant suffered his first industrial injury in July 1966 when a car fell off a jack and landed on his chest. He injured his chest, neck, back and shoulder. In December 1967 he fell off of a lift truck and injured his right arm and shoulder. Both claims were accepted, closed and thereafter appealed. After a hearing the Referee, by an Opinion and Order, granted claimant 50% unscheduled neck and chest disability, 10% loss of the left arm and he affirmed the Determination Order's award of 5% loss of the left leg.

Claimant was owner-operator of a Mobil service station and was a working mechanic. On December 24, 1976 he and a fellow employee were lifting a rear-end of a car when claimant experienced a pop in his neck, chest and arm.

Dr. Zeller originally diagnosed pulled muscles and claimant was hospitalized.

On February 11, 1977 Dr. Hill reported claimant had definite evidence of symptomatic cervical spondylosis. He recommended a myelogram. Dr. Hill felt claimant showed evidence of spinal cord compression which was certainly related to his several injuries resulting in traumatic arthritis.

In April 1977 Dr. Seres examined claimant and reported claimant's complaints now were like his complaints when seen in October 1967. Upon this examination claimant had limited range of neck mobility in all directions due to muscle splinting. Dr. Seres' opined claimant had exacerbated his pre-existing cervical degenerative arthritis. He recommended conservative care.

On April 28, 1977 claimant was examined by the Orthopaedic Consultants. There was no functional disturbance upon this examination. Diagnosis was cervical strain superimposed on advanced degenerative arthritis. Claimant's condition was not medically stationary.

In May 1977 Dr. Seres re-examined claimant and found his condition improved. On May 31, 1977 Dr. Zeller reported he did not agree with Dr. Seres and claimant was not improved.

On September 27, 1977 Dr. Hill found claimant's condition medically stationary.

Claimant was re-examined by the Orthopaedic Consultants on December 13, 1977. Upon this examination, functional interference was moderate manifested by refusals and inconsistencies. Claimant was medically stationary with the diagnosis the same as at the prior examination. Claimant could return to his regular occupation with limitations, and was in fact so doing. Total loss of function of the neck was mild.

On March 3, 1978 a Determination Order granted claimant time loss only.

The Referee found, considering claimant's age, impairment, education and trainability, that he had suffered a loss of wage earning capacity. He granted claimant an award of 75% of the maximum allowable by statute.

The Board, on de novo review, would modify the award granted by the Referee.

The Board finds, based upon the medical evidence which indicates claimant's injury was originally diagnosed as pulled muscles, the fact claimant has not undergone any surgical procedure and the Orthopaedic Consultants rating of claimant's neck disability as mild, that with claimant's limitations and mild impairment he would be adequately compensated by an award of 45% for his loss of wage earning capacity.

ORDER

The order of the Referee, dated November 9, 1978, is modified.

Claimant is hereby granted an award of 144° for 45% unscheduled neck disability. This award is in lieu of, and not in addition to, that granted by the Referee in his order which, in all other respects, is affirmed.

WCB CASE NO. 78-6340 June 11, 1979

REGINALD WALKER, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the employer, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-4178 June 11, 1979

TERRY WREN, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks Board review of that portion of the Referee's Opinion and Order which set aside the State Accident Insurance Fund's denail of the left knee injury and awarded claimant 10% scheduled disability for his left knee. The employer contends its denial should be affirmed or, in the alternative, if the left knee injury is compensable, claimant has no permanent disability.

Claimant, a 21-year-old forklift driver, alleged a left knee injury due to operating the clutch on a hyster. Dr. Kitzhaber examined him on January 26, 1978 and reported that claimant complained of tenderness in the lateral aspect of his left thigh. Claimant gave a history of pain, starting with his beginning to drive a forklift in November 1977 and progressively getting worse. Dr. Kitzhaber diagnosed tendinitis of the extensor muscles of the left thigh. He opined this condition was most likely caused by the operation of the forklift.

On February 17, 1978 a medical report reflected claimant still was experiencing some left thigh discomfort. It was the opinion of the treating physician that claimant had progressed satisfactorily enough to return to modified work on February 20, 1978 with limitations of no lifting over five pounds, no excessive bending, twisting, or straining and avoidance of anything like a clutch pedal for at least two weeks, at which time claimant should be able to return to full time employment.

Dr. Strietz reported in March 1978 his orthopedic examination was normal with a history of a lumbosacral strain and possible strain of the left iliotibial band or vastus lateralis muscle group. Dr. Strietz didn't anticipate any disability and released claimant to return to any type of work activities without restrictions. Claimant stated he felt fine and had no real complaints, specifically no back or radicular complaints. He did have occasional mild aching in the lateral left thigh area, but denied any knee symptoms, swelling, locking or giving way.

A Determination Order, dated May 10, 1978, awarded claimant compensation for temporary total disability from January 27, 1978 through March 29, 1978, less time worked.

At the hearing, the Fund denied responsibility for the entire claim, back and knee or leg.

The Referee affirmed the denial of the back condition, but reversed the denial of the left knee injury and ordered it accepted. He awarded claimant permanent partial disability equal to 15° for 10% disability and granted claimant's attorney the sum of $500 as and for a reasonable attorney's fee.

The Board, on de novo review, would modify the Referee's order and affirm the denial of the left knee injury. The medical evidence reflects that claimant has not sustained any injury to his left knee. Drs. Strietz and Kitzhaber both found an injury to the thigh, not to the knee.

The Board finds that claimant sustained a compensable injury to his left thigh but that this condition has resolved without any permanent residual effects. Because the Determination Order awarded no permanent partial disability for a left leg injury and the Board finds no permanent partial disability resulted from the left thigh injury, the Board affirms the Determination Order.

ORDER

The Referee's order, dated December 11, 1978, is modified. The Fund's denial of the left knee injury is affirmed.

The Board sets aside the denial of the left thigh-leg injury and orders that matter accepted.

Further it is ordered that the Determination Order dated May 10, 1978 is affirmed.

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

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

SAIF CLAIM NO. A 928821 June 12, 1979

RAY BURNETT, CLAIMANT
Nepom & Rose, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, requested the Board to reopen his claim for an injury sustained on May 31, 1962 to his back. Claimant's aggravation rights have expired. Attached to the petition for own motion relief were several medical reports in support of claimant's request.

Dr. Schlersser indicated that claimant was being seen by Dr. Morse and responding well to treatment when he slipped on a wet floor at a Fred Meyer store in February 1976. He noted claimant did not sustain direct trauma from this incident but found definite evidence of muscle spasm and increased pain. He felt rehabilitation and a change of occupation were indicated.

On April 17, 1978 Dr. Schoepflin reported that claimant had rather typical symptoms for an inflammatory spondylitis which is a form of hereditary arthritis. The doctor felt claimant's back symptoms were unrelated to any work injuries.

On January 30, 1979 the Board advised the Fund of claimant's request and requested it to advise the Board of its position within 20 days.

After correspondence between the Fund and the Board, the Fund forwarded to the Board a copy of a May 11, 1979 Orthopaedic Consultants report which stated that claimant could do light to medium work. The doctors could find no relationship between claimant's present disability and the 1962 industrial injury. The Fund opposed a reopening of claimant's claim.

The Board, after fully considering the evidence before it, concludes that claimant has failed to prove a worsening of his condition as it relates to his 1962 industrial injury and his request for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-5290 June 12, 1979

KENNETH DeMILLE, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
Cheney & Kelley, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the Determination Order dated June 19, 1978 whereby claimant was awarded compensation only for temporary total disability.

Claimant, an 18-year-old farm laborer, sustained a compensable injury on August 30, 1976 when an irrigation pipe end plug struck him in the left forehead. Claimant lost consciousness. He was seen on the day of the accident by Dr. Lahiri who diagnosed a depressed skull fracture left frontal area. Claimant was immediately transferred from Pendleton to Kadlec Hospital in Richland, Washington and Dr. Sen performed an operation for elevation of compound depressed skull fracture and debribement of skin. All of this was done on the date of the industrial injury.

The claimant remained in the hospital until September 4, 1976. At the time of his discharge claimant's wound was found to be healed satisfactorily and there were no neurological abnormalities noted. Claimant was allowed to go home and the discharge summary indicated that Dr. Sen would continue to treat claimant and that sometime in the future consideration would be given to the possibility of repairing the small skull defect.

On October 22, 1977 Dr. Sen advised the carrier that he had last seen claimant on September 27 and that claimant's post-operative condition was quite satisfactory although during his last visit claimant had multiple complaints. He felt the complaints were primarily related to anxiety and not to any significant neurological problems. He stated that claimant should be able to return to his normal work within a short period of time with very little restrictions unless claimant continued to have symptoms of dizziness which, in his case, would make it important for him not to work above ground level.

Subsequently, claimant moved to Dallas, Texas and came under the care of Dr. Dyll, a neurosurgeon. Dr. Dyll's reports indicated that claimant's condition was gradually improving; that his complaints were mostly about a problem which Dr. Dyll diagnosed as migraine headaches. Claimant had suffered these migraine headaches since he was a young child.

Claimant returned to Oregon and was seen by Dr. Sen on June 6, 1977. Dr. Sen had been corresponding with Dr. Dyll and was aware of claimant's headaches which Dr. Dyll opined were of a vascular origin. Dr. Sen did not feel that claimant's headaches symptoms were related to his head injury though it might have provoked such reaction. Claimant informed Dr. Sen that he intended to return to Dallas and hoped to find work in an apartment complex. The reason he consulted Dr. Sen was to inquire about a cranioplasty to cover the skull defect. Dr. Sen felt that in view of claimant's anxiety over the small skull defect such surgery would be appropriate.

On June 21, 1977 a cranioplasty of the frontal skull defect was performed by Dr. Sen. Claimant was discharged from the hospital on June 24 and at that time was in good condition and showed no evidence of neurological abnormalities.

On August 6, 1977 Dr. Sen advised the carrier that claimant was planning to return to Texas and stated that claimant's disability would be minimal.

Upon his return to Texas, claimant again came under the medical care of Dr. Dyll who, on January 17, 1978, advised the carrier that claimant was now employed as a sheet metal worker and enjoyed his work but had a relatively high absentee record because of his headaches. On February 14, 1978 Dr. Dyll reported that claimant was now complaining of some neck and shoulder pain with very modest spasm but it was his impression that claimant had resolved his symptoms and that no significant sequela are to be anticipated. Dr. Dyll said that claimant was now able to work.

On June 19, 1978 a Determination Order granted claimant compensation for temporary total disability inclusively from August 13, 1976 through August 31, 1977.

The Referee concluded that the medical evidence was not convincing that claimant's present problems were causally related to the August 30, 1976 industrial injury nor had claimant proven that he had suffered any permanent partial disability as a result of that injury. Therefore, he affirmed the Determination Order of June 19, 1978.

The Board, on de novo review, agrees with the conclusion reached by the Referee.

ORDER

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

WCB CASE NO. 78-768 June 12, 1979

KATHLEEN HUGHEY, CLAIMANT
Allan H. Coons & Samuel Hall, Jr.,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which awarded claimant compensation for permanent and total disability effective on the date of his order, December 14, 1978.

Claimant sustained a compensable injury to her low back and neck on March 22, 1971 when she tripped and fell over a piece of pipe after leaving work at the employer's where she was working as a fish filleter.

Claimant's claim was first closed by a Determination Order dated March 2, 1973 whereby claimant was granted 64° for 20% unscheduled neck disability. Subsequently, the claim was reopened and closed and on January 19, 1978 the Fifth Determination Order was entered which granted claimant no additional compensation for permanent partial disability in excess of that granted by the Board's Order on Review dated June 9, 1975 which had granted claimant 240° for 75% unscheduled disability. It was from this Determination Order that claimant requested a hearing held before Referee Lyle R. Wolff and, as a result thereof, recieved an award of compensation for permanent and total disability.

Claimant had back surgery consisting of a laminectomy and fusion at L3-4 in 1975. On August 10, 1977 claimant was examined at the Orthopaedic Consultants who diagnosed cervical and lumbar osteoarthritis with secondary chronic strain at both levels and exogeneous obesity. The physicians felt claimant's condition was stationary and the claim should be closed. No further medical treatment was recommended and the overall total loss of function of claimant's back as it existed at the time of the examination was considered moderate; as it related to her injury of 1971 it was rated as mildly moderate. They rated part of claimant's neck condition which was due to her 1971 injury as mild. Dr. Woolpert, who became claimant's treating physician in late 1975, concurred in the report from the Orthopaedic Consultants.

The Referee, based upon the medical evidence and the testimony of claimant and her husband, concluded that claimant had established in terms of probability that she was permanently and totally disabled from pursuing, obtaining or holding any gainful or suitable work on a regular basis. He felt that in all probability her motivation for not finding and holding a job was the result of the job-caused injuries to her neck and back which produced such pain that she could not work.

The Board, on de novo review, finds that claimant's motivation to return to the labor market is extremely poor. In April 1978 claimant worked for a seafood processing firm in Charleston, Oregon for 19 days. She filleted fish and was paid $2.65 an hour, working eight hours a day, five days a week. She complained she had difficulty going up and down stairs and standing but during her four weeks of work she rode to and from work every day, a distance of 56 miles round trip. Claimant testified that at no time during the period she was working for the seafood processing firm was the work slow. Claimant also attempted to work as a motel maid for one day; she discontinued that work because of her inability to carry heavy objects. Aside from these two attempts, claimant has neither worked anywhere else nor looked for work of any kind since 1974.

The Board finds that the medical evidence as a whole indicates that claimant's condition is better now than it was in 1974. The Orthopaedic Consultants' consensus opinion was that claimant fully intended to retire from the labor market with the belief that what she and her husband received together would provide adequately for their continued living expenses. Dr. Woolpert concurred in this impression.

The Referee found that every time claimant attempted to do any of the work in which she was experienced, the pain prevented her from continuing. The fact is that claimant didn't make attempts of any consequence to return to work.

The Board feels that claimant could be helped through job placement but they do not feel that there is any necessity for referral to the Vocational Rehabilitation Division.

The Board concludes, based upon the medical evidence, that claimant is not permanently and totally disabled and that she was adequately compensated for her loss of wage earning capacity resulting from the industrial injury of 1971 by the 240° awarded claimant by the Board's Order on Review dated June 9, 1975.

ORDER

The order of the Referee, dated December 14, 1978, is reversed.

The Determination Order, dated January 19, 1978, which granted claimant no permanent partial disability in excess of the award of 240° granted by the Order on Review dated June 9, 1975, is hereby affirmed.

GERALD KUTCH, CLAIMANT
Holmes & James, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

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

Claimant was employed as a landing chaser for Medford Corporation and on September 21, 1973 he sustained a compensable injury when he was bucking limbs off of logs and a log rolled, throwing him off balance and twisting his back. The original diagnosis was strain left sacroiliac and lumbar muscles.

In January 1974 claimant was examined by Dr. Gilsdorf who found a functional component present and informed the claimant that he could find no reason for his continued disability.

In February 1974 claimant was examined by Dr. Halferty at the Disability Prevention Center. Dr. Halferty's diagnosis was possible chronic lumbar strain and moderate functional overlay. A psychological evaluation revealed claimant had a ninth grade education with his principal occupation in logging. Claimant was having significant family problems.

A Determination Order of May 30, 1974 granted claimant an award of 30% unscheduled low back disability.

Claimant then came under the care of a chiropractor, Dr. Blandino, who commenced conservative management. Claimant had complaints in May 1975 of constant numbness, pain, insomnia, limited range of motion, leg cramps, radiculitis, paresthesia of the legs and arms, neck stiffness and headaches. Dr. Blandino diagnosed chronic postural scoliosis, severe chronic dorsal and lumbar syndrome with paresthesia, radiculitis and somatic dysfunction. Dr. Blandino rated claimant's disability at 45-55% and at times he is totally disabled.

On July 18, 1975 a Second Determination Order granted claimant an additional award of 20% unscheduled disability.

On September 8, 1975 Dr. Matthews examined claimant. His diagnosis was chronic cervical, thoracic and lumbar strain without nerve root impairment, rheumatoid spondylitis is a possibility and he had chronic employment problems probably related to medical problems. Dr. Matthews felt claimant was now limited to light employment and vocational rehabilitation was recommended.

On January 12, 1976 Dr. Pasquesi examined claimant and found he definitely had lumbar instability with some subjective evidence of paresthesia of S-1 nerve root involvement. Claimant's condition was medically stationary. Claimant could perform work not requiring lifting more than 30 pounds, nor repetitive bending or twisting and work not requiring him to be on his feet a full eight-hour day. Claimant's impairment was rated at 32% of the whole man.

On February 13, 1976 a Third Determination Order affirmed the Second Determination Order in its entirety.

Claimant underwent a vocational rehabilitation authorized on-the-job training program in refrigeration repair and completed it in August 1974. Claimant continued on this job until July 18, 1975 and he testified he quit because of back pain.

On March 29, 1976 Dr. Dunn examined claimant and found he had 40% limitation of back motion. Dr. Dunn's diagnosis was lumbosacral strain with possible L5 or S1 nerve root compression, chronic. A myelogram was recommended as was a weight loss program.

On June 24, 1977 Dr. Blandino, who had continued giving claimant treatments, reported claimant's disability was job-related and he highly recommended total disability and rehabilitation.

On August 2, 1977 the Fund denied the claim for aggravation.

Dr. Dunn performed a re-examination on November 21, 1977, 15 months after his last examination, and found progression of symptoms with objective changes including progression of hyporeflexia in the right leg, loss of range of motion of the spine. X-rays revealed evidence of progression of degenerative disc disease.

On December 7, 1977 Dr. Matthews examined claimant; he had not seen claimant since 1975. His diagnosis was continuing chronic cervical strain, chronic lumbar strain superimposed on degenerative disc changes, limited chest expansion and functional overlay of uncertain severity. He felt the prognosis was a bit gloomy. He reported that, orthopedically, there was no reason to consider claimant permanently and totally disabled, however, looking at claimant's work history over the past few years, gainful employment seemed unlikely.

On March 15, 1978 Dr. Matthews found claimant's condition medically stationary and on March 17, 1978 Dr. Dunn concurred.

Claimant was examined by Dr. Emori on May 17, 1978 and he diagnosed ankylosing spondylitis. Dr. Emori expressed that this unfortunate gentleman was having increasing difficulties with spinal disease. Claimant had marked symptomatic impairment as well as significant physical impairment.

Claimant testified at the hearing that he was unable to do anything. He is helping out a friend part time in a saw shop. He is drawing social security disability. He testified that his condition is progressively worsening.

Films were shown at the hearing which contradicted a significant amount of claimant's testimony. Claimant testified he had difficulty getting out of his pickup, could only turn his neck 5°, could not put his chin down, and could not bend. The movies indicated otherwise.

The Referee found the medical evidence is in conflict. He concluded that claimant has substantial disability but the films eroded claimant's credibility. He concluded claimant had failed to prove a worsened condition related to his industrial injury since July 18, 1975, the last award of compensation. The Referee affirmed the denial of aggravation.

The Board, on de novo review, first finds that the last award or arrangement of compensation was the Third Determination Order of February 13, 1976 and not July 18, 1975. The Board further finds that the medical evidence supports, objectively, a worsened condition and is supported by the findings of Dr. Dunn on his re-examination of claimant of November 21, 1977, and the report of Dr. Emori. However, claimant's condition was again stationary on March 15, 1978.

Since claimant's condition has now been found to be medically stationary his permanent partial disability can be determined. The Board finds that claimant has been adequately compensated for his loss of wage earning capacity by his prior awards and this loss of wage earning capacity has not been increased by the aforementioned aggravation.

Therefore, the Board concludes that claimant is entitled to compensation for temporary total disability for the period of his aggravation commencing on November 21, 1977, the date of Dr. Dunn's medical report supporting a finding of a worsened condition through March 15, 1978, the date he was found to be medically stationary. Claimant's entitlement to permanent partial disability is unchanged.

ORDER

The order of the Referee, dated November 8, 1978, is hereby modified.

Claimant is hereby granted compensation for temporary total disability commencing November 27, 1977 through March 15, 1978, the period claimant's condition was aggravated.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $600, payable by the Fund.

CLAIM NO. 131-45626 June 12, 1979

RICHARD V. PETERSON, CLIAMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
Own Motion Order

On January 26, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on June 10, 1968 while working for Plumley, Inc., Medford, Oregon. Claimant's aggravation rights have expired. Attached to claimant's request were reports from Dr. Holbert which related claimant's current condition to his 1968 industrial injury.

In an attempt to locate the carrier on the risk at the time of claimant's injury, several letters were written. On April 16, 1979 claimant's attorney advised the Board that its search revealed correspondence from Underwriters Adjusting, Continental Insurance Company and Tobin & Crawford Insurance Companies.

Based upon the attached correspondence, the Board advised Underwriters Adjusting Company of the claim number and asked it to advise the Board of its position within 20 days. The carrier has failed to respond to the Board's letter. It is the Board's understanding that Underwriters Adjusting was handling this claim for Continental.

The Board, after fully considering the evidence before it, concludes that claimant's claim should be remanded to Underwriters Adjusting to be reopened for the industrial injury he sustained on June 10, 1968, commencing on the date claimant is hospitalized for surgery as recommended by Dr. Holbert and until the claim is closed pursuant to ORS 656.278, less time worked.

Claimant's attorney should be granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

IT IS SO ORDERED.

SAIF CLAIM NO. PC 276019 June 12, 1979

JUNE PYLE, CLAIMANT
Robert Grant, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On May 18, 1979 an Own Motion Determination was entered in the above entitled matter. The awards granted claimant for loss of his right foot and left foot were incorrectly stated. The Own Motion Determination should be corrected by changing the figure "7.5°" to "6.75°" in the fourth and fifth lines on page two thereof.

In all other respects the Own Motion Determination is reaffirmed and republished.

WCB CASE NO. 78-709 June 12, 1979

WILMA TEGGE, CLAIMANT
J. Burdette Pratt, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the Fund's denial on January 16, 1978 of claimant's claim for aggravation.

Originally, claimant filed a claim for an occupational disease resulting from exposure to fumes from a photocopy machine. The claim was denied and a hearing was requested by claimant (WCB Case No. 72-1992). As a result of the hearing the Fund was directed to accept claimant's claim by an order dated March 10, 1975. Compensation for temporary total disability was paid for approximately three-and-a-half years, less time worked, and on April 12, 1976 a Determination Order was entered whereby claimant was awarded no compensation for permanent partial disability. No appeal was taken by the claimant from this Determination Order.

On September 14, 1977 claimant requested the Fund to reopen her claim on the basis of aggravation. She contended that she had sustained dental problems as a result of her original employment exposure and that said problems had worsened, necessitating further treatment. Additionally, claimant alleged a general worsening of her entire condition.

Dr. Reimer, a naturopathic physician, testified that he first treated claimant on February 23, 1977 which was subsequent to the Determination Order. He testified that he could not definitely state whether or not he had found any sensitivity of claimant to petroleum products but he felt it was "possible".

With respect to the dental problems, Dr. White, claimant's dentist, testified that he found claimant's teeth to be very badly stained, with the stain apparently coming from both external and internal causes. He also found what he felt to be a rapid decaying process existing and felt that such conditions were extremely unusual. He requested claimant's previous dental records from Dr. Stoffers. Dr. Stoffers wrote Dr. White on June 28, 1977, stating that he did not recall there being much question of the fumes from the duplicating machine being responsible for her dental condition, but he did see in her record that the last time she was in her teeth were very badly stained and he had cleaned them.

The issue of whether the fumes from the photocopy machine were responsible for claimant's condition was adjudicated by the circuit court when it affirmed both the Board and the Referee on the issue of compensability (WCB Case No. 72-1992).

The Referee concluded that with respect to claimant's general physical condition there was absolutely no evidence of worsening. The earlier medical reports and claimant's testimony in the previous case indicate that at the time of the first hearing on compensability claimant was suffering certain conditions which at the present time claimant does not have, at least, to the same degree. Dr. Reimer was not able to compare claimant's present condition with her previous condition because he had not seen claimant prior to February 23, 1977, however, he did find her general complaints to be similar to those reported in 1971.

With respect to claimant's dental problems, Dr. Stoffer reported that a year and a half prior to the issuance of the Determination Order claimant was suffering from very badly stained teeth which he cleaned. At that time claimant had but one cavity. For slightly over two years claimant sought no additional dental care. When she was then examined by Dr. White he found badly stained teeth and numerous cavities. Dr. White expressed his opinion that the presence of numerous cavities only two years after her last dental examination had revealed only one indicated a probability that the condition was caused by an outside source. He admitted, however, that the teeth which he had extracted were not examined by either a toxicologist or a pathologist nor did he have any specialized training in toxicology.

The Referee concluded that tooth decay was a natural and progressive condition of the human body and in the absence of expert testimony it would be pure speculation to explain how or why claimant's teeth decayed. He concluded that in any event, there was no showing that the condition, if it was originally related to the fumes, had worsened since the last award or arrangement of compensation. Prior to the issuance of the Determination Order the teeth were found to be badly stained and cavities were present. The staining cannot represent a worsening of a pre-existing condition; it is merely a continuation of that condition. The additional cavities could be caused by many, many things entirely unrelated to claimant's industrial exposure five years earlier.

The Referee concluded that claimant had failed to meet her burden of proving with a reasonable certainty that there had been a worsening of either her general physical condition or that her present dental problems were related to her initial industrial exposure. He affirmed the denial of claimant's claim for aggravation.

The Board, on de novo review, concurs in the conclusion reached by the Referee. Claimant has failed to prove that she is currently suffering from any condition which may causally be related to the claimant's earlier industrial exposure.

ORDER

The order of the Referee, dated December 15, 1978, is affirmed.

WCB CASE NO. 78-4486 June 12, 1979

MYRLIE WEEMS, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which found claimant to be medically stationary and approved the Determination Order dated May 24, 1978.

Claimant suffered a compensable injury to his back on February 28, 1977 while he was carrying hides which weighed approximately 160 pounds; he slipped on ice and fell, injuring his lower back. Claimant was first seen by Dr. Mintz who later referred claimant to Dr. Goodwin, an orthopedic physician who had examined claimant on June 24, 1975 after claimant had been involved in an automobile accident earlier that year.

In July 1977 claimant was involved in an altercation with the police; he had been struck on the head and knocked to the pavement. Claimant also hit his head on the automobile and sustained a head laceration. However, there was no evidence that any injury to claimant's back had been sustained at that time. In November 1977 claimant was involved in a one-car accident and the injuries sustained were almost exclusively facial, according to the medical reports.

The claimant also had been involved in a two-vehicle collision in July 1977 and received treatment at Holladay Hospital as an outpatient.

The Fund contended that the intervening accidents have relieved it of any continuing responsibility of claimant's permanent partial disability as of July 1977. Claimant contended that the intervening accidents have had nothing to do with his back problems.

Dr. Goodwin prescribed a back brace which claimant has worn constantly; he was also instructed in back exercises. Intensive measures were recommended to get claimant back to work; if claimant did not respond, hospitalization with traction had been suggested.

Claimant also was treated by Dr. Brown who diagnosed a lumbosacral strain, cervical strain and spasm and headaches and put claimant on a program of conservative treatment. Dr. Brown was quite pleased with claimant's progress up to the time he left Dr. Brown's care.

On January 23 Dr. Pasquesi examined claimant; he also examined him on April 12, 1978. At the first examination claimant failed to advise the doctor of the earlier automobile accident in which he had been involved but he did so at the time of the second examination. Dr. Pasquesi said most back complaints have to be determined on the basis of history and subjective complaints, therefore, a definite diagnosis could not be made unless complete confidence could be given to the history related by the patient. He stated that even though claimant said that his back was not materially worsened by the subsequent automobile accidents, they must be taken into consideration. He found claimant had been impaired to the extent of 22% of the whole man. He recommended claim closure for curative treatment and also different employment which would not require bending, stooping or lifting more than 30 pounds alternating sitting and standing positions throughout an eight-hour shift. In February 1978 Dr. Brown concurred with Dr. Pasquesi's first report which contained his opinion that claimant was medically stationary as a result of the industrial injury and that psychiatric evaluation would be beneficial.

In March 1978 Dr. Parvaresh, a psychiatrist, examined claimant and found him to be of average intelligence. He could not find any psychiatric impairment other than basic personality disorder. He did not feel that any psychiatric care would benefit claimant but suggested that claimant was enjoying secondary gains and expected to be supported. He felt claimant's personality prolonged his recovery but his emotional make-up was not caused by the fall. Claimant would be able to work.

In April 1978 Dr. Reynolds found claimant to be medically stationary and on May 24, 1978 the claim was closed by a Determination Order which awarded claimant 32° for 10% unscheduled low back disability.

After the issuance of the Determination Order, Dr. Brown requested that claimant be admitted to the Emanuel Pain Center for evaluation and treatment, referring to the treatment he had given claimant between December 14, 1977 and September 1978 and relying on the respective opinions of Dr. Pasquesi and Dr. Parvaresh.

The Referee was not convinced that claimant's present emotional problems should be the responsibility of the employer. He did not allow the request made by Dr. Brown for an evaluation of claimant at the Pain Center. He found that claimant was now restricted from certain occupations which require heavy use of his back but that part of this may be due to claimant's refusal to undergo back surgery. The Referee admitted that back surgery could not be performed without claimant's consent, but on the other hand neither could his extent of disability be based on speculation. Therefore, he concluded that claimant had not borne his burden of proving that he was entitled to a greater award of disability than that which he was granted by the Determination Order of May 24, 1978.

The Board, on de novo review, based primarily upon the limitations of claimant's activities placed upon him by Dr. Parvaresh, Dr. Brown and Dr. Pasquesi, concludes that claimant sustained substantially more loss of wage earning capacity than the award of 10% of the maximum allowed by statute would indicate. The contention of the Fund made at the hearing that their responsibility terminated at the time of the first automobile accident in July 1977 is not well-taken. The medical evidence indicates that neither the altercation with the police officers in July 1977 nor the automobile accidents later that year involved claimant's back. Dr. Parvaresh felt that claimant should be admitted to a pain clinic if for no other reason than to get him off the drugs which he took to alleviate his pain.

Claimant has a limited work background, most of it being heavy manual labor. He has only a fourth grade education and he can barely read or write.

Dr. Parvaresh also indicated that it was important that claimant be given vocational retraining. He felt that claimant had the ability to tend bar or do such jobs as janitorial, security guard or other similar employment which did not necessarily entail too much lifting.

Dr. Brown, in his report of September 20, 1978, discusses in great detail the opinions expressed by Dr. Parvaresh and agrees that it would be in the best interest of claimant to get him off drugs, teach him how to cope with low back pain and give him suitable vocational training.

The Board concludes that claimant has lost 40% of his wage earning capacity as a result of the industrial injury of February 28, 1977 and that his present condition is the direct result of that industrial injury and has not been worsened by the intervening non-industrial incidents.

The claimant has been turned down for vocational rehabilitation training, however, Dr. Pasquesi says that claimant can do certain types of work and is retrainable.

The Board concludes that Field Services Division of the Workers' Compensation Department should re-evaluate claimant's eligibility for vocational rehabilitation and do everything possible to place him in a suitable on-the-job training program.

ORDER

The order of the Referee, dated November 29, 1978, is modified.

Claimant is awarded 96° of a maximum of 320° for 30% unscheduled back disability. This award is in addition to the award of 32° granted claimant by the Determination Order of May 24, 1978.

The Field Services Division of the Workers' Compensation Department is directed to re-evaluate claimant's eligibility for vocational rehabilitation training as soon as possible.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said additional compensation as paid, not to exceed a maximum of $3,000.

WCB CASE NO. 77-6450 June 13, 1979

LAURA J. ELLIOTT, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-request by the SAIF

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which denied her claim for a disabling mental state, including medical services incurred in connection therewith; directed the Fund to pay claimant time loss benefits from December 29, 1977 to July 27, 1978, less time worked; directed the Fund to pay claimant, by way of penalty, an amount equal to 5% of the compensation due claimant for the period previously set forth, directed it to pay claimant's attorney $750 as a reasonable attorney's fee, and affirmed the Determination Order dated October 14, 1977.

On January 13, 1976 claimant sustained a compensable injury to her back while working as a bartender for the employer. Claimant was unable to work from January 15 to January 28, 1976; thereafter, she returned to work and continued to work until March 13, 1976 when, while she was carrying glasses to the kitchen, she slipped on the wet floor.

Dr. Saboe, a chiropractic physician, initially treated claimant and diagnosed the injury as a chronic, recurring lumbar, lumbosacral and right sacroiliac strain syndrome with paresthesia of the right leg.

On May 6, 1976 claimant was examined by Dr. Martens, an orthopedic physician, who diagnosed the injury as a discogenic back pain with sciatic nerve root irritation. Claimant received physical therapy treatments as an out-patient at Albany General Hospital but obtained no relief and from June 1 through June 4, 1976 she was hospitalized in Corvallis for her back pain.

A neurological evaluation of claimant was performed by Dr. Throop in August 1976. The EMG was normal. In September Dr. Martens found claimant to be medically stationary but recommended that she undergo comprehensive physical rehabilitation. He released claimant for work which did not require bending, lifting, twisting, prolonged standing or walking. He said that her disabilities prohibited her from returning to her former type of work as a waitress and bartender.

All of claimant's treatment has been conservative; no surgical procedures were provided claimant because she refused to submit to them. Claimant was disqualified for consideration of a vocational rehabilitation program because of her general physical condition.

Claimant was examined by the staff of the Orthopaedic Consultants on October 25, 1976 and found to be medically stationary from a physical standpoint. There was no functional interference on examination and claim closure was recommended. It was felt that claimant could return to her former employment as a bartender with limitations. The back impairment was rated as mild.

On July 26, 1977 Dr. Martens found claimant to be medically stationary. He found she had some permanent disability and placed the same limitations upon her work activities as he had done in his report of September 21, 1976.

On October 14, 1977 a Determination Order granted claimant compensation for temporary total disability from January 15, 1976 through June 1, 1977, less time worked, and from June 2, 1977 through September 13, 1977; also compensation equal to 64° for 20% unscheduled low back disability.

Dr. Martens examined claimant twice after the issuance of the Determination Order. The first time was on November 1, 1977 and the second examination was done on May 10, 1978. Dr. Martens found no reason to alter his July 26, 1977 opinion concerning claimant's physical condition nor did he feel that claimant was permanently and totally disabled from a physical standpoint.

Claimant is 50 years old and has a 7th grade education. Claimant has worked most of her adult life as a waitress and bartender.

Claimant states that she has experienced mental or emotional problems since her industrial injury and that these problems are attributable to that injury. Claimant was examined by the staff at the Callahan Center who, on January 27, 1977, reported that claimant experienced an anxiety tension reaction with some depression. This report was not clear whether this condition was causally related to claimant's job activities or to her industrial injury. On December 5, 1977 Dr. Ackerman, a clinical psychologist, talked with claimant and referred her to Dr. Kuttner, a psychiatrist, for further care and treatment. Both Dr. Ackerman and Dr. Kuttner reported that claimant suffered from a disabling mental state and they also reported that claimant's industrial injury was a material contributing factor thereto. Both felt, initially, that claimant's disabling mental state prevented her from being employable.

However, when Dr. Ackerman was deposed on May 12, 1978 he made certain comments which indicated that he was uncertain about his prior opinion relating to causal relationship. The doctor stated that he felt claimant was a dishonest and manipulative person in many ways and that he didn't trust her. He was also uncertain as to whether claimant and her husband were truthful with him in relating the history of claimant's problems. If claimant and her husband had been truthful, Dr. Ackerman said he would hold to his original opinion; however, if they had not been truthful in reporting historical facts, then Dr. Ackerman stated he would have to reverse his original opinion.

The Referee concluded that Dr. Ackerman was unable to determine whether he had been told the truth and that Dr. Ackerman had failed to establish, by a reasonable medical probability, causal relationship between claimant's disabling emotional state and her industrial injury.

Dr. Kuttner's deposition was also taken on May 12, 1978. He also felt that claimant had been manipulating him towards her own ends, at least, to a certain degree. The Referee concluded, after considering the equivocation on the part of Dr. Kuttner with respect to causal relationship between claimant's disabling mental state and her industrial injury that his opinion did not establish such relationship.

The Board, on de novo review, finds that claimant is entitled to an award for permanent partial disability as a result of her industrial injury. Claimant has lost considerable amount of her wage earning capacity as a result of that injury. Her work background is very limited; most of her life she was employed as a waitress and/or bartender and it is obvious from the restrictions placed upon her by all of the doctors who have examined and/or treated claimant that she cannot return to this type of work. Claimant has been found to be ineligible for vocational rehabilitation because of her general physical condition.

Taking into consideration all of these factors, the Board concludes that the award equal to 20% of the maximum granted by the Determination Order does not adequately compensate claimant for her loss of wage earning capacity. The Board increases this award by 15% which gives claimant a total of 35% of the maximum.

With regard to claimant's claim for an alleged disabling mental state, the Board finds that claimant has not been a credible witness and that the histories which she and her husband related to both Dr. Ackerman and Dr. Kuttner were full of inaccuracies and possibly were intentionally misleading.

The Referee had found the claimant to be basically a credible witness but stated that it was apparent from her demeanor at the hearing that she was claims conscious and that the weight given to her testimony was reduced accordingly. The Board goes even farther and finds that claimant's testimony was not credible and, therefore, entitled to no weight. Furthermore, inasmuch as the original opinions expressed by Dr. Ackerman and Dr. Kuttner were based upon the history related to each by claimant and her husband, such opinions must be viewed with scepticism. Apparently, this is the same view which was ultimately taken by both Dr. Ackerman and Dr. Kuttner.

The Board concurs in the findings, conclusions and directives of the Referee with the exception of the affirmance of the Determination Order dated October 14, 1977.

ORDER

The order of the Referee, dated January 5, 1979, is modified.

Claimant is awarded 48° of a maximum of 320° for 15% unscheduled back disability. This award is in addition to the award of 64° granted claimant by the Determination Order dated October 14, 1977 which was affirmed by the Referee's order which, in all other respects, is affirmed.

Claimant's attorneys are awarded as a reasonable attorney's fee a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed a maximum of $3,000.

WCB CASE NO. 78-2770 June 13, 1979

WILLIAM HALL, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
Collins, Velure & Heysell,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the March 22, 1978 Determination Order whereby he was granted compensation equal to 32° for 10% unscheduled low back disability.

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

ORDER

The order of the Referee, dated November 17, 1978, is affirmed.

WCB CASE NO. 78-2952 June 13, 1979

ELWOOD KIRKPATRICK, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith Griffith
& Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which granted claimant compensation equal to 19.2° for 10% loss of the left arm, said award to be in addition to the compensation awarded by the Determination Order of March 14, 1978.

Claimant sustained a compensable injury to his left shoulder on March 11, 1977 when he tripped over a board and fell. Claimant had worked for the employer for 33 years. After the injury claimant continued working although he felt immediate pain at the time of the accident. He was first seen by Dr. McNeill, an orthopedic surgeon, on March 29. Dr. McNeill diagnosed a tear of the rotator cuff; an arthrogram was performed which confirmed this diagnosis.

On April 18, 1977 claimant underwent an arthroplasty for repair of the left rotator cuff. He was able to return to work at his same job on July 18 but on August 9 Dr. McNeill reported that claimant was complaining of an ache in the front of his shoulder towards the end of his work shift which occurred especially when he was doing overhead work. He also complained of weakness in his shoulder.

On February 3, 1978 Dr. McNeill reported that claimant was medically stationary and had full range of active motion. He stated that claimant was unable to reach out and pick anything at arm's length and that he had aching in the anterior aspect of his shoulder. The exterior rotation of the shoulder was limited but otherwise he had good motor power.

A Determination Order dated March 14, 1978 awarded claimant 16° for 5% unscheduled disability.

In August 1978 claimant left his employment, stating he had decided to retire due to a combination of factors, one of which was the difficulty he was having with his shoulder and arm. Claimant also was having some problems with his supervisor and he was complaining about the dust around the work area in the plant.

Claimant testified that prior to his injury he had planned to work until he was 65; he was 63 at the time of the injury. Claimant worked as a tool and die maker and repairman which required operating various machines and also involved lifting, pushing and pulling the stock. Claimant stated that after he had returned to work in July 1977 he had diffculty reaching up, back and from side to side to operate the controls of the machines. He contends that he has lost 60% of the strength in his arm as a result of the injury and he has had to change his method of working and use his other hand for tasks which he was formerly able to do with his left arm.

Claimant's supervisor testified that claimant was above average as a worker and was much stronger than the average worker prior to his injury. Following claimant's return to work, claimant continued to perform his job satisfactorily and the supervisor noticed very little change in his work habits. He did not believe that claimant's work ability had been impaired and stated that claimant had never complained to him of any problems concerning his job. From July 1977 until August 1978 claimant worked 400 hours of overtime and missed very little time from his regular work.

It is claimant's contention that he is entitled to an increased award for unscheduled disability and a separate scheduled award for loss of use of his arm.

The Referee found that the injury was to claimant's shoulder but as a result of the injury claimant has disability in both shoulder and arm and under such circumstances a separate award for loss of function to the arm is appropriate.

The Referee concluded that claimant's unscheduled disability, which is measured by loss of wage earning capacity, has been adequately compensated for by the award made by the Determination Order. With regard to the scheduled disability, which is measured by permanent loss of function and use of the scheduled member, the Referee found that claimant has experienced loss of strength and use of his left arm due to the injury. The Referee affirmed the award for unscheduled disability made by the Determination Order and granted claimant an additional award for scheduled disability equal to 10% loss of the left arm.

The Board, on de novo review, finds that the medical evidence indicates that claimant suffered an injury to his shoulder and that any loss of function or use of the left arm is related to the impairment in the shoulder area. Therefore, the medical evidence does not justify granting a separate award for loss function of the arm.

The Board finds, however, that claimant has suffered a greater loss of wage earning capacity as a result of the injury than is represented by the award of 16° which represents 5% of the maximum allowable for unscheduled disability. Claimant had retired two years earlier than he planned to and one of the reasons claimant decided to retire was because of the difficulty he was experiencing with his shoulder and arm. Claimant's supervisor testified that he noticed very little change in claimant's ability to work after his injury. Claimant had been a better than average worker prior to the injury and evidently, according to his supervisor, continued to be a better than average worker on his return to work after the injury. The time sheets indicate that claimant was able to do substantial overtime and missed very little work from the job. Because of this evidence the Board does not feel that any more than a minimal increase is justified.

The Board concludes that the claimant is not entitled to a separate award for 10% loss of the left arm. The Board further concludes that claimant is entitled to an additional 24° for his unscheduled shoulder disability which would give claimant a total of 40° unscheduled shoulder disability.

ORDER

The order of the Referee, dated December 18, 1978, is modified.

Claimant is awarded 40° of a maximum of 320° for 12.5% unscheduled shoulder disability. This award is in lieu of the award for unscheduled disability granted by the Determination Order of March 14, 1978 (affirmed by the Referee) and the award of 19.2° for 10% loss of the left arm granted by the Referee in her order which, in all other respects, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted claimant by this order, payable out of said compensation as paid, not to exceed a maximum of $3,000.

WCB CASE NO. 78-3369 June 13, 1979

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

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the Determination Order dated April 11, 1978 whereby claimant was awarded 20.25° for 15% loss of the left leg [foot] and referred claimant's claim to the Disability Prevention Division for vocational rehabilitation consideration.

On January 26, 1976 claimant sustained a fracture of the mid-shaft of the second and third metatarsal when a gear fell and crushed his left foot. He was initially seen by Dr. Dunlap and referred to Dr. Potter, an orthopedic physician. On February 2, 1979 an examination revealed no neurovascular problems and claimant was allowed full weight bearing as tolerated. Claimant was able to return to light duty work, but when he returned to full active duty he commenced having further problems with his left foot.

Dr. Potter, on April 20, 1976, found no instability and no major discomfort although claimant complained of mild burning sensation when walking. It was his opinion claimant could return to full duty with no restrictions. On June 18, 1976 claimant was still limping on the left foot and having considerable pain and swelling and Dr. Potter concluded that claimant was having a residual type discomfort secondary to the fracture. He felt that from a structural standpoint claimant had returned to his pre-injury level; there was a mild sympathetic distrophy but he felt claimant could work without any restrictions.

Dr. Potter excised a Morton's type neuroma involving the web space of the second and third web of the left foot on January 26, 1977. Claimant continued to have pain and Dr. Potter concluded that claimant's problem was a generalized neuralgia secondary to the crushing injury. Claimant was given steriod injections at the site of the neuroma and fitted with a special boot. At this time Dr. Potter stated that claimant would probably never be able to work for lengthy periods during cold weather; he advised vocational rehabilitation for another type of work. Claimant, at the time of his injury, was a 55-year-old maintenance man.

In January 1978 claimant was complaining of numbness, which Dr. Potter felt could be caused by a circulatory disturbance. He referred claimant to Dr. Nicholson, a vascular surgeon, who found early significant arteriosclerosis affecting the iliac and femoral arteries but not more significant on the left than on the right. It was difficult to draw a cause and effect relationship between the industrial injury and claimant's present problems. Dr. Potter said that claimant could do all of his former work with the exception of walking in cold water. Unfortunately, that was a major portion of claimant's job.

In January 1978 claimant was contacted for vocational rehabilitation; he appeared well motivated and his work background included training as a barber, working on a farm, working as a diesel mechanic on locomotives for 17 years, owning and operating a second hand store, working as an attendant at a service station and working as a maintenance man, the job at which he was employed at the time of his injury. Claimant's work background was good and he was very interested in operating a woodwork shop, doing security work or perhaps lighter type duty as a maintenance man.

Dr. Potter stressed that any job which claimant was trained to do would have to allow him to sit and stand at various times during the work day because of his chronic metatarsalgia and also the mild circulatory problems in the left foot which was secondary to his industrial injury. He recommended bench type jobs.

On April 11, 1978 the claim was closed by a Determination Order which awarded claimant 20.25° for 15% loss of his left foot.

Vocational rehabilitation was terminated on May 26, 1978 because claimant stated that he was going to travel to Czechoslavakia. Arrangements were made for claimant to start a custodial job upon his return.

On October 2, 1978 Dr. Potter saw claimant who was complaining of left foot problems from walking on cement floors required by the janitorial job which he had commenced when he returned on September 11, 1978. Claimant stated the problems were so severe that he would have to quit. Dr. Potter concluded claimant was medically stationary but that he could not work eight hours a day standing on his feet; he considered claimant's impairment to be moderate from a physical standpoint and limited his walking or standing to not more than three hours a day. He did not feel that claimant's condition had worsened since the claim had been closed in April 1978 and that any further treatment would be for the alleviation of pain.

The Referee found that claimant had suffered moderate impairment of his left foot and leg but that the medical evidence indicated that much of his present problems was not a compensable consequence flowing from his industrial injury and there was no evidence that the industrial injury had exacerbated a prior condition which would make it compensable. He concluded that the medical evidence was not sufficient to establish that claimant had established he had any greater disability than that for which he had been awarded.

The Board, on de novo review, finds that claimant does not have 85% use of his left foot. This is a scheduled injury and the sole criterion for determining the award to which claimant is entitled is based upon loss of function of the scheduled member of the body which had been injured. The restrictions placed upon claimant's activities because of his industrial injury clearly indicate that claimant has lost at least 30% use of his left foot. Although the inability to do certain jobs cannot be considered insofar as it affects claimant's wage earning capacity because this is not an unscheduled disability, nevertheless, it can be considered in determining to what use claimant can put the injured limb. It is apparent that there are many things that he can no longer do with this foot.

The Board concludes that claimant should be entitled to an award of 40.5° which represents 30% of the maximum for loss function of the left foot. The Referee refers to the Determination Order as awarding 20.25° for 15% loss of the left leg; 20.25° represents 15% loss of the left foot. The Board, by this order, is increasing the award made by the Determination Order from 15% loss of the left foot to 30% loss of the left foot.

The Board agrees with the Referee that claimant should receive vocational assistance but feels that it could be best furnished through the auspices of the Field Services Division of the Workers' Compensation Department. The previous job placement obviously was not suitable to claimant's physical capabilities, however, based upon Dr. Potter's opinion, there are many types of sedentary jobs for which claimant could be retrained.

ORDER

The order of the Referee, dated November 24, 1978, and the Order on Reconsideration, dated January 3, 1979, are modified.

Claimant is awarded 40.5° of a maximum of 135° for 30% loss of the left foot. This award is in lieu of the award made by the Referee in his order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed a maximum of $3,000.

WCB CASE NO. 78-1898 June 13, 1979

ROBERT L. ORR, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks review by the Board of that portion of the Referee's order which directed it to pay claimant's attorney a fee of $800. The claimant contends that the carrier had not paid the doctor bills and it must be assumed that the carrier believed claimant was not entitled to further psychological and/or psychiatric treatment at the hands of Dr. Henderson, therefore, claimant's attorney was entitled to an attorney's fee for having prevailed on what amounted to a de facto denied claim.

Claimant suffered a compensable injury to his back on August 25, 1975. The claim was closed by a Determination Order dated March 1, 1978 which granted claimant compensation for temporary total disability and 48° for 15% unscheduled low back disability.

Since April 12, 1978 claimant has been seeing Dr. Henderson, a psychiatrist, whose opinion was that claimant was not medically stable and that his case should be reopened both for medical treatment and exploration of vocational alternatives.

Instead of authorizing reopening of the claim as requested by Dr. Henderson, the employer referred claimant to Dr. Quan, a psychiatrist. Dr. Quan agreed to a large degree with Dr. Henderson's report, indicating that the improvement resulting from Dr. Henderson's therapy was good evidence that the treatment should be continued.

The Board, on de novo review, finds that claimant's attorney is not entitled to an attorney's fee in addition to compensation. Claimant's attorney was asked specifically by the Referee if claimant was making a claim for attorney's fees in addition to compensation inasmuch as the posture of the request for hearing was an appeal from a Determination Order. Claimant's attorney replied that claimant was not; that subsequent to the issuance of the Determination Order on March 1, 1978 claimant had asked that said Determination Order be set aside and that a finding be made that the claim was prematurely closed. Claimant's attorney also advised the Referee that he was not, in behalf of claimant, contending for any further treatment other than the psychological or psychiatric treatment recommended by Dr. Henderson.

The treatment recommended by Dr. Henderson can be furnished under ORS 656.245 and there is no evidence that the carrier at any time refused to furnish such services pursuant to this statutory provision.

Based upon the unambiguous statements made at the hearing by the claimant's attorney and the evidence that the carrier at no time refused to furnish the treatment recommended by Dr. Henderson, the Board concludes that the Referee's order should be amended.

ORDER

That portion of the order of the Referee, dated December 8, 1978, which directed that claimant's attorneys should be paid an attorney's fee of $800 in addition to and not out of compensation is reversed.

In all other respects the order is affirmed.

WCB CASE NO. 78-4160 June 13, 1979

HAROLD D. PITTMAN, CLAIMANT
Richardson, Murphy, & Nelson,
Claimant's Attys.
Bruce A. Bottini, Defense Atty.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the employer, and said request for review now having been withdrawn,

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

WCB CASE NO. 77-4259 June 13, 1979
WCB CASE NO. 78-3627
WCB CASE NO. 78-3628

WILLIAM R. REICHSTEIN, CLAIMANT
Dennis H. Black, Claimant's Atty.
Biggs, Boyle, Strayer, Stoel &
Bailey, Defense Attys.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-5265 June 13, 1979

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

Reviewed by Board Members Wilson, Phillips and McCallister.

The employer seeks Board review of the Referee's order which granted claimant compensation for permanent total disability.

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

ORDER

The order of the Referee, dated December 12, 1978, is affirmed.

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

Chairman M. Keith Wilson dissents as follows:

The disabilities reflected in the stipulation entered into on January 20, 1975 between the claimant and the employer-carrier, providing for an award of 218° (40%) unscheduled disability, 115.2° (60%) right arm, and 9.6° (5%) left arm (the Referee and the parties mistakenly compute this disability at 7.5°), fairly and adequately compensated claimant, and I find no justification in the record to declare him now permanently and totally disabled, and would reverse the Referee.

After the successful surgery by Dr. Anderson on the right shoulder, none of the current and recent medical and psychological reports by the treating doctor, a psychologist and a psychiatrist, support a finding of permanent total disability. The claimant bears the burden of proving permanent total disability, and the burden of proof never shifts. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). The claimant has made no effort to obtain light work and has rejected all efforts at retraining in any area other than on his own terms in self-employment. The evidence of vocational potential is unrefuted that there are job opportunities available within the "light work" category. The Referee agrees with the medical evidence that the claimant is capable of light work.

The physical restrictions are found to be more attitudinal than physical. Claimant has been found to have a rebellious personality and there is no psychological impairment. It is conceded that it will be a difficult task to return the claimant to work because of the disabled behaviour of the claimant.

The physical residuals are not severe; there is no psychological impairment residual from the industrial injury and the claimant is capable of performing light work.

The claimant has been adequately compensated and the resources toward rehabilitation and/or job placement continue to be available to claimant if he elects to take advantage of them.

WCB CASE NO. 77-7097 June 15, 1979

MAE DeWHITT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On October 2, 1978 Referee Kirk A. Mulder entered his Opinion and Order in the above entitled matter. On October 30, 1978 the employer requested the Board to review the case. The Board acknowledged the request on November 2, 1978 and, upon receipt of the transcript of the proceedings, both parties were furnished a copy of the transcript and notified of the schedule for the filing of briefs.

On June 7, 1979 claimant, by and through her attorney, filed a motion to dismiss the request for review on the grounds that it was not timely filed pursuant to ORS 656.289(3). Claimant contends that the employer's personal typewritten request for review of the Referee's order mailed on October 2, 1978 was dated October 30, 1978 but that the Board did not acknowledge receipt of the request until November 2, 1978 which was 31 days after the mailing of the order.

ORS 656.289(3) provides that the Referee's order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests review by the Board under ORS 656.295. ORS 656.295(1) states that it is only necessary for the party to request a review of the order. Subsection (2) of the same statute provides that the request for review shall be mailed to the Board and copies of the request shall be mailed to all parties to the proceeding before the Referee.

The request for review in this case was mailed on October 30, 1978. There is no allegation by claimant that she and/or her attorney were not served by a copy of the request. In fact, a copy of the request is attached as Exhibit B to the claimant's motion.

The Board concludes that the request for review by the employer was timely made and therefore the motion to dismiss must be denied.

IT IS SO ORDERED.

CLAIM NO. H15220 June 15, 1979

RICHARD A. FAULKNER, CLAIMANT
Gerald Knopp, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on September 13, 1972 when a side of beef weighing approximately 450 pounds dropped on his right side. Subsequently, claimant changed jobs and, while working as a janitor, developed an exacerbation of his original injury. This was determined to be an aggravation by the Workers' Compensation Board.

On March 2, 1978 Dr. Hill performed a laminectomy and fusion at C6-7. In a later examination, claimant reported to Dr. Pasquesi that the surgery relieved about 90% of his pain, including all of his arm pain and he was able to return to the same job. Dr. Pasquesi found claimant to be stationary. Claimant appears to be well motivated.

Claimant has been granted an award equal to 32° for 10% unscheduled disability by a June 13, 1974 stipulation.

On May 10, 1979 the carrier requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted additional compensation equal to 48° for 15% unscheduled neck disability and temporary total disability from November 28, 1977 through April 16, 1978, less time worked.

The Board concurs in this recommendation.

ORDER

The claimant is hereby granted compensation for time loss from November 28, 1977 through April 16, 1978, less time worked, and compensation equal to 48° for 15% unscheduled neck disability. These awards are in addition to any awards previously granted claimant. The record indicates that most of the time loss benefits have been paid to claimant already.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

SAIF CLAIM NO. 947153 June 15, 1979

VERNIE MEWHINNEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

An Own Motion Determination was entered in the above entitled matter on May 25, 1979 which erroneously granted claimant compensation equal to 100% loss of the left leg by separation. The order should be corrected and claimant granted compensation equal to 100% loss function of the left leg. In all other respects the Own Motion Determination should be reaffirmed and republished.

IT IS SO ORDERED.

CLAIM NO. KC 51634 June 15, 1979

EARL RAMSBOTTOM, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left knee on December 4, 1966 when he slipped on some rain soaked sugar as he was going up steps. Claimant had surgery. His claim was first closed by a Determination Order, dated February 7, 1968, which granted compensation for 40% loss of use of the left leg. An Opinion and Order, dated November 6, 1968, granted 20% more for a total of 60% loss of use of the left leg.

Surgery was again performed in December 1971 but claimant continued to have problems and a left total knee replacement was carried out on April 26, 1973. On June 18, 1974 a Determination Order granted an additional 30% for a total of 90% loss of the left leg.

The worker was examined on September 12, 1974 and, on October 14, 1974, a tibial component replacement and complete synovectomy were performed. On September 30, 1975 the Orthopaedic Consultants recommended additional treatment. In early 1978 Dr. Johnson performed a fusion of the knee and, at that time, recommended claim closure with an award for a total knee fusion.

On May 21, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommends claimant be granted compensation for time loss from September 12, 1974 through May 14, 1979 but no additional permanent disability in addition to the 90% claimant has already been granted.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 12, 1974 through May 14, 1979, less time worked. The record indicates that most of this award has already been paid.

WCB CASE NO. 77-5164 June 15, 1979

LAURA STICKNEY, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
G. Howard Cliff, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the Determination Order dated July 19, 1977 whereby claimant was awarded 32° for 10% unscheduled low back disability.

Claimant suffered a compensable injury to her back on August 20, 1975 while lifting a tub of beets. Claimant is a 20-year-old cannery worker. Claimant finished the shift but has not worked since. She has received treatment from Dr. Porter and Dr. Spady. The latter examined claimant on October 2, 1975 and found a left thoracolumbar scoliosis which was probably idiopathic; there was no evidence of spondylolisthesis or spondylolysis and no significant arthritic change. Nor was there any evidence of fractures or subluxations. Dr. Spady concluded that claimant had a disc disease at the lumbosacral level, a very slight nerve root irritation.

Claimant was hospitalized for conservative treatment from October 31 to November 7, 1975. At that time Dr. Spady found no need for surgery or further therapeutic measures. Dr. Boyd examined claimant on March 11, 1976 and found her to be medically stationary. He recommended claimant seek employment which would not require heavy lifting, bending or stooping and recommended that she participate in physical therapy and do back exercises.

The claim was closed by a Determination Order dated June 30, 1976 which awarded claimant 16° for unscheduled low back disability.

Months later, claimant was again seen by Dr. Spady. At this time she was complaining of continuing back symptoms which were localized in the lumbosacral region. There is no indication of any additional injury and Dr. Spady interpreted claimant's complaints as a continuation of previous back problems. At that time claimant was pregnant and it was not possible for Dr. Spady to carry out all of the usual diagnostic tests, however, he did not feel that the increased symptoms were caused by the pregnancy.

Dr. Spady continued to treat claimant after the birth of her child and concluded that claimant would not have had the low back symptoms which she presently had if she had not been injured. He further concluded that the pregnancy aggravated claimant's condition, however, he did not feel that it aggravated it permanently and he was unable to determine what percentage of claimant's present problems were due to the trauma-caused condition and the scoliosis.

On July 19, 1977 the claim was again closed with an additional award of 32° for 10% unscheduled low back disability.

Claimant continued seeing Dr. Spady with complaints of low back pain which he found to be consistent with her original problem and probably also related to the mild scoliosis in the lumbar spine. He found her condition stationary with no additional treatment indicated. He did not believe that there was any justification for an additional award for her disability.

On April 13, 1977 Dr. Hopkins examined claimant and found that her scoliotic curve had little to do with her etiology or cause for her present symptoms in the low back. He recommended conservative treatment because he was not sure that there wasn't some functional overlay present.

On May 8, 1978 claimant was examined at the Orthopaedic Consultants. They found no functional interference with the examination and diagnosed chronic lumbar strain, superimposed on lower lumbar scoliosis. Her condition was stationary and it was recommended that she not return to the same employment either with or without limitations. They rated her disability as mildly moderate and, as due to the injury, mild.

Claimant was seen by Dr. Chen Tsai on July 11, 1978. He found that no neurosurgical, diagnostic, or therapeutic procedure was indicated. Claimant would probably continue to experience low back pain and left leg pain from time to time over an indefinite period and he recommended she consult an orthopedic surgeon specializing in scoliosis to obtain a better prognosis with respect to the lumbar disc disease.

When claimant was injured she was a student working during the summer vacation at the cannery. Her work background includes working as a waitress for six months while in high school, working as an edger in an eyeglass factory for four months, and clerking in a department store for six months. She also has worked for short periods of time in the summer as a file clerk, a clerk in a doctor's office and driving an ice cream truck. At the present time she is attending a community college taking courses leading to a teaching degree. She has been attending school since her industrial injury but still complains of a dull aching pain in her back and legs mostly on the left side. She states she has difficulty lifting, bending, sitting or riding in an automobile. She also has difficulty standing and walking up stairs.

At the present time, she attends school two days a week for one-and-a-half hours each and during the preceeding summer she went four days a week, two-and-a-half hours a day. In the spring of 1978 she taught classes five days a week on an eight-hour day basis for three months student teaching at the third grade level. She experienced no particular problems doing this and only missed five days of work because of back problems. She has not seen any physicians since Dr. Tsai examined her on July 11, 1978. She has had no surgery.

The Referee concluded that the medical evidence indicated that claimant suffers an acute and chronic lumbosacral strain. In determining her unscheduled disability, the Referee considered only claimant's loss of future earning capacity. He concluded that claimant had been awarded disability for a mild impairment and in addition to the residuals from the injury, she had a hereditary problem, scoliosis, which accounted for some of her discomfort and limitations. Claimant has little investment in the heavy labor field; the only time she did work which approached that type of employment was when she was working during school vacation. Her primary goal is to obtain a degree which would allow her to teach school.

The Referee, based upon the examination of cases previously decided which involve young, educated claimants with similar type injuries, concluded that seldom, if ever, were awards in excess of 10% for unscheduled back disability granted. The Referee further concluded that claimant had already received 15% for her unscheduled low back disability and with her training as a teacher it could not be reasonably contemplated that she would return to the heavy labor market, therefore, he found that she had failed to establish that she had suffered a greater permanent partial disability than that for which she had been awarded by the Determination Orders.

The Board, on de novo review, does not agree with the conclusion reached by the Referee with regard to claimant's future wage earning capacity. Hopefully claimant will have a career as a teacher, nevertheless, at the present time it must be considered as speculative. Many of the things which claimant was able to do in the past, even though they were done during school vacations or in conjunction with claimant's attendance at school, cannot be done by her now.

The Referee refers to the heavy labor market. Clerking in a department store, working as a file clerk and working as a clerk in a doctor's office can hardly be considered to be in the heavy labor category and it is entirely possible that claimant may want to do this type of work in the future. It is a well-known fact that teachers usually work nine months out of the year and many times, if they are not going to summer school, supplement their income by jobs such as claimant has been doing in the past. Because of the limitations placed upon her as a result of this injury to her back, claimant cannot do that type of work.

The Board concludes that claimant has lost 25% of her potential wage earning capacity as a result of her injury and, therefore, the award made by the Determination Order, dated July 19, 1977, should be increased accordingly.

ORDER

The order of the Referee, dated December 22, 1978, is reversed.

Claimant is awarded 32° of a maximum of 320° for 10% unscheduled low back disability. This award is in addition to the awards granted claimant by the Determination Orders dated June 30, 1976 and July 19, 1977.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 79-3119 June 15, 1979

ARTHUR L. TILLOTSON, CLAIMANT
Charles Paulson, Claimant's Atty.
Cheney & Kelley, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 8, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for a "1964" industrial injury. Attached to his request were supporting medical reports, however, the 1964 industrial injury involved claimant's feet and the medical reports concerned a back injury of September 6, 1967. Claimant's attorney indicated, on May 18, 1979, that the own motion request was, in fact, for the 1967 back condition. Claimant's aggravation rights have expired.

On May 22, 1979 the Fund was given 20 days to respond to claimant's request. On June 7, 1979 the Fund indicated it would oppose reopening claimant's claim for the 1967 back injury. It felt claimant's current back problems were related to a new injury sustained on February 9, 1978, a claim which was denied on March 28, 1979.

A request for hearing on the denied February 9, 1978 injury is pending in the Hearings Division and the Board believes it would be in the best interest of all parties if this hearing and claimant's request for own motion relief were consolidated for hearing.

Therefore, claimant's own motion request is remanded to the Hearings Division of the Board to be consolidated for hearing with WCB Case No. 79-3119. The Referee shall take evidence on both claims and determine whether or not claimant's present condition is directly related to his 1967 compensable injury and represents a worsening thereof since the last arrangement and award of compensation or is the result of the injury sustained on February 9, 1978.

Upon conclusion of the hearing if the Referee finds that claimant's present condition is the result of his 1967 injury and represents a worsening thereof he shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation that claimant's request for own motion relief be granted and enter his order approving the denial of the 1978 claim.

If the Referee finds that claimant's present condition is the result of his industrial injury suffered on February 9, 1978 then he shall recommend to the Board that the request for own motion relief be denied and enter an Opinion and Order disapproving the denial.

WCB CASE NO. 77-2508 June 18, 1979

KIRBY COPELAND, CLAIMANT
Dye & Olson, Claimant's Attys.
Paul L. Roess, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the Referee's order which granted claimant compensation equal to 160° for 50% unscheduled low back disability.

Claimant suffered a compensable injury to his low back on May 12, 1976 when he fell from a freezer ramp. His claim was closed by a Determination Order dated April 11, 1977 which awarded claimant compensation for temporary total disability from May 12, 1976 through February 1, 1977 and 64° for 20% unscheduled low back disability.

Claimant is 62 years old, he is married and has a high school education. Claimant owned a restaurant for a period of time and then went into the meat cutting business. Since 1939 claimant has continued to work as a meat cutter except for three years in the mid-1950's when he worked for an oil company driving truck. He quit the truck driving job because of a back injury in 1957 which required surgery. In 1960 claimant reinjured himself and had another laminectomy. After the 1972 surgery, claimant continued to have back problems but was able to work steadily, notwithstanding.

After the 1976 back injury claimant was hospitalized first in June and again in July. The second hospitalization was necessitated by a fall by claimant at home. The 1976 injury did not require surgery but claimant was placed in traction and given other conservative treatment by Dr. Murray, claimant's treating physician.

Claimant has also been seen by Dr. Serbu who had performed the 1972 back surgery and by Dr. Schostal who did EMG slides. Claimant was examined by the physicians at the Orthopaedic Consultants who reported on February 1, 1977 that claimant's condition was stationary and recommended his claim be closed. It was felt that claimant did not need further active treatment for his back. Claimant could not return to his former occupation but there were other types of employment which he would be able to do. They suggested claimant be given job placement assistance. Claimant did not need psychological or psychiatric evaluation in their opinion and they rated the loss of function of the back due to the injury as mildly moderate.

On February 1 Dr. Murray stated that claimant should not return to his former occupation because it required him to lift heavy quantities of beef and also involved considerable bending and stooping.

Claimant attempted to return to his former employer but they refused to rehire him in any capacity even though he had worked for them for 16 years.

Dr. Murray considered claimant to be medically retired. Claimant contends that he is permanently and totally disabled, however, Dr. Murray felt claimant's condition was not such that it would confine him to bed and that he would be able to do certain things, although his lifting would be confined to 10 pounds or less and even that would cause increased pain in his back. Dr. Murray was of the opinion that any prolonged walking would cause pain in claimant's leg. He concurred with the rating of the physicians at the Orthopaedic Consultants that claimant's total loss of function of the back as it existed at the time of their examination of claimant was moderate.

Claimant testifies that he has constant pain in his low back which radiates into the right hip and leg with occasional pain in the left leg.

At the present time claimant is drawing Social Security benefits and is receiving a pension from his union.

Mr. Murren, who has been in the meat cutting business since 1947, expressed his opinion that claimant could work as a salesman for a packing house, as a state meat inspector or as a USDA inspector. Robert Adolph, an independent vocational counselor, expressed his opinion that claimant was employable in a number of positions including at least three in the retail meat business.

The Referee concluded that claimant's motivation was suspect and that he may have decided to retire. Although claimant has done some part time work, he has made no real effort to find full time employment. The Referee concluded that claimant's extensive experience as a meat cutter would enable him to find collateral jobs but that he has not tried to seek such jobs. He believed claimant was obligated to make an attempt to find work within his physical and mental capabilities.

The Referee concluded that the medical evidence did not justify a finding that claimant was permanently and totally disabled. Claimant was capable of doing certain types of work and that such work was available to him, however, based upon his physical impairment, his limited education and work background and his adaptability for retraining, the Referee concluded that claimant had lost a greater amount of his wage earning capacity as a result of the industrial injury than was indicated by the award of 64°. He increased the award to 160°.

The Board, on de novo review, finds that the only chance for future employment for claimant is in some other occupation and job placement. Dr. Greiser indicated claimant could return only to minimal work activities. Claimant testified that he was unable to work at even a sedentary job for more than three to five hours. There has been no question of claimant's credibility by the Referee, therefore, his testimony regarding pain, limitation and disability, when considered with Dr. Greiser's medical findings can be taken as a fairly accurate description of claimant's physical limitations.

The Board agrees with the Referee that claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled. However, there is very little that claimant can do now as a result of the 1976 back injury. Although claimant has had a continuing history of back problems since 1957, the evidence indicates that claimant has also had a fairly steady employment record up until the 1976 injury.

The Board, relying to a large degree on the opinions expressed by Dr. Murray, concludes that claimant has lost at least 75% of his wage earning capacity as a result of his industrial injury. Claimant is 62 years old and 38 of those years he spent working as a meat cutter. Claimant is precluded from returning to work as a meat cutter and the evidence is not convincing that there are other collateral jobs available to claimant. Perhaps claimant could work as a sales representative for a packing company or as a meat inspector, but the actual job qualifications were not set forth and the limitations placed upon claimant's work activities strongly suggest that claimant would not be able to be regularly and gainfully employed in such occupations.

The Board concludes that claimant is entitled to an award equal to 240° which represents 75% of the maximum allowable by statute for unscheduled disability and, therefore, the Referee's award should be increased accordingly.

ORDER

The order of the Referee, dated October 9, 1978, is modified.

Claimant is awarded 240° of a maximum of 320° for 75% unscheduled low back disability. This award is in lieu of the award granted by the Referee's order which, in all other respects, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation granted to claimant by this award, payable out of said compensation as paid, to a maximum of $3,000.

WCB CASE NO. 791256 June 18, 1979

MELVIN DECKER, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his low back and left leg on July 7, 1972. The March 28, 1974 Determination Order granted him compensation for 75% unscheduled low back disability and 15% loss of the left leg. He thereafter filed a claim for aggravation which was denied by the Fund. On May 6, 1976 claimant requested a hearing on this denial and, subsequent to the hearing, a stipulation was entered into by the parties. This stipulation, dated July 15, 1976, provided claimant with additional compensation for 10% unscheduled low back disability and 15% left leg disability.

On December 14, 1978 claimant, by and through his attorney, requested that the July 15, 1976 stipulation be set aside and the matter set for hearing on the aggravation issue. The letter indicated that claimant felt he was permanently and totally disabled at the time of the stipulation. He requested the Board to review the matter either under its own motion jurisdiction or under ORS 656.236.

On January 30, 1979 the Board informed claimant that his aggravation rights had not expired and he, therefore, had time to file a claim for aggravation pursuant to ORS 656.273.

The Hearings Division in February 1979 received a request for hearing on the issue of the validity of the July 15, 1976 stipulation. A hearing date was set, however, because the Referee had a conflict of interest, the hearing was postponed and subsequently claimant's five-year aggravation period lapsed. Claimant filed an amended request for hearing and also, on May 30, 1979, requested that the Board consider the same issue under its own motion jurisdiction.

The Board, after fully considering the evidence before it, concludes that it would be in the best interest of the parties to consolidate the request for own motion relief with the request for hearing presently pending in the Hearings Division (WCB Case No. 79-1256).

The Referee is hereby instructed to take evidence on the validity of the July 15, 1976 stipulation, claimant's entitlement to an increased award of compensation by virtue of the fact that he had a greater disability at the time of the stipulation and if claimant's condition has worsened since that time. At the conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his appropriate recommendations and enter the appropriate orders.

If the Referee determines the stipulation should be set aside he shall do so by an order which will also include his findings on claimant's extent of disability. At the same time, the Referee shall recommend to the Board whether or not claimant's own motion request should be granted. If the Referee determines the stipulation is valid, he shall enter an order to that effect and make his recommendation to the Board on claimant's request for own motion relief.

WCB CASE NO. 78-5448 June 18, 1979

RAYMOND DUNLAP, CLAIMANT
Corey, Byler & Rew, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Employer's Attys.
Thomas J. Mortland, Defense Atty.
Request for Review by Aetna Casualty & Surety Company

Reviewed by Board Members Wilson and McCallister.

The employer's carrier, Aetna Casualty & Surety Company, hereinafter referred to as Aetna, seeks Board review of the Referee's order which remanded to it claimant's claim for an aggravation of his May 2, 1974 industrial injury.

Claimant suffered a compensable injury on May 2, 1974 while lifting pipe lengths. In 1971 claimant had sustained a compensable low back injury and had received conservative treatment therefor; however, there was no indication that claimant had any residual disability as a result of that injury.

The claim for the May 2, 1974 injury was closed initially by a Determination Order dated October 3, 1974 whereby claimant was awarded compensation only for time loss. The claim was reopened and, in March 1975, claimant had a fusion L4 to the sacrum which relieved him of much of his symptomatology and allowed him to return to work in August 1975. The claim was again closed by a Determination Order dated February 9, 1977 which awarded claimant 80° for 25% unscheduled low back disability.

The Travelers Insurance Company, hereinafter referred to as Travelers, had furnished the employer workers' compensation coverage through July 1975. Effective August 1, 1975, Aetna assumed the risk.

After claimant returned to work following his surgery, he testified that he gradually improved and was using less medication. On December 19, 1975 claimant, while installing a pipe, fell injuring his left knee and low back. Travelers denied responsibility for this incident but Aetna accepted the claim.

Claimant received treatment of a conservative nature and was off work from January 1976 to January 1977. This claim was closed by a Determination Order dated December 3, 1976 whereby claimant received 32° for 10% unscheduled low back disability.

Claimant returned to work in January 1977 and for approximately 16 months drove an excess of 43,000 miles while performing his occupational duties. In the early part of 1978 claimant's low back condition worsened and after several examinations and evaluations he submitted to back surgery in July 1978.

On June 26, 1978 Travelers denied claimant's workers' compensation benefits and on August 7, 1978 Aetna denied claimant such benefits. An order dated August 30, 1978 was issued pursuant to ORS 656.307 which designated Travelers as the paying agent.

At the hearing the parties stipulated that the claim was compensable and the only issue to be determined was which carrier was responsible for claimant's 1978 claim.

Claimant's treating physician was Dr. Donald D. Smith, an orthopedic surgeon, who referred claimant to Dr. Grewe, a neurosurgeon who examined claimant on April 19, 1978. Dr. Smith, on January 16, 1976, had stated that claimant apparently twisted his back or strained it when he stepped in a hole and injured his knee on December 19, 1975. He stated that claimant's knee was painful but that his back was not really hurting too much when he had examined him on December 22, however, since that time his back has become more acute and Dr. Smith felt that he had strained his lumbar spine but he did not believe that he had injured the fusion. Later, Dr. Smith reported that the fusion was solid, that apparently claimant had strained the muscles attached to the fusion area. He stated that claimant had been making excellent progress before the December 1975 episode.

When Dr. Grewe evaluated claimant in April 1978 he found that the December 1975 incident resulted in a sharp jerk to claimant's back which caused him to have pain in the left lower extremity and in both hips. He noted that claimant had had a spinal fusion and laminectomy and had apparently done very well for about the first six months until he had the additional injury. Since that time claimant had been bothered by pain in the back which radiated up into the neck and the auxiliary areas with muscles cramping in the leg. On September 14, 1978 Dr. Grewe reported that claimant's recent surgical procedures were related to his original injury of "March 1975" which had required a laminectomy and spinal fusion and to an aggravation occurring when he stepped into a hole in December 1975 and from which he has been continuously symptomatic, although working since that time.

The Referee concluded, after giving consideration to all of the evidence and being aware of the last injurious exposure rule, that the claimant's 1978 claim was an aggravation of the December 19, 1975 industrial injury and, therefore, the responsibility of Aetna. He remanded the claim to Aetna and directed it to reimburse Travelers for all expenditures the latter had made in accordance with the .307 order dated August 30, 1978. He awarded claimant's attorney an attorney's fee to be paid by Aetna.

The Board, on de novo review, finds that Dr. Grewe's report of September 14, 1978 refers to an "original injury of March 1975 for which he had a laminectomy and spinal fusion". Obviously, Dr. Grewe was mixed up in his dates because claimant suffered no injury in March 1975. Claimant was injured on May 2, 1974 and again on December 19, 1975; the question is which injury, if either, necessitated claimant's 1978 surgery. In his letter of September 14, Dr. Grewe stated that the episode of May 30, 1978 when claimant stumbled and fell, although a temporary aggravating event, was not responsible for the decision regarding surgery. Again he refers to a March 1975 injury but parenthetically says "or was it May 2, 1974". He indicates that his records would show the exact date, that the dates stated in his report were given to him from memory. On the other hand, Dr. Smith, claimant's treating physician from the date of the 1974 injury forward, unequivocally states in his report of August 3, 1978 that the recent treatment and surgery regarding claimant has no relationship to the December 19, 1975 knee injury.

In spite of the "last injurious exposure rule", the Board believes that Dr. Smith's statement is the most persuasive evidence in the record and it is not contradicted by Dr. Grewe's reports which indicate that he was not exactly certain of the dates involved. Therefore, the Board concludes that the Referee's order should be reversed and that Travelers should be held responsible for claimant's 1978 surgery which was an aggravation of the May 2, 1974 injury and directly related to the prior surgery in 1975 according to the medical reports of record.

ORDER

The order of the Referee, dated December 20, 1978, is reversed.

The denial by Aetna Insurance Company, dated August 7, 1978, is approved.

The denial by Travelers Insurance Company, dated June 26, 1978, is reversed and claimant's claim for an aggravation of his May 2, 1974 industrial injury is remanded to Travelers Insurance Company to be accepted and for the payment of compensation, commencing on April 18, 1978, the date claimant was admitted to Emanuel Hospital, and until closed pursuant to the provisions of ORS 656.268.

CLAIM NO. B53-132894 June 20, 1979

GEORGE C. JOHNSON, CLAIMANT
Roger Warren, Defense Atty.
Order

Claimant sustained a compensable injury on November 14, 1969. By a Judgment Order issued on November 19, 1976 by the Circuit Court of Lane County, claimant was granted compensation for permanent total disability.

On May 14, 1979 the carrier had Dr. Pasquesi re-examine the claimant's disability. On May 11, 1979 the carrier requested reconsideration of the award of permanent total disability based on the medical report from Dr. Pasquesi.

Dr. Pasquesi's report failed to reveal any improvement in claimant's condition since the award made by the circuit court.

On June 12, 1979 the Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant's award for permanent total disability be continued.

The Board, after thorough consideration of the file together with the attached medical report, concludes that claimant's condition has not changed since the circuit court's order of November 19, 1976. Therefore, claimant's award for permanent total disability shall remain in effect.

IT IS SO ORDERED.

WCB CASE NO. 78-2654 June 20, 1979

RAYMOND G. GIBB, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which awarded him 160° for 50% unscheduled neck, shoulder and upper back disability. Claimant contends he is permanently and totally disabled.

On May 28, 1975 claimant filed a claim alleging that as of December 1, 1974 he had a strained left shoulder as a result of a constant strain from operating a "lumberjack", a large piece of log handling equipment. The claim was accepted and benefits were paid to claimant. During the course of treatment, x-rays were taken which indicated that claimant had lung cancer. This was surgically treated on September 10, 1975 and, thereafter, claimant received approximately eleven radiation treatments.

Claimant was able to return to work on February 1, 1976 as a lumberjack operator, however, the pain in his neck increased and he was off work from June 30, 1976 until August 9, 1976. However, the evidence indicates that this layoff was occasioned by a labor dispute not by any of claimant's cancer symptoms.

When claimant returned to work on August 9 he was employed as a pond man which required him to cut steel bands and cables with a pair of bolt cutters and, as a result, he developed symptoms in his neck, shoulder and back. On January 28, 1977 Dr. Butler examined claimant and, on April 21, 1977, Dr. Donald T. Smith performed an anterior cervical fusion C5 to C7.

Between December 1, 1974 and January 28, 1977 the employer changed from a contributing employer to a self-insured employer. Both the Fund and the employer denied responsibility for the January 1977 symptoms and claimant requested a hearing on the denials. As a result of the hearing in August 1977 a Referee issued an order stating that said symptoms were an aggravation of the December 1, 1974 injury. At the present time, this matter is on appeal.

Claimant testifies he has constant severe pain and he is unable to move his neck. He is unable to sleep in bed, he can only sleep in a recliner or on a davenport. His activities are limited to walks and raising his arms to loosen the muscles and cords in his neck and shoulder and upper back. According to claimant's wife's testimony, claimant, prior to his injury, was able to do anything anyone else could do and now he is able to do nothing. She stated he was in pain and that his memory was very poor.

Claimant is 62 years old, he has an 8th grade education, and his work background includes farming, working in factories and lumber mills, working as a cat skinner, and for 19-1/2 years he worked in various mill jobs for the employer.

The Referee found that it was difficult to assess the residuals of claimant's injury because there was evidence that a portion of the stiffness, tightness and inability to use some of his upper back muscles was caused by the radiation treatments required for the lung cancer and some was related to the industrial injury and the resulting surgery therefor.

The Referee concluded that claimant was not permanently and totally disabled in spite of the fact that there was medical evidence stating that he was permanently disabled and could not return to his former employment. The reason for the Referee's conclusion evidently was that there wasn't any medical evidence indicating whether or not claimant could return to lighter work and there wasn't any medical evidence indicating how much of claimant's inability to return to his former employment resulted from the radiation therapy.

Based upon the evidence presented to him, the Referee concluded that claimant had suffered a loss of wage earning capacity equal to 50% as a result of the industrial injury on December 1, 1974. He increased the award made by the Determination Order of March 13, 1978 whereby claimant was granted 80° for 25% unscheduled neck, left shoulder and upper back disability, to 160°.

The Board, on de novo review, finds claimant to be permanently and totally disabled. The Referee was correct in stating that because the claimant's cancer condition did not pre-exist his industrial injury the consequence of such condition could not be considered in determining whether or not claimant was permanently and totally disabled. However, the Board finds that Dr. Willis, in his deposition, stated that the treatment of lung cancer had nothing to do with the degenerative changes in claimant's upper back condition. After the issuance of the Determination Order on March 13, 1978 claimant attempted to return to work for the employer who advised him by letter that they could not accept

him back to work in the mill until he presented a complete medical release from one of his treating physicians for unrestricted physical work in a sawmill. On August 16, 1978 Dr. Carr, who had been one of claimant's treating physicians, reported, in response to the employer's request for a complete release and to its questions concerning what kinds of occupation claimant would be approved for, that claimant would have to be excluded from any occupations involving standing, bending forward, lifting, or any movement of his neck. He further stated:

> "When one takes into consideration his [claimant's] present age and general physical status, I doubt there is very much that Mr. Gibb [claimant] could be employed at the present time."

Dr. Willis, in attempting to determine a cause for the severe muscle spasms in claimant's neck, reported on July 5, 1978 that claimant did have some fibrotic changes in superclavicular areas and in the trapezius muscles which might be responsible for some stiffness and local discomfort. He stated, based upon his experience, that the amount of disability claimant was having had not occurred with radiation and muscle fibrosis alone; if claimant did indeed have arthritic changes of the cervical spine such changes would not be attributable to side effects of radiation therapy which might well be contributing to his symptomatology. In his deposition, Dr. Willis repeated his belief that the radiation therapy alone was not enough to cause the extent of the problems claimant was having and even if claimant had had surgery in the area following the radiation therapy he would not have had nearly the amount of problem with pain and disability that he is presently having. He felt that the primary direct cause of claimant's current problem is his degenerative spinal disease and that this is being contributed to by the effects of the radiation therapy on the muscles, an effect which wouldn't be clinically significant in the absence of claimant's other problems.

The Board concludes that claimant's present condition of permanent and total disability is directly related to his industrial injury of February 1, 1976. There is no question but that the lung cancer and the treatment therefor have had debilitating effects upon claimant, however, both Dr. Carr and Dr. Willis are of the opinion that the residuals of claimant's industrial injury, excluding any consideration of the lung cancer condition, are sufficient to prevent him from returning to any gainful and suitable employment on a regular basis.

ORDER

The order of the Referee, dated December 14, 1978, is modified.

Claimant is found to be permanently and totally disabled and this award shall be considered in lieu of the award made by the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-1934 June 21, 1979

BONNIE E. KING, CLAIMANT
Dye & Olson, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks Board review of the Referee's order which directed it to accept claimant's claim for aggravation, including the responsibility for the psychological condition and to pay claimant compensation as provided by law.

Claimant, at the time she suffered a compensable injury to her low back on January 18, 1973, was a 25-year-old nurse's aide. She was attempting to assist a patient into bed when she was injured. Her claim was closed on July 11, 1974 by a Determination Order which awarded claimant compensation equal to 64° for 20% unscheduled low back disability and also compensation for temporary total disability from January 18, 1973 through July 11, 1974.

On March 13, 1975 a stipulation granted claimant an additional award of 32° for her unscheduled disability. This was the date of the last arrangement or award of compensation.

At the time of the hearing on September 5, 1978 claimant was not medically stationary. She had filed a claim for aggravation which had been denied by the carrier on February 28, 1978 on the grounds that there had been no aggravation of claimant's condition since March 13, 1975. Furthermore, responsibility for psychological services furnished claimant by Dr. Ackerman, a clinical psychologist, was denied by letters dated April 13, 1978 and May 30, 1978.

Claimant had been seen by Dr. Ackerman three times between September 1974 and January 1975; he again saw claimant on April 24, 1975 which was after the claimant had received the additional 32° pursuant to the stipulated order. This visitation was based on a referral by claimant's vocational counselor. Claimant was seen by Dr. Ackerman approximately 15 times between April 24 and October 30, 1975. She returned to school in September 1975 and received high grades, however, in October her back and neck pain became more severe and she withdrew from school at the end of October.

On September 7, 1976 when Dr. Ackerman next saw claimant, she was complaining of increased headaches and GI symptoms. Claimant was upset and tense regarding the restrictions her back pain had placed upon the normal life she had hoped to pursue. Between September 1976 and March 1977 Dr. Ackerman saw claimant in therapy approximately 10 times. At that time claimant was working part time at a dog kennel and she appeared stable. During the latter part of February 1977 claimant was confined to bed for a pulled muscle suffered while handling dogs at the kennel. She looked for a less physically demanding job and returned for additional therapy on July 15, 1977.

Claimant contended that had it not been for the 1973 injury she could have continued her employment as a nurse's aide and she would have been able, from both an economical and a physical standpoint, to pursue the active life she contemplated. Dr. Ackerman, who had seen claimant approximately 20 times between July 1977 and June 2, 1978 in addition to the previous visitations he had had with her, was of the opinion that the loss of opportunity to continue as a nurse's aide was a continuing significant factor to claimant's 1978 psychological condition.

Subsequent to the last award of compensation on March 13, 1975 claimant was examined by Dr. Burck, a chiropractor, complaining of back pain, stiffness and numbness in the left hip. He felt this represented an exacerbation of her 1973 industrial injury. In November 1977 Dr. Burck expressed his opinion that claimant's condition had worsened since March 1975 and that she was unable to work due to her disability.

On January 19, 1978 claimant was examined at the Orthopaedic Consultants who found claimant's condition was stationary. They stated that if her claim had not been reopened it should be closed; no further therapy and, specifically, no further chiropractic manipulations were recommended. It was felt that claimant could not return to her former occupation even with limitations but that she obviously had many skills and should be referred for job placement assistance. Total loss of function and loss of function due to the injury was rated as mild. They could not find any objective evidence of worsening of claimant's injury from an organic structure point of view.

At the request of the carrier, claimant was interviewed by Dr. Quan, a psychiatrist, on January 20, 1978. He found claimant had a psychiatric impairment which preceeded her industrial injury, that her basic difficulty was a personality disorder and that she would have reached her present level of dysfunction whether or not she had been injured.

Dr. Ackerman and Dr. Burck both referred claimant to Dr. Fleshman who examined claimant on June 28, 1978 for complaints of persistant low back pain with radiation to the left leg. He concluded that claimant definitely had entrapment of a nerve root on the left and might require further neurosurgery. He, in turn, referred claimant to Dr. Throop, a certified specialist in psychiatry and neurology, who examined claimant on July 5, 1978 and performed an EMG and nerve conduction velocity examination of claimant's lower left extremity. The only abnormality he found was the minor compression of the nerve over the dorsal foot or ankle and he referred claimant back to Dr. Fleshman for conservative therapy concerning her low back. He did not recommend another myelogram or surgery.

In July 1978 Dr. Fleshman prescribed exercises and back protection procedures and said claimant could return to work in one month.

The Referee concluded that claimant had established by a preponderance of the evidence that her psychological condition for which she had been treated by Dr. Ackerman was materially and causally related to the consequence of her industrial injury in 1973 and that since the last award of compensation in March 1975 claimant had worsened psychologically and in her perception of disabling pain from the industrial injury. At times claimant had been unable to work due to the materially related conditions. He found that proof of organic, structural change was not required and that Dr. Ackerman was in the best position to evaluate the psychological causes.

Dr. Quan, based upon his examination of claimant on January 20, 1978, stated that claimant had a psychiatric impairment which preceeded her industrial injury and that she would have reached her present level of dysfunction regardless of whether she had suffered an industrial injury. Claimant successfully completed one term at Linn-Benton Community College and had a GPA of 4.00 on the subjects she completed. She does not recall how many terms she went to school but she quit during the second term. At the commencement of the third term, claimant apparently "panicked" upon seeing the cars on the parking lot, being in the midst of people and having to put up with noise. As a result of this she did not continue. Dr. Quan said that although an argument could be made that the injury added additional stress, it was his feeling that the stresses of coping with life would have likely led her to the same point.

The Board concludes that the preponderance of the evidence does not support a finding that claimant's psychological condition is causally related to her 1973 industrial injury nor does it support a finding that claimant's condition has worsened either from psychological or physiological standpoint since March 1975 which was the date of the last arrangement and award of compensation.

The three physicians at the Orthopaedic Consultants found no objective evidence of worsening of claimant's condition from an organic structural point of view. Dr. Burck, a chiropractor, felt that her condition had worsened, but he did not explain in what manner it had worsened. Neither Dr. Fleshman nor Dr. Throop expressed an opinion that claimant was not able to do some type of work. Dr. Ackerman, in his report of February 6, 1975, stated that he did not elicit a very detailed history of claimant's condition or inquire in detail about her pre-injury personality.

The Board concludes that the Referee erred in finding that claimant had established that her psychological condition was causally related to her industrial accident and also that her condition both from a psychological and physiological standpoint had worsened since March 13, 1975. Therefore, the denial by the carrier on February 28, 1978 of claimant's claim of aggravation and its denial of its responsibility for psychological services furnished claimant by Dr. Ackerman which was made through letters dated April 13, 1978 and May 30, 1978 should be approved.

ORDER

The order of the Referee, dated October 27, 1978, is reversed.

The denials made by the employer and its carrier on February 28, 1978, April 13, 1978 and May 30, 1978 are approved.

SAIF CLAIM NO. A 689013 June 20, 1979

ALVIE LEACH, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

A request for own motion relief, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for own motion relief now having been withdrawn,

IT IS THEREFORE ORDERED that the request for own motion relief now pending before the Board is hereby dismissed.

WCB CASE NO. 78-1562 June 20, 1979

BYRON MILLER, CLAIMANT
Steven C. Yates, Claimant's Atty.
Cosgrave & Kester, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Referee's order which granted claimant 48° for 15% unscheduled disability.

Claimant suffered a compensable injury to his low back on September 9, 1976 diagnosed by Dr. Paradis as a pelvic strain. At the time of the injury claimant was a 37-year-old millwright. On March 21, 1978 Dr. Roberts examined claimant and diagnosed a chronic cervical thoracic and lumbosacral sprain and gave claimant conservative treatment. Claimant was referred to the Callahan Center and his claim was closed by a Determination Order dated December 29, 1977 which granted compensation for temporary total disability only from September 15, 1976 to September 28, 1977, less time worked.

Claimant complained at the hearing of some limitation of motion in his low back and chronic back pain which was exacerbated by activity. He testified that this back condition affects his ability to perform activities which require prolonged sitting, driving, repetitive bending, stooping and heavy lifting. Films taken of claimant engaged in different activities tended to show that claimant exaggerated his disability.

Claimant has a GED. Over a three-year period he had taken courses in carpentry at Lane County Community College. Claimant has also had a four-year apprenticeship training program for a construction millwright. Prior to his injury claimant had a varied work background. He was involved in restaurant work, was a dance instructor, worked in the woods, worked in the sawmill, has done some welding layout work, and has also worked as a carpenter's helper. At the present time claimant is self-employed, cleaning, repairing and overhauling industrial sewing machines. He also manufactures traction devices which are used by the medical profession.

The Referee found claimant credible. He also found the medical evidence supported the claimant's testimony concerning his residual symptoms and limitations. Based on these findings, he concluded that claimant was entitled to an award of compensation for his permanent residual back impairment which will adversely affect his ability to return to his former occupation or to do any type of employment involving heavy work. He granted claimant 48° which represents 15% of the maximum for unscheduled disability.

The Board, on de novo review, finds no objective medical evidence which would support claimant's subjective complaints. Furthermore, the films indicate that claimant had little, if any, limitations which would affect his work activities.

Claimant was referred to a service coordinator but he showed a lack of cooperation and his claim was closed on the grounds that claimant, at that time, was self-employed and had various skills which would enable him to enter the labor market.

The Board concludes that claimant has suffered no loss of earning capacity as a result of the injury of September 9, 1976 and that the Determination Order which granted claimant compensation for temporary total disability only sufficiently compensated claimant for his industrial injury.

ORDER

The order of the Referee, dated December 19, 1978, is reversed.

The Determination Order, dated December 29, 1977, as reaffirmed by the Special Determination Order, dated February 23, 1978, is affirmed.

WCB CASE NO. 78-4099 June 20, 1979

LUCILLE M. PEMBERTON, CLAIMANT
David R. Vandenberg, Jr., Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Referee's order directing it to accept claimant's claim for aggravation.

Claimant had sustained a compensable injury on April 18, 1975; at the time of the injury she had been employed as a temporary laborer in a nursery and strained her upper back. She continued to work for the next ten days and then left because of the severity of symptoms. Claimant has not returned to work.

After her 1975 injury claimant was treated by Dr. Davis and Dr. Scheer, both chiropractic physicians. Her treatment consisted of chiropractic adjustments and, on June 3, 1975, Dr. Davis advised the employer that claimant could resume her regular work but was not medically stationary. On September 3, 1975 Dr. Scheer reported to the employer that claimant was medically stationary but had residuals of disability and he was referring claimant to Dr. Luce, a neurosurgeon.

On October 21, 1975 Dr. Luce examined claimant and found limitations of cervical motion and hypesthesia in the left forearm; he diagnosed degenerative disc disorder, C5-6, moderately advanced, C4-5, moderate, post-traumatic aggravation. He also diagnosed radiculopathy, C6, left, and hypertrophic arthrosis, thoracic. Although he recommended a cervical myelogram it was not performed.

On November 10, 1975 the employer had claimant examined by Dr. Balme, an orthopedic surgeon. Claimant had been previously examined by Dr. Balme about a month after her industrial accident. At that time she was complaining of mid-back pain under her left scapula and left anterior chest. He found some limitation of motion and diagnosed cervical spondylosis. He told claimant

he felt this was a self-limited problem and that she should enjoy spontaneous recovery. At the time of the recovery she could return to work without limitations. He noted several physical findings inconsistent with organic disease. He examined claimant again in November and made essentially the same findings but recommended that an electrocardiogram and profile be ordered. He did not recommend a myelography at that time. He felt her condition was stationary and advised her to return to work without any limitations.

Dr. Klump examined claimant on December 16, 1975. After this examination he felt the most likely explanation for claimant's difficulty was a muscle pull or strain at the time of the accident which should resolve spontaneously. He did not recommend specific treatment at that time; he did not feel that a myelogram was indicated. Based on his findings and the reports of prior examiners, he found it difficult to explain her symptoms.

On January 16, 1976 a Determination Order closed claimant's claim with an award of compensation for temporary total disability only.

On March 20, 1978 Dr. Dunn, who is associated with Dr. Luce, wrote claimant's attorney, stating he thought it was possible that claimant could be helped but it would require admission to the hospital. He suggested analgesic discograms at mid-cervical levels followed by a myelogram and consideration for anterior discectomy, depending upon the results of the test. He stated her symptoms were clearly the result of her 1975 injury. Based upon this letter, claimant's attorney requested the employer to reopen the claim for further medical care and treatment as suggested by Dr. Dunn. He had requested that the reopening be on the basis of aggravation. The employer deferred reopening of the claim but commenced payment of compensation for temporary total disability on March 17, 1978.

The employer again requested claimant be examined by Dr. Balme and Dr. Klump. The former examined claimant on April 12, 1978 and, after taking x-rays of her cervical spine and comparing them with the 1975 x-rays, concluded that, essentially, no change could be noted. He also felt that the amount of cervical spondylosis as noted on the x-ray film was consistent with the claimant's age. He discouraged aggressive, invasive medical programs such as a myelography or surgery and encouraged claimant to try to make a full recovery. At the time of this examination he stated he would allow claimant to return to work at a level that she was capable of performing prior to the industrial injury.

Dr. Klump examined claimant on April 16, 1978 and found very little objective evidence of significant abnormality, however, there was a suggestion of conversion reaction with decreased appreciation of pain in the left upper extremity. In his opinion, the claimant's symptoms did not appear to be worse. A myelogram might be of help but he placed very little faith in the results from cervical discography; only if the myelogram was distinctly positive would he recommend surgery.

The employer, by letter dated April 26, 1978, advised Dr. Dunn that it would authorize and accept responsibility for a myelogram; however, it would not reopen the claim until it had been informed of the results. On May 26, 1978 the employer, not having received the results of a myelogram, denied claimant's claim for aggravation.

On August 8, 1978 Dr. Dunn repeated his opinion that claimant's pain was clearly the result of her cervical spondylosis which has been aggravated by her accident. The myelogram, which was finally performed on October 31, 1978, indicated some defects at C4-5 and C5-6 and Dr. Dunn felt that the disc should be removed. Dr. Klump viewed the myelogram and doubted that the defects were causing the claimant's shoulder and arm symptoms but he did not question Dr. Dunn's judgment. Dr. Klump felt that the myelogram indicated changes of spondylosis and that was not work-related.

The Referee concluded that the compensable injury of 1975 aggravated a pre-existing, although asymptomatic, cervical spondylosis. He also concluded that claimant's condition had worsened since the last award or arrangement of compensation. Relying upon Dr. Dunn's report of June 7, 1978 he found that the worsening resulted from the industrial injury.

The Board, after de novo review, finds that any worsening of claimant's condition is attributable to her non-industrial spondylosis. Both Dr. Balme and Dr. Klump stated that claimant's subjective symptoms were not fully explained by their objective findings. Dr. Balme found claimant had changes of cervical spondylosis but insofar as the film taken of claimant's upper back, he found no change between the x-ray findings of 1975 and x-ray findings of 1977. Neither Dr. Balme nor Dr. Klump related claimant's symptoms to her cervical degenerative changes and both felt that claimant could return to work with no limitations. The Board finds the opinions of Dr. Klump and Dr. Balme more persuasive.

The Board concludes that claimant has failed to prove by a preponderance of the evidence that her condition, insofar as it relates to her industrial injury of April 18, 1975, has worsened since July 16, 1976, the date of the Determination Order which awarded her compensation for temporary total disability only.

ORDER

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

The denial of May 26, 1978 is affirmed.

WCB CASE NO. 77-2125 June 20, 1979

GEORGE PHILPOTT, CLAIMANT
Richard A. Carlson, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which granted him 224° for 70% unscheduled disability.

Claimant, at the time of his industrial injury on October 23, 1973, was a 46-year-old mechanic. He was struck across the thighs by a metal rod and suffered bilateral quadriceps strain and lumbar strain.

Claimant had back surgery twice and has not worked since June 1974 although he has attempted to return to work. The medical evidence indicates claimant is restricted to light, possibly sedentary, work. Claimant's work background consists mainly of heavy duty work, e.g., a heavy construction, logging and heavy duty operations. Obviously, claimant cannot now return to any of these types of employment. However, claimant has obtained a GED, he had some high school education, and has scored very well in all of the aptitude tests which he has been given which indicates he has somewhat better than average intelligence.

The Referee concluded that claimant was medically stationary from a psychological and medical standpoint. He concluded that claimant was not permanently and totally disabled because of a report from Dr. Abrams, a clinical psychologist, which indicated to the satisfaction of the Referee that claimant was inhibited by a secondary gain influence motivation not to return to work.

Dr. Pasquesi had examined claimant on May 27, 1976 and rated claimant's impairment as 52% of the whole man. The Referee used this rating of impairment as a starting point and then took into consideration the effect of the causally related psychopathology as opposed to claimant's superior intellectual qualities and aptitudes plus his motivational problem and reached the conclusion that claimant was entitled to 70% of the maximum for unscheduled disability.

The Board, on de novo review, finds that claimant has been, because of the limitations placed upon him as a result of the industrial injury, precluded from returning to the types of employment in which he has had considerable experience. The Board reaches the same conclusion as that reached by the Referee, however, the Board's conclusion is based upon claimant's loss of wage earning capacity.

It agrees with the Referee that claimant is not permanently and totally disabled. Claimant is a fairly young man and he has shown, through the aptitude tests, that he has a higher than average intelligence and obviously can be retrained for light work. There are types of gainful and suitable employment available to claimant.

Apparently, the largest obstacle in the path of claimant's return to the labor market is claimant's own resistance to any assistance which might aid him in learning the types of employment which he is now physically and mentally able to do. The Board strongly urges claimant to take advantage of the services offered by the various agencies in this state which offer vocational rehabilitation programs.

ORDER

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

WCB CASE NO. 78-3009 June 20, 1979

PATRICK UDOSENATA, CLAIMANT
David A. Vinson, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer requests the Board to review the Referee's order which directed it to accept claimant's claim and pay compensation from Janaury 20, 1978, less time worked, until the claim is closed pursuant to ORS 656.268.

Claimant was a 38-year-old laborer who commenced working for the employer on January 5, 1976 as a security guard and clean-up man. On April 30, 1977 claimant was involved in an automobile accident which injured his lower back and required claimant to miss 2-1/2 months from work. Claimant returned to work on July 18, 1977 and had no particular problems doing the same job he had had prior thereto.

Claimant continued to work as a security guard and clean-up man until November 1977 when he was transferred to a janitorial job which required him to load chips from a machine into a wheel barrow and empty them into a large container. This job was more strenuous than the former job.

On October 14, 1977 claimant's supervisor dicussed with him the quality of his work and claimant, in writing, attempted to justify it.

Claimant testifies that on January 20, 1978, while unloading chips, a bin tipped back striking him in the rib cage and chest and although he was able to hold the bin until another worker hooked a crane to the bin and lifting it he has had chest pains and difficulty lifting his hands over his head since that time. Claimant was working a 3:00 p.m. to 11:30 p.m. shift and at the time of his injury he had not reported to his immediate supervisor who left between 4:00 and 5:00 p.m. The injury occurred at the end of claimant's shift.

Claimant filed a claim which was initially accepted and claimant was examined by Dr. Luethe who referred him to Dr. Fechtel. In his examination report Dr. Fechtel stated that claimant had had severe back pains since the automobile accident in April 1977 and that his condition was aggravated by his job. The complaints of pain were in the mid and lower thoracic spinal areas and in the lumbosacral area. Dr. Luethe was of the opinion that claimant's condition was due to the automobile accident of April 1977, aggravated by his work activity.

On March 8, 1978 the employer denied the claim on the ground that the claimant's condition was due to his automobile accident and did not arise out of his employment.

The Referee found that after the automobile accident in April 1977 claimant returned to work and was able to perform satisfactorily without any particular problems until the incident on January 20, 1978 after which he was off work until July 18, 1978. The Referee concluded that whether or not claimant suffered a compensable injury as he had alleged he did is a fact question turning largely on whether or not claimant's testimony is believeable in light of all the other evidence. He found, after hearing all of the witnesses and examining all of the evidence, that the preponderance of the evidence justified a finding that the claimant's claim was compensable.

The Board, on de novo review, finds that claimant did not suffer a compensable injury. There are too many conflicts in the dates contained in the medical reports. Furthermore, claimant stated that he had a witness to the alleged injury, yet he failed to call this witness. It is reasonable to assume, therefore, that this witness would not have testified favorably to claimant's case.

The Board finds that claimant has failed to meet his burden of establishing by a preponderance of the evidence that he had suffered a compensable injury on January 20, 1978.

ORDER

The order of the Referee, dated December 27, 1978, is reversed.

The denial of the employer, dated March 8, 1978, is affirmed.

WCB CASE NO. 77-7748 June 21, 1979

HELEN BERNDT, CLAIMANT
Don S. Dana, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks review by the Board of the Referee's order which granted claimant 224° for 70% unscheduled disability and stated that claimant's aggravation rights would commence to run from November 30, 1977 rather than June 30, 1976.

Claimant suffered a compensable injury to her low back on August 21, 1975. She has not worked since her injury. Her claim was originally closed by a Determination Order dated June 30, 1976. This order awarded compensation for temporary total disability and 64° for unscheduled low back disability.

The claim was reopened pursuant to a stipulation and closed again on November 30, 1977 by a Determination Order which awarded additional compensation for temporary total disability and an additional 48° for unscheduled disability, giving claimant a total of 112° which is 35% of the maximum allowable by statute for unscheduled disability.

The additional temporary total disability benefits commenced on the day after the first temporary total disability benefits terminated, therefore, claimant has received temporary total disability benefits from August 22, 1975 through July 28, 1977. At the hearing, issue was raised regarding the date from which the claimant's aggravation rights should properly start. It was argued that since temporary total disability compensation was continuous from the date of the injury the aggravation rights should run from the date of the Second Determination Order rather than from the date of the First Determination Order.

Claimant is a 62-year-old widow with an 8th grade education. Her work background consists primarily of working as a housekeeper. She had previous experience as a cannery worker. She has worked 18 years for the employer as a psychiatric aide I. Her work consisted of taking care of the patients at Fairview Hospital. Her duties included bathing, feeding and putting patients to bed.

Claimant originally received medical care from Dr. Morrison who referred her to Dr. Mayhall. Dr. Mayhall continued from that time on to be claimant's treating physician. He indicated in his final report on July 28, 1977 that claimant was medically stationary. He concluded that no active treatment would improve her situation. He reported that housework and lifting caused her pain as did prolonged walking and standing. He found objective evidence of moderate disc degeneration with subjective complaints of pain. He expressed the opinion that work to which she might return should be extremely light.

Claimant testified that she had extreme difficulties with her back and that any exertion would exacerbate the pain. She testified that pain materially restricted her ability to do all housework, except in a very slow manner. She further stated her two daughters came in and helped with the housework. She testified that she would like to put in 20 years working for the state and wasn't anxious to retire, but due to her industrial injury she felt that she was forced to do so.

Claimant has made no attempt to return to work; she claims that there is little or nothing that she could do. At the present time, her income consists of state disability retirement and Social Security disability benefits.

A service coordinator for the Workers' Compensation Department testified that, based on claimant's physical condition, education and attitude, attempts at vocational rehabiliation were likely to fail. The service coordinator stated she did not believe that claimant was not motivated to work. She expressed the opinion that claimant would like to work but felt her condition was such that she could not work. The service coordinator said that even though vocational rehabilitation had little chance of success, if claimant <u>really wanted to work</u> she would do so, even if it caused some pain. The service coordinator's opinion was that claimant could find some type of employment within her physical capabilities.

After the hearing was concluded, an additional medical report was received from Dr. Mayhall, dated May 19, 1978. Dr. Mayhall stated that claimant was showing some improvement after a change in the medication, that neurologically she remained normal and he felt that she had a lumbar strain superimposed on degenerative arthritic changes. He had reviewed her case and found there was little, if any, change in claimant's condition since his previous reports in July 1977 and November 1976. She had some decreased range of motion in her back with loss of full

flexibility and loss of lateral bending. He also thought that her back impairment appeared to be stationary at that time and there had been no changes. He believed the award equal to 35% of the maximum was consistent with her loss of back function. However, on June 19, 1978, Dr. Mayhall wrote to claimant's attorney indicating that his previous reference to the 35% impairment award probably should have been called a disability award as it apparently was an administrative decision. He stated that physicians in Oregon were not required to rate disability and he was merely stating what he though appropriate insofar as claimant's impairment was concerned.

The Referee found it reasonable to conclude that claimant was having difficulty with her back. He felt that, to a certain extent, she was exaggerating the difficulty. He noted Dr. Mayhall's rating of 35% impairment to the back but stated, correctly, that disability is not rated solely on impairment.

The Referee concluded as follows: Taking into consideration the fact that claimant is 62 years old, has only an 8th grade education and has had very little work experience except that of a housekeeper (until she went to work for the state as a psychiatric aide at Fairview Hospital 18 years ago) and assuming that claimant had no difficulties with her back until the industrial injury, it would be unlikely that the claimant could return to the type of work in which she had had many years of experience.

The Referee further concluded that the claimant lacked motivation to participate in any type of vocational rehabilitation nor would she try to train herself for any other type of employment. He concluded that if claimant was to be considered out of the labor market it was not entirely due to her industrial injury but was a combination of that injury plus her age and lack of motivation. He agreed with Dr. Mayhall's rating of impairment and considering it with the other factors found claimant's loss of wage earning capacity to be 70%.

The Board, on de novo review, notes that the only issue before it on review is the extent of claimant's permanent disability. The Board finds the medical reports do not justify an award equal to 70% of the maximum. Claimant is 62 years old, she says she wants to continue to work yet she has made no attempt whatsoever to look for any type of work within her physical capabilities. She has not provided meaningful cooperation with those who have offered vocational rehabilitation assistance.

Dr. Mayhall stated that claimant could do light type work and in May 1976 released her to do this type of work. She still made no attempt to look for work.

Although claimant's objective findings on medical examination remain fairly constant, her subjective complaints have decreased. Claimant stated that she had constant pain until October 1976; thereafter, she noted some improvement and stated her pain was not as severe. There is a possibility that her discomfort could be further reduced with the use of surgery, weight loss and exercise. Claimant has refused surgery and has not lost weight. She is able to do light housekeeping chores around her house and received $304 each month from the Social Security Administration plus an additional $164 each month from the state retirement system.

The Board concludes that most of the factors which are keeping claimant from returning to the labor market are not job-related. The two previous awards total 35% of the maximum and, in the opinion of the Board, adequately compensate claimant for the loss of wage earning capacity resulting from her industrial injury.

ORDER

The order of the Referee, dated December 1, 1978, is reversed.

The Determination Order, dated November 30, 1977, is hereby affirmed.

CLAIM NO. A 814123 June 21, 1979

CLARENCE BOYEAS, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

A request for own motion relief, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for own motion relief now having been withdrawn,

IT IS THEREFORE ORDERED that the request for own motion relief now pending before the Board is hereby dismissed.

WCB CASE NO. 77-7905 June 21, 1979

DONALD BUTTON, CLAIMANT
Charles Robinowitz, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests Board review of the Referee's order which reversed its denial dated December 5, 1977 of claimant's claim for right knee disability and the surgery therefor and remanded the claim for acceptance and payment of compensation as provided by law; directed the Fund to pay all claimant's reasonable medical hospital bills in connection with the claim, plus a 25% penalty for unreasonable resistance to the payment thereof; directed it to pay claimant compensation for temporary total disability between October 31, 1977 and December 5, 1977, the date of the denial, plus a penalty in the amount of 25% of the accrued compensation for temporary total disability for unreasonable failure to pay it; assessed a penalty against the Fund in the amount of 25% of the sum of $371.34 for unreasonable delay in the payment of said sum; awarded claimant's attorney an attorney's fee of $2,000 to be paid by the Fund and, based upon a stipulation of the parties made at the hearing, vacated the Determination Order dated February 27, 1978.

Claimant suffered an injury to his right knee on August 24, 1977 when a log rolled against him. Claimant was working as a timber cutter making approximately $140 a day based on a $4.50 rate per thousand. Claimant was taken to the hospital for emergency treatment and the x-ray films indicated no fracture but there was a soft tissue injury to the right thigh.

Dr. Holbert reported on August 31, 1977 that claimant was hit in the right trochanteric area by the end of a log which pinned him against a stump. Claimant heard a snap and had pain at symphysis and over right greater trochanter. He was seen at the emergency room at the Bay Area Hospital by Dr. Callen and then returned to work until the end of August when the pain was so great that he was seen by Dr. Holbert who found a sprain at the joint of the pubic bones and contusion, right hip.

Claimant remained off work from August 31 through October 31, 1977. Although he did not have pain in his right knee, initially, as time passed the hip improved and the knee worsened. Despite the pain, he asked Dr. Holbert for a release to return to work and tried working for his father for three or four days after October 31, 1977. The pain in the right knee was too much and he quit.

Dr. Holbert performed an arthrogram on November 8, 1977 which revealed a tear of the posterior horn of medial meniscus. A medial meniscectomy was done on November 30, 1977. Dr. Holbert stated that the tear was a fresh one and couldn't be more than a few weeks old.

On December 5, 1977 the Fund denied responsibility for the right knee injury and the resulting surgery.

On December 12, 1977 Dr. Holbert informed the Fund that the claimant felt his knee problem was probably related to the August 24, 1977 injury. He said that there was nothing in his chart notes to indicate a problem with the right knee at the time but that he had certainly received a blow on his right hip and right thigh area and at the time of the surgery the knee cartilage injury was not an old cartilage injury. On October 21, 1978 Dr. Holbert expanded his opinion, stating that when he first saw claimant he had pain in the right greater trochanter area as well as in the medial thigh region. This pain improved but claimant had increasing difficulty with his right knee. He stated that a small tear started at the moment the log hit claimant in the right upper thigh which could have been extended and could present itself as a disabling problem in the time sequence in which they were dealing.

The Referee found that this was adequate medical causation; he felt that the fact that the pelvic area healed well did not preclude the existence of an injury to the knee on August 24, 1977 and the comments of Dr. Holbert which referred to a fresh tear convinced him claimant had suffered that tear on August 24. He also found that the tear required the surgery.

Dr. Holbert's deposition made it even more clear that he felt there was causal relationship between claimant's knee problem and the August 24, 1977 incident.

Claimant was finally released to work on January 13, 1978. He had received no compensation for temporary total disability since October 31, 1977.

The Referee concluded that claimant's claim was compensable, therefore, the denial by the Fund should be set aside. He further found that the Fund had not paid any medical or hospital bills relating to claimant's knee surgery performed on November 8, 1977. He ordered the Fund to pay those bills, plus a penalty equal to 25% of this amount for unreasonable resistance to the payment thereof.

The Referee found that despite many telephone calls from claimant to the Salem office of the Fund, the Fund miscalculated his weekly temporary total disability benefits. On June 1, 1978, which was over a month after the hearing, the Fund sent a check to claimant for the balance of his disability benefits through October 31, 1977 but it refused to pay any interest on the delayed payment.

The Referee concluded that the Fund had waited too long to pay claimant the difference between the proper rate and the rate it had paid him for his temporary total disability, therefore, claimant was entitled to a penalty equal to 25% of the difference between the proper rate and the rate paid claimant for temporary total disability, this difference was $371.34, for its unreasonable delay in making the adjustment.

The Referee found that claimant was entitled to receive compensation for temporary total disability from October 31, 1977, the last date claimant received such compensation, and until December 5, the date the Fund denied claimant's claim, plus a penalty equal to 25% of that compensation assessed for unreasonable failure to pay it. He also awarded claimant's attorney a sum of $2,000 as a reasonable attorney's fee to be paid by the Fund.

The Determination Order was vacated pursuant to a stipulation made by the parties at the hearing.

The Board, on de novo review, agrees with the majority of the Referee's findings and conclusions. However, the Board finds that claimant should be paid compensation for temporary total disability from August 24, 1977 to January 13, 1978, less any time worked during that period and with a credit given the Fund for any payment it has made claimant for temporary total disability pursuant to the Determination Order of February 27, 1978.

The Board does not find any justification for assessing penalties against the Fund for the failure to pay medical and/or hospital bills relating to claimant's knee surgery or the bills submitted by Dr. Holbert for the surgery and the pre- and post-surgical care. The arthrogram was perforemd on November 8; the medial meniscectomy was done on November 30, 1977. The Fund denied responsibility for the claim on December 5, 1977. The Board concludes that the Fund is responsible for the bills, however, there was no consequential delay between the surgery and the denial.

ORDER

The order of the Referee, dated January 22, 1979, is modified.

The Fund is not required to pay a sum equal to 25% of claimant's reasonable medical and hospital bills as a penalty.

Claimant is entitled to compensation for temporary total disability from August 24, 1977 to January 13, 1978, less time worked, and the Fund shall be given credit for any payments for temporary total disability which it has previously made pursuant to the Determination Order of February 27, 1978. Claimant is entitled to additional compensation, as a penalty, in the amount of 25% of the compensation for temporary total disability due claimant from October 31, 1977 to December 5, 1977 for unreasonable failure to pay compensation between those dates.

In all other respects the Referee's order is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with thie Board review in the amount of $300, payable by the Fund.

WCB CASE NO. 78-490 June 21, 1979

BILLY D. GIBLER, CLAIMANT
Sanford Kowitt, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which granted him 240° for 75% unscheduled low back disability. Claimant contends that he is permanently and totally disabled.

On February 5, 1975 claimant, a 49-year-old milling machine operator, injured his low back. Initially, claimant was given conservative treatment, however, on January 13, 1976, a pseudoarthrosis at the L4-5 level was discovered. Claimant had had a fusion at that level in 1959. A bilateral transverse process fusion from L4 to the sacrum was performed but claimant's symptoms persisted. On February 23, 1977 additional back surgeries were performed at the L4-5 and L5-S1 levels. Claimant's problems continued and on September 18, 1977 more surgeries were done.

In November 1977 the Orthopaedic Consultants found claimant's condition was medically stationary. Claimant's treating physician, Dr. Goodwin, agreed. The claim was closed by a Determination Order dated January 5, 1978 which awarded 208° for 65% unscheduled back and right shoulder disability.

Claimant is 53 years old and he did not finish grade school. A psychiatrist evaluated claimant's intelligence as being in the low-normal range. The Referee felt that such evaluation was based primarily on claimant's lack of education rather than his ability to learn. The claimant testified at the hearing that he had taught himself to read blueprints while working as a janitor for the employer and it was the Referee's opinion that it would have been impossible for him to do so unless he was at least of high-average intelligence.

Claimant's work background consisted of working on farms, working as a deck hand on tug boats, both occupations having been followed during the early years of claimant's life. Claimant had also worked as a carbon setter in an aluminum plant, owned and operated his own bar and restaurant and worked as a night watchman. In June 1958 he became employed by the defendant as a janitor. After learning to read blueprints and also benefiting from on-the-job training claimant became a machinist. At the time of his injury he had progressed to the point that he had sufficient knowledge and skill to set measuring instruments and fix gauges. The Referee concluded that claimant's adaptability is as good as, and probably better, than average.

Claimant has had low back symptoms since his mid 20's. Following his 1959 injury claimant was able to return to work and although he had intermittent symptoms he continued to work at his job until the injury of February 5, 1975.

Claimant testified that since the 1975 injury his back goes out almost once every month and when this occurs he is unable to get out of bed. Almost anything can cause these "flare-ups". During the last year claimant has developed cervical symptoms which he stated began during physical therapy. The Referee found that claimant's cervical complaints were related only to his aging process and were not causally related to his compensable injury.

At the hearing one of the vice-presidents of defendant testified that the defendant had a part time job ready and waiting for claimant which would enable him to work as many hours per day as he felt capable of doing and that during the job he could sit or stand as necessary. The job was one which would be considered in the light type category.

Prior to the hearing claimant had never been informed of the existence of such a job and in October 1977 he was notified that he had been terminated on June 30, 1977. The Referee found that although such a job would be of help to claimant, both physically and psychologically, he was rather skeptical as to the existence of such position and doubtful that if it did exist that it would remain available after legal processes were completed.

Setting aside the question of whether a possible employment for claimant existed or not, the Referee concluded that claimant had failed to prove that he was permanently and totally disabled. The doctors had rated his disability to be in the mildly-moderate range and claimant, in the opinion of the Referee, failed to carry the burden as set forth in ORS 656.206(3).

Claimant has not attempted to seek employment nor vocational rehabilitation. The Referee found that in view of claimant's educational limitations, vocational rehabilitation would not be feasible but stated that any person who could teach himself to read blueprints and acquire the skills which claimant had must have more potential than he was given credit for.

The Referee found that although the Determination Order included an award for claimant's right shoulder, he had found no evidence that claimant had ever sustained a right shoulder injury or that he had any disability in his right shoulder. Based upon the evidence as a whole, the Referee concluded that claimant had sustained 75% unscheduled low back disability as a result of his February 5, 1975 injury and he accordingly increased the award granted claimant by the Determination Order from 208° to 240°.

The Board, on de novo review, finds that claimant is permanently and totally disabled. The Board finds that because of the industrial injury in 1975 claimant is precluded from returning to any types of employment within which he engaged prior to his industrial injury.

The medical evidence indicates that claimant has had low back problems for many years and he had a serious industrial injury in 1959 which required back surgery, however, claimant had always been able to work on a regular basis. Even after the back surgery he was able to return and continued to work until February 5, 1975. Since that time claimant has been unable to do much of anything.

At the time of the hearing claimant was 52 years old and had undergone four surgical procedures to his low back; he also suffers from a kissing spine syndrome, L2 to L4. Practially every doctor who has examined and/or treated claimant feels that it would be impossible for him to return to gainful and suitable employment on a regular basis.

The Board agrees with the Referee's expression of doubt regarding the job offered claimant by the employer at the hearing. If such job existed, why wasn't the claimant informed of it before the hearing? It certainly would have been to the advantage of the employer had this been done.

The Board concludes, despite the Referee's belief that claimant had a good potential for retraining, that claimant is in such severe pain, has so many physical limitations and has undergone multiple surgeries which constitute surgical intervention to at least four vertebrae bodies, a serious insult to the claimant's spine and body, that all the intelligence and adaptability in the world would not make or assist claimant in becoming gainfully employed at a suitable occupation on a regular basis.

The Referee concluded that the shoulder disability was not related to his industrial injury; the Board finds no evidence to support this conclusion.

ORDER

The order of the Referee, dated November 7, 1978, is modified.

Claimant is considered to be permanently and totally disabled as of the date of the Referee's order. This is in lieu of the award made by the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 77-2965 June 21, 1979
WCB CASE NO. 77-3173

JOHN D. McCARTER, CLAIMANT
Robert A. Lucas, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Employer's Attys.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Wausau

Reviewed by Board Members Wilson and Phillips.

On September 28, 1978 the Board received a request from Employers Insurance of Wausau, hereinafter referred to as Wausaw, to review the second amended Opinion and Order of the Referee, dated August 29, 1978, which approved the denial of claimant's claim for aggravation filed against Hearin Products, and its carrier, Wausau, dated October 27, 1977.

On January 4, 1979 Crown Zellerbach, a self-insured employer, moved for a dismissal of the request for Board review by Wausau, contending, first, that it was not timely filed, and second, that Crown Zellerbach was not at any time a party to WCB Case No. 77-2965 because it had been allowed by the Referee to withdraw from the hearing on the basis of a collateral case designated as WCB Case No. 77-3173 which had been settled by Crown Zellerbach on a bona fide dispute basis.

The Board, after consideration of the memoranda filed both in behalf and in opposition to the motion, denied the motion to dismiss and concluded that the matter could be reviewed by the Board.

Claimant suffered a compensable injury to his low back on September 13, 1971 while working for Hearin Products, whose carrier was Wausau. The claim was closed by a Determination Order, dated April 26, 1973, whereby claimant was awarded 64° for 20% unscheduled low back disability.

In January 1974 claimant became employed by Crown Zellerbach. He testified that at this time his back hurt but he was still able to do the work and did not feel that it would be risking a reinjury to take this job. Claimant worked at various jobs for Crown Zellerbach until February 1977 when his back gradually began to worsen. He could not point to any specific incident or injury; he just testified that his back kept hurting and that was the reason he was constantly changing jobs while working for Crown Zellerbach. His final job operating a bobcat really bothered his back and he returned to his initial employment as a clean-up man.

Claimant filed a claim for a new injury against Crown Zellerbach which was denied on April 26, 1977. He also filed a claim for aggravation against Wausau which was denied on October 27, 1977. An order designating Wausau as the paying agent was issued pursuant to ORS 656.307. Nine months after the issuance of the .307 order Crown Zellerbach settled the new injury claim on a disputed claim basis. The Referee who approved the disputed claim had no knowledge of the issuance of the .307 order nor was its existence disclosed by the attorney for Crown Zellerbach.

Based upon the bona fide dispute which had been signed by all parties and approved and in the absence of any objection on the part of the attorney for Wausau, the Referee at the time of the .307 hearing had no choice but to grant Crown Zellerbach's request to be dismissed as a party to that hearing and the only question left to be resolved was claimant's appeal of Wausau's denial of his aggravation claim.

The Board, on de novo review, finds that the order designating paying agent pursuant to ORS 656.307 was entered on September 2, 1977 and copies were furnished to both Wausau and Crown Zellerbach.

ORS 656.307 provides for the determination of responsibility between carriers for the payment of compensation on a claim which is otherwise compensable. The perfect example for the basis of the issuance of an order pursuant to this statute is where one carrier will deny responsibility for a compensable injury claimant has suffered because it contends the injury is the responsibility of another carrier and the other carrier will admit claimant has suffered an injury but denies that it is its responsibility. ORS 656.289(4) provides that "in any case where there is a bona fide dispute over compensability of a claim, the parties may, with the approval of a referee, . . . by agreement make such disposition of the claim as is considered reasonable" [emphasis supplied].

In this case, both parties had denied responsibility for claimant's 1977 condition of low back pain. The order issued pursuant to ORS 656.307 not only designates the paying agent until a determination of the responsible paying party has been made, it also refers the matter to the Hearings Division to set a hearing pursuant to ORS 656.307 to determine the issues of benefits to the claimant and, if necessary, make monetary adjustments between the parties involved.

Crown Zellerbach was informed well in advance of their bona fide dispute settlement that a hearing was set to determine responsibility of claimant's 1977 condition. The issue was whether claimant had aggravated his 1971 injury for which Wausau would be responsible or whether he had suffered a new injury which would place the responsibility therefor on Crown Zellerbach.

The Board concludes that under this set of circumstances Crown Zellerbach was not in a position to take advantage of the provisions of ORS 656.289(4) in the absence of a showing that there was a complete denial of any injury sustained by claimant while in Crown Zellerbach's employ. If this was the position which Crown Zellerbach wished to take, they should have immediately advised the Compliance Division of the Workers' Compensation Department that this was not a case wherein an order could be issued pursuant to ORS 656.307 because it was more than a denial of responsibility; it was a denial of compensability. They did not do this and the Board concludes that the bona fide dispute settlement should be set aside.

The Board concludes that the directives contained in the order issued on September 2, 1977, pursuant to ORS 656.307, have never been followed. The issue of which carrier, if either, is responsible for claimant's low back condition for which he filed claims against both employers has never been fully resolved. Therefore, the Hearings Division should set this matter down for hearing to take evidence on this issue and to determine if it is necessary to make any monetary adjustments between the parties involved.

ORDER

The bona fide dispute order which was approved on May 12, 1978 is hereby set aside.

The order issued on September 2, 1977 by the Compliance Division of the Workers' Compensation Department, pursuant to ORS 656.307, is referred to the Hearings Division to set for hearing the issues set forth in said order.

WCB CASE NO. 77-5737 June 21, 1979

DONNA J. SHILLING, CLAIMANT
Frohnmayer & Deatherage, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund seeks review by the Board of the Referee's order which reversed its denial of claimant's claim.

Claimant's husband, John, was the manager of the Village Motor Inn. The contract of hire, dated March 15, 1975, was signed only by the owners of the Inn and John Shilling, however, it was understood that claimant would be assisting John as head housekeeper and assistant manager, although she was listed on the payroll as a maid.

On November 17, 1975 claimant sustained an injury while working on the job. The claim was closed by a Determination Order dated June 16, 1978 which awarded claimant compensation for temporary total disability from November 17, 1975 through April 17, 1978 and 96° for 30% low back disability. This injury required three back surgeries; the last one was performed in July 1976.

The contract of hire provided that John would receive 10% of the annual room rent as his yearly compensation. There were 49 rental units and John drew $600 a month. The manager's apartment was furnished rent-free to both John and claimant as additional compensation. John and claimant moved into the manager's apartment on March 15, 1975, were subsequently married on July 1, 1975, and lived there until July 31, 1977. After the November 1975 injury claimant continued to live in the manager's apartment but she did very little work because her hospitalizations and slow recoveries had greatly incapacitated her. However, she was present and did answer the phone and helped in a small way in the management activities when John was absent or unavailable. She was not carried on the payroll after November 17, 1975.

On March 29, 1977 claimant and her husband had gone out to dinner. When they returned to the Inn, John went to one room to sleep and claimant went to the bedroom area of the manager's apartment. Hearing a noise outside, she saw two men attempting to break into a vending machine and she went out and attempted to stop them. She was seriously beaten by the two men.

Claimant was able to crawl to the phone and call the police. She was taken to the hospital and remained there until April 21, 1977. The discharge sheet signed by Dr. Wilson indicated recurrent lumbar nerve root irritation, with considerable psychiatric overlay.

Claimant filed a claim which was denied by the Fund on July 18, 1977 on the basis that claimant was not, at the time of that injury, an employee of the Village Motor Inn and she was not in the course and scope of any employment.

The Referee concluded that claimant was protecting the premises of the employer. She was not on the payroll but she was receiving compensation through the use of the manager's apartment in which she lived. Her actions in protecting the premises benefited the employer because part of the monies put into the vending machines were paid by the vending machine operator to the owners of the Inn.

The Referee further concluded that although claimant was only able to help to a minimal degree in assisting the manager, nevertheless, she was performing limited duties. The owners of the Inn were aware of claimant's work activities and expected that she would do what she could to aid and assist her husband in the management of the premises. The action which claimant took on the night she was beaten could reasonably be expected by the employers. Claimant was on their premises and acting to protect their interests.

Although it was not contained in the contract of hire, it was understood that claimant and her husband were to manage the motel operations as a "working team" and the employer consented to that arrangement. The evidence indicates that the employers contemplated and encouraged such a team working together to protect and promote their interests.

The Referee overturned the denial and remanded the claim for the incident of March 29, 1977 to the Fund to be accepted for the payment of compensation as provided by law.

The Board, on de novo review, agrees with the findings and conclusions of the Referee. Claimant was a subject employee and the incident of March 29, 1977 arose out of and in the course of her employment. The denial was improper and the claim was correctly remanded by the Referee to the Fund to be accepted.

ORDER

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

WCB CASE NO. 78-5437 June 21, 1979

WILLIAM W. WYNEGAR, CLAIMANT
Spence, O'Neal & Banta, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim for an injury sustained on May 18, 1978 to it for acceptance and payment of compensation to which he is entitled.

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

ORDER

The order of the Referee, dated January 2, 1979, is affirmed.

Board Member McCallister dissents as follows:

I disagree with the opinion of the majority. I do not find the claimed injury of May 18, 1978 involving the lifting of a truck tire compensable.

The claimant testified he had experienced back problems prior to the claimed injury-producing incident (Tr. p. 13 and 14). This fact becomes significant when considered in the light of claimant's later testimony (Tr. p. 15) when asked why he did not immediately report the tire incident injury to the employer:

> "Q. Why was it that you didn't say anything to him?
>
> "A. Well, because, like I said, I have hurt my back before; I have sprained it or something, and I didn't think there was anything wrong with it, see, and so that next morning -- until I started to get out of bed, then I realized that I had actually hurt my back pretty bad."

And again, Tr. p. 17:

> "Q. Well, why was it that you didn't go to the doctor until the 22nd?
>
> "A. Well, because I didn't -- like I said, I didn't think it was that bad. So, I had my wife make an appointment Monday morning and Dr. Parsons got me right in then. I figured it would go away" (Emphasis added).
>
> "Q. Why didn't you go to the emergency room that day?
>
> "A. Well, because, like I say, I figured it would pass. I hurt it before and I -- of course, not that bad."

Again, Tr. p. 19:

> "Q. These occasions when you were working for Mr. Graf and you had lost some time because of your back, did you not seek any treatment on those occasions?
>
> "A. No."

This testimony indicated (1) a claimant who had a back problem which pre-existed hire by the employer herein, (2) that these problems persisted during the period of employment, (3) the back problem had from time to time become symptomatic, (4) the claimant had reacted to these symptomatic episodes with home remedies and (5) he did not routinely seek medical attention to cure and/or relieve him from these episodic "flare ups" of symptoms.

The tire moving incident of May 18, 1978 can best be described as but another "flare up" of symptoms in the episodic history of claimant's back problem. A logical inference can be drawn from the evidence that the tire moving incident was at the time, and for a time thereafter, indistinguishable from prior episodes for which the claimant did not seek medical attention.

All of the evidence regarding the claimant's pre-existing back problem and how he dealt with it becomes crucial considering events subsequent to the tire moving incident. The facts are, that after the tire moving incident, but before claimant consulted a physician, an intervening non-work-related lifting incidnet occurred. This incident occurred when the claimant lifted a friend from the floor to a bar stool. Considering the opinion of Dr. Woolpert (Defendant's Exhibit 2) in the light of claimant's past pattern of dealing with his back problem, it is speculation to attach causation to the remote incident when a more recent and equally likely cause is present.

If the tire lifting incident produced an "injury", that injury does not become compensable unless medical services are required [see ORS 656.005(8)(a)].

I find the claimant has not carried his burden of proving that it was the tire lifting incident and not the lifting of the friend that produced the injury which brought him to the need for "medical services".

I would reverse the Referee and reinstate the Fund's denial.

WCB CASE NO. 77-5377 June 22, 1979

LONNIE L. HENRY, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On September 7, 1978 the Board entered its Order on Review which modified the order of the Referee, dated April 3, 1978, and found claimant's claim for an industrial injury to be compensable.

The State Accident Insurance Fund requested judicial review of the Board's order and on April 23, 1977 the Oregon Court of Appeals rendered its decision and opinion which reversed the Board's finding of compensability and affirmed the Referee's finding that it was not compensable.

On June 15, 1979 the Board received a copy of the Judgment and Mandate from the Court of Appeals directing it to enter an amended order in conformance with its decision and opinion of April 23, 1979.

Accordingly, IT IS HEREBY ORDERED that the Board's Order on Review, dated September 7, 1978, be set aside and that the Opinion and Order of the Referee, dated April 3, 1978, be affirmed in its entirety.

IT IS SO ORDERED.

WCB CASE NO. 78-5516 June 25, 1979

ROBERT E. McDANIEL, CLAIMANT
Brown, Burt & Swanson, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which approved the denial by Employee Benefits Insurance Company of claimant's claim for an alleged industrial injury.

Claimant has worked for the employer since 1975. He developed back problems which ultimately required surgery in March 1978. The question to be resolved in this case is when was the initial onset of the problem and what was the cause of it.

Claimant worked as an "offbearer on the chipping saw". He alleges that he injured himself at work on Thursday, August 4, 1977, however, the employer was not notified nor did he have any knowledge of claimant's claim that his back problems were work-related until March 1978.

Claimant contends that the employer failed to properly process his claim when he was notified of the injury and was unreasonable in refusing to pay compensation and medical bills. Based on this contention, claimant requested penalties and attorney's fees.

The employer contended that claimant had not complied with the provisions of ORS 656.265 and, furthermore, had failed to prove by a preponderance of the evidence that he suffered a compensable injury.

Prior to March 1978 claimant had reported to all of the physicians who had examined and/or treated him, that his injury was not caused by his employment; he had also given the same history to his private insurance carrier.

Claimant saw Dr. Buell at the hospital on August 7, 1977, a Sunday, and told him that he had developed back pain "yesterday afternoon". He was seen by Dr. Hoda on August 11 and at that time claimed he had noticed pain in his left leg about three months earlier and had developed more intense pain after he had driven a car "last Saturday afternoon" (August 6). Dr. Craske saw claimant later in August and at that time claimant stated he had had back pain for many months but he denied any specific incident, injury or trauma initiating the problem.

In September 1977 Dr. Gripekoven took a history from claimant which indicated claimant had back pain the previous February and had noticed increased pain while riding in a car in August. He also said a few days later he was riding in a go-cart which rolled backwards and struck a tree, causing claimant to wrench his back. At the time of this last incident, he said he felt a snapping sensation in his back.

A laminectomy and fusion were performed on March 24, 1978 and on August 7, 1978 claimant's claim was denied.

The Referee concluded that there were so many inconsistencies in claimant's various reports of the alleged accident, that claimant could not be considered as a credible witness, nor could his wife, who in her testimony supported claimant's allegations, be deemed credible.

The Board, on de novo review, finds that claimant has failed to prove that he has suffered a compensable injury. Claimant, at the hearing, maintained that he did not have any back problems prior to August 1977; the medical reports indicate claimant suffered pain in his back as early as February 1977. There is no reference in any of the medical reports to an on-the-job accident.

Claimant attempts to explain the inconsistencies in his testimony by stating that he is a poor record keeper and has a poor historical recollection. He admits that he erred in failing to relate his complaint to a specific traumatic episode associated with his work but asks the Board to take note of the portions of the medical record which reflect claimant to be a person without adequate grasp of the facts but who, when questioned in detail, did recall that he had hurt his back lifting lumber. Claimant also offered as a defense his lack of resources which forced him to seek compensation through his private insurance carrier.

Such explanations cannot be substituted for proof and, therefore, claimant has failed to meet his burden of proving that he suffered a compensable injury while in the employ of the defendant. The denial by EBI of his claim should be approved.

ORDER

The order of the Referee, dated December 14, 1978, is affirmed.

SAIF CLAIM NO. BC 187017 June 25, 1979

CLIFFORD NOLLEN, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Own Motion Order

On June 1, 1979 the claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and reopen his claim for an industrial injury sustained on May 28, 1969.

At the time of his injury claimant was employed by Helms Brothers whose workers' compensation coverage was furnished by the State Accident Insurance Fund. The claim was accepted and closed initially by the Determination Order dated April 30, 1970 which awarded claimant only temporary total disability benefits. Subsequently, after re-openings and re-closures and litigation, claimant received 128° for 40% of the maximum.

Claimant alleges that he commenced having further difficulty in the cervical area in the fall of 1977 and filed a claim with his employer at that time, Seabrook Foods, Inc., whose workers' compensation coverage was furnished by Liberty Mutual. On November 9, 1978 Liberty Mutual denied the claim. At the present time claimant has requested a hearing on the denial.

In support of his request for own motion relief claimant has furnished the Board and the Fund with medical reports from Dr. Fitchett dated March 2, 1979 and March 14, 1979.

The Fund was advised on June 5, 1979 of claimant's request for own motion relief and requested to advise the Board of its position within 20 days after it received the medical reports from Dr. Fitchett which had not been initially attached to the claimant's request.

On June 8, 1979 the Fund responded, stating that it believed claimant had sustained a subsequent accident which was responsible for his present problems, therefore, it would oppose reopening the claim.

The Board, having considered both reports from Dr. Fitchett, concludes that there is not sufficient medical evidence to justify reopening of claimant's claim for the May 28, 1969 injury.

ORDER

The claimant's request that the Board, pursuant to ORS 656.278, reopen his claim for an industrial injury sustained on May 28, 1969 is hereby denied.

WCB CASE NO. 78-4981 June 26, 1979
WCB CASE NO. 78-4982

JUNE LYTER, CLAIMANT
Carl H. Brumund, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Reconsideration

The Board entered its Order on Review in the above entitled matter on June 8, 1979. This order found that the order of the Referee should be modified. The Board ordered claimant's claim to be remanded to the Fund for acceptance and for the payment of compensation, as provided by law, commencing on the date claimant completed her authorized vocational rehabilitation program, and until the claim was closed pursuant to ORS 656.268. This was done by the Board primarily because there was no evidence in the record that claimant, at the time she completed her authorized program of vocational rehabilitation, was re-evaluated with respect to her disability and an administrative order entered pursuant to the provisions of ORS 656.268. The Board's order did not reverse the Referee's remanding of claimant's claim for aggravation.

On June 14, 1979 the Board received a request from the State Accident Insurance Fund to reconsider said order. The Fund alleges that the Board properly found that the Referee was incorrect in allowing aggravation. It also alleges that the statute and Department rules regarding payment of time loss and vocational rehabilitation apply only to injuries occurring after December 31, 1973.

ORS 656.268, the statute to which the Fund refers, concerns the processing of claims and, therefore, relates only to procedure, not to substantive rights.Normally, amendments thereto would be applied retroactively. However, OAR 436-61-065, which relates to the applicability of rules relating to vocational rehabilitation reads as follows:

> "(1) This rule applies to the vocational rehabilitation of any injured worker having a disabling injury, except that the provisions of Subsection 050, 052, and 055 shall apply only to those injured workers having a disabling injury which occurred after December 31, 1973. When those workers injured prior to January 1, 1974 become medically stationary, a Determination Order will be issued,
>
> and temporary disability compensation shall not be paid even though the worker is enrolled and actively engaged in an authorized program of vocational rehabilitation."

The Board concludes that the Fund's request to reconsider its Order on Review should be granted.

The Board, after reconsideration, concludes that it should set aside in its entirety its order entered on June 8, 1979 and that it should affirm and adopt as its own the Opinion and Order of the Referee, a copy of which is attached to this Order on Reconsideration and, by this reference, made a part hereof.

IT IS SO ORDERED.

CLAIM NO. H15220 June 26, 1979

RICHARD A. FAULKNER, CLAIMANT
Gerald Knapp, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Amended Own Motion Determination

On June 15, 1979 the Board entered its Own Motion Determination in the above entitled matter. It has now been advised by Mr. Gerald C. Knapp that he was not representing claimant in connection with the request to reopen his claim for additional treatment and time loss. Mr. Knapp stated that claimant negotiated with the carrier directly, therefore, it is not necessary to make an award of attorney's fees.

The Board's Own Motion Determination should be amended by deleting therefrom the first paragraph on page two thereof.

IT IS SO ORDERED.

WCB CASE NO. 78-1649 June 26, 1979

In the Matter of the Compensation
of The Beneficiaries of
GERALD MAYES, DECEASED
Grant, Ferguson & Carter,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Order

On May 18, 1979 the Board issued its Order on Review in the above entitled matter. On June 5 the Board received from the employer, by and through its attorney, a Motion for Reconsideration, Clarification, and Motion to Hold Order on Review in Abeyance.

On June 8, 1979 the Board issued an Order of Abatement, temporarily setting aside the Order on Review entered on May 18, 1979 to allow claimant, by and through her attorney, to respond to the employer's motion and to allow the Board sufficient time to fully consider both the motion and response thereto.

On June 18, 1979 the Board received claimant's memorandum in opposition to the motion and, after giving full consideration to the motion and the response thereto, the Board concludes that the employer's motion should be denied and that the Order on Review entered in the above entitled matter on May 18, 1979 should be reaffirmed and republished in its entirety with appeal rights to commence from the mailing date of this order.

IT IS SO ORDERED.

WCB CASE NO. 78-7052 June 26, 1979

ELMER RAYVON, CLAIMANT
Pozzi, Wilson Atchison, Kahn
& O'Leary, Claimant's Attys.
Newhouse, Foss, Whitty & Roess,
Defense Attys.
Order Of Dismissal

The requests for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the parties, and said requests for review now having been withdrawn,

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

WCB CASE NO. 78-8318 June 26, 1979

ROBERT A. TAYLOR, CLAIMANT
Cheney & Kelley, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On June 1, 1979 the Board acknowledged receipt of the request made by the State Accident Insurance Fund for Board review of the Referee's order entered in the above entitled matter on May 1, 1979.

On June 7, 1979 the Board received from the claimant, by and through his attorney, a Motion to Dismiss the Fund's request for review on the grounds that it was not timely filed.

On June 12, 1979 the Board received a response to claimant's motion which stated that on May 30 the Fund had mailed its request for review to the Board with a copy to the claimant, his attorney and the employer.

Claimant did not support his motion with any affidavit setting forth facts which would show why the filing was not timely. The Fund's statement that it did mail its request for review on May 30, which was within 30 days after the mailing date on the Referee's Opinion and Order, is unrebutted.

The Board concludes that the claimant's Motion to Dismiss should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-3475 June 28, 1979
WCB CASE NO. 77-6112
WCB CASE NO. 78-958
WCB CASE NO. 78-959
WCB CASE NO. 78-957

In the Matter of the Compensation
Of
JAMES E. FOSSUM, DECEASED
Richardson, Murphy & Nelson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by the SAIF
Cross-request for Review by
Claimant's Widow

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requested and the widow of claimant cross-requested Board review of the Referee's order which approved all of the denials issued in this case except the denial issued by the Fund on January 11, 1978 with regard to Kaiser Company T.R.D. and remanded that claim to the Fund for acceptance and for the granting of death benefits, as provided by law, to the widow of the deceased claimant.

The facts in this case cover an extended period of time and involve five different employers. The Referee has very succinctly set forth these facts in her Opinion and Order and it would serve no purpose to reiterate them in this order. Therefore, the Opinion and Order of the Referee, although it is modified by the Board, after de novo review, will be attached to this order and identified as Exhibit A.

The sole question to be answered is whether claimant's death, which was caused by a form of cancer, was related to his exposure to asbestos which commenced when claimant was employed as an electrician in the shipyards during the war and following the war continued such employment for several other employers up until December 15, 1976.

The Referee found that Mr. Fossum's death was probably caused by mesothelioma which in turn was caused by his exposure to asbestos while employed in the shipyards in the 1940's. She applied the last injurious exposure rule and concluded that the responsibility for claimant's condition was Kaiser Company T.R.D. whose workers' compensation coverage which the Referee assumed, in the absence of evidence to the contrary, was furnished by the Fund.

The Board, on de novo review, finds that claimant's widow has failed to prove either legal or medical causation in this case. There is no evidence of claimant's exposure to asbestos nor of the duration of such exposure if he was so exposed. There is no medical evidence to support claimant's claim, only medical statistics which show that exposure to asbestos may cause mesothelioma, which is a form of cancer, but that the disease does not develop generally until 25 to 40 years after the exposure. There are also certain inferences made which cannot be accepted as fact.

Therefore, the Board concludes that the claimant's widow has failed to establish either legal or medical causation and therefore is not entitled to a claim for widow's benefits, as provided by law.

ORDER

The order of the Referee, dated September 22, 1978, is modified by approving all of the denials issued on claimant's claims.

Claimant's attorney's fee of $2,000 is not approved.

WCB CASE NO. 78-1041 June 28, 1979

STANLEY HILLYER, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
Keith D. Skelton, Defense Atty.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-7180 June 28, 1979

EMIL A. SEAL, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of a portion of the Referee's order. Claimant contends that the Referee erred by refusing to set aside the Determination Order of August 15, 1978 (as corrected) when claimant was not medically stationary; by failing to reinstate payment for temporary total disability as of July 7, 1978, rather than August 12, 1978, and by not granting an adequate attorney's fee to claimant's attorney.

Initially, claimant requested a hearing on the denial of his request to reopen his claim but prior to the hearing the Fund agreed to rescind the denial.

Claimant suffered a compensable injury on March 21, 1977 when he slipped and fell, injuring his head, neck and back. He was first seen by Dr. Reardon and on January 13, 1978 the claim was closed by a Determination Order granting claimant compensation from March 21 through October 23, 1977 and 32° for 10% unscheduled head and neck disability.

On January 5, 1978, claimant had been examined by Dr. Rusch, an orthopedic physician, who concluded that claimant was not medically stationary and was not able to perform his regular type of work and had not been able to since October 1977. He stated that claimant had remained temporarily totally disabled from that time forward. A stipulated order of dismissal set aside the Determination Order of January 13, 1978 and granted claimant compensation for temporary total disability commencing October 24, 1977 and until the claim was closed pursuant to ORS 656.268.

In April 1978 Dr. Rusch referred claimant to Dr. Franks, a neurosurgeon, and at the same time claimant was also referred to the Callahan Ceter where he was enrolled from April 11 to May 26, 1978.

On July 6, 1978 Dr. Rusch expressed his opinion that claimant's condition was medically stationary and based upon this opinion a Determination Order was issued on August 15, 1978 and corrected on September 1, 1978 whereby claimant was granted compensation for temporary total disability from March 21, 1977 through July 6, 1978 and 32° for 10% unscheduled head and neck injuries.

Three days before the issuance of this Determination Order, claimant had consulted Dr. Franks, complaining of left shoulder and left arm symptoms which had not previously existed. A myelogram was performed which revealed defects at the C4-5 level on the left and at the C5-6 level bilaterally. Dr. Franks did an anterior cervical discectomy C4-5 and C5-6 on August 16, 1978. Before the fusion at C4-5 could be performed a mishap occurred which caused brisk arterial bleeding. This bleeding was controlled but Dr. Franks decided not to proceed at that time. On August 28, 1978 Dr. Franks diagnosed traumatic left vertebral artery aneurysm and venous fistula, secondary to the previous fusion procedure. He trapped the vertebral artery aneurysm and removed the fistula by blocking the left vertebrae at its origin and at the C-1 level. He then did the fusion at C4-5 level.

On August 18, 1978 claimant's attorney advised the Fund that the claimant had been rehospitalized and requested it to reinstate payment of compensation for temporary total disability retroactive to July 6, 1978. Ten days later the Fund inquired of Dr. Rusch who deferred to Dr. Frank. Copies of various hospital and medical reports were sent to the Fund and on October 6, 1978 the Fund's medical advisor expressed his opinion that the last surgery was not related to the compensable injury. On October 16 the Fund denied responsibility for claimant's treatment for left vertebral artery fistula, cervical, stating such condition was not related to the industrial injury of March 21, 1977. No compensation for temporary total disability was paid in the interim.

The Referee found that the medical reports of Drs. Rusch and Franks were reasonably necessary to enable claimant to secure reopening of his claim, therefore, claimant should be reimbursed for the cost of such reports.

He also found that claimant was medically stationary on July 6, 1978; that the condition for which he was being treated by Dr. Rusch and Dr. Franks began about July 22, 1978 and the fact that claimant was medically stationary for approximately two weeks had not changed the fact that he was medically stationary. Therefore, he concluded that the Determination Order of August 15, 1978 (as corrected) should stand.

The Referee found that claimant's "medically verified" time loss should have commenced on August 12, 1978 rather than August 15, 1978 continuing until claimant again became medically stationary.

The Referee concluded that claimant was entitled to a penalty on the compensation for temporary total disability which was accrued between August 12, 1978 and October 16, 1978. The Fund was not required to pay compensation until it received medical verification of claimant's inability to work as a result of his worsened condition. The Fund did not receive supporting medical documentation until mid-September, however, the Fund should have denied or paid the first installment of compensation for time loss by the end of September 1978. It failed to do so, therefore, all of the compensation for time loss which accrued between August 12, 1978 and October 16, 1978 becomes the basis upon which a penalty can be assessed for unreasonable delay in the payment of compensation.

The Referee found that the claimant's attorney's request for $1,625.00 as a reasonable attorney's fee was approximately three times the amount he usually allowed on cases in which the claimant prevailed after an adversary hearing and, therefore, he awarded an attorney's fee in the amount of $550.

The Board, on de novo review, finds that the Referee was in error in finding that the Determination Order of August 15, 1978 (as corrected) was valid based on the fact that for a period of possibly two weeks claimant had been medically stationary. The Fund first requested Dr. Rusch to advise them if claimant was medically stationary. Dr. Rusch said that he had not seen claimant in his office since claimant came under the care of Dr. Franks. As of April 13, 1978 Dr. Franks became claimant's major treating physician. It was his unequivocal opinion that claimant had never been medically stationary from the first time he was seen on April 13. Obviously, claimant could not have been medically stationary on July 6 and he certainly was not medically stationary on August 15, 1978. On August 12 he consulted Dr. Franks complaining of left shoulder and left arm symptoms which ultimately required surgery. At the time claimant was found to be medically stationary he was in the hospital, had undergone a myelogram and was awaiting surgery the following day.

Having found the Determination Order of August 15, 1978 to be premature, the Board finds that claimant is entitled to compensation commencing on April 13, 1978. The evidence indicates that claimant had received compensation for temporary total disability up to July 6, 1978, and also from August 12, 1978 to October 16, 1978, therefore, he is entitled to continue to receive compensation for temporary total disability from July 6, 1978 until his condition is medically stationary and his claim is ready for closure pursuant to the provisions of ORS 656.268, however, the Fund is allowed credit for any compensation for temporary total disability it paid claimant from August 12 to October 16, 1978.

The Board finds no merit in the Referee's method of determining a reasonable attorney's fee. A reasonable attorney's fee should be awarded on an individual basis rather than on any "fixed" schedule. The complexities of this case and the benefits which claimant received as a result of his attorney's efforts justify a reasonable attorney's fee of $1,000, payable by the Fund.

ORDER

The order of the Referee, dated January 26, 1979, is modified.

The Determination Order, dated December 15, 1978, as corrected, is set aside and held for naught and claimant's aggravation rights shall commence when his claim is closed pursuant to ORS 656.268.

Claimant's claim is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on July 6, 1978 and until closed pursuant to the provisions of ORS 656.268. The Fund shall be given credit for any payments for temporary total disability which it made to the claimant from August 12 to October 16, 1978.

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

The balance of the Referee's order not in conflict with the above is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $300, payable by the Fund.

WCB CASE NO. 77-4702 June 28, 1979

CHARLES TOLLES, JR., CLAIMANT
Dean VanLeuven, Claimant's Atty.
Lang, Klein, Wolf, Smith,
Griffith & Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks Board review of the Referee's order which affirmed the denial dated July 6, 1977 of claimant's claim for workers' compensation benefits.

Between March 1973 and June 1977 claimant was employed by the defendant as a regional director of loss prevention. His duties required considerable travel, including extensive flying, in Idaho, Washington, Oregon and California.

While traveling by air on a business trip on June 23, 1975 claimant struck the left side of his head when he fell in the restroom of the plane. When the plane landed claimant stated that he had a ringing sensation in his ears. He, at that time, experienced no dizziness or nausea, however, in the middle of 1976 claimant began to experience those conditions when he was flying. They would occur on take-off, landing and during any sudden change of altitude. The symptoms would subside in a few minutes.

Since claimant left his employment with the defendant he has flown only once on business but he still experiences these symptoms while riding in an elevator in a tall building.

On February 21, 1977 Dr. Hartzell, after examining claimant, stated he had bilateral neural sensory hearing loss and vistibular neuronitis. On September 18, 1978, Dr. Camp, based upon a history given to him by claimant of the onset of the dizziness and his examination of claimant, he diagnosed dizziness, associated with altitude changes, probably of Eustachian tube origin. He found no evidence of inner ear disease but also diagnosed bilateral severe to profound sensory-neural deafness, high frequency 4,000 to 8,000 Hz., probably noise induced, and tinnitus, secondary to nerve deafness, stable. Dr. Camp was of the opinion that the dizziness was probably a Eustachian tube malfunction and was a new symptom, probably unrelated to the injury.

The Referee concluded that claimant had failed to prove a relationship between the dizziness and nausea he has developed in the period after the original claim. He based his conclusion on Dr. Camp's opinion that dizziness, plugging of ears, ringing and pain, all could be caused by congestion from a cold or an allergy and claimant did not report any congestion during the flying episodes in question.

The Board, on de novo review, based on Dr. Camp's report that there was no relationship between claimant's hearing loss and ringing in his ears and his subsequent development of dizziness and altitude intolerance, finds that claimant failed to establish medical causation.

ORDER

The order of the Referee, dated January 16, 1979, is affirmed.

DOROTHY B. VIRTUE, CLAIMANT
C. H. Seagraves, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests the Board to review the Referee's order which directed it to accept claimant's claim for an industrial injury sustained on February 24, 1978.

Claimant sustained an injury to her right ankle on February 24, 1978 at which time she was taking a training course under the CETA program to enable her to become a nurse's aide in a nursing home. The course was offered by the Jackson-Josephine Job Council to people over 55 years of age and consisted of approximately 50% classroom work and 50% practical work in a nursing home under the supervision of a nurse's aide.

While attending a classroom course claimant stated that she arose from a seated position at break time and turned her ankle in the process of standing up. She was able to continue her course but the ankle caused difficulties and she later came under the treatment of Dr. Saul, who is still treating claimant.

There is no dispute that claimant suffered the injury to her ankle; the dispute is whether the Fund was liable.

The Fund denied the claim on the grounds that claimant did not qualify as an employee. It urged that ORS 656.005 defines an employee as a person who engages to furnish service for a remuneration and is subject to direction and control of an employer. The Fund contended that as a class-room participant claimant did not receive remuneration for her services and there was no contract of hire with an employer.

The Referee found that claimant did receive remuneration for the 80-hour course payable through the CETA program at the rate of $2.65 per hour.

The Referee found nothing in ORS 656.005 which would exclude claimant from being a worker. Claimant was engaged in a training program but she did receive remuneration. The argument that the remuneration which claimant received was only for taking the training course does not preclude her from workers' compensation coverage in light of the government regulations and laws which require that any state agency using CETA funds must provide workers' compensation insurance or insurance equal thereto to protect the people working and training under such program.

The Referee found that the Fund provided workers' compensation coverage to the Jackson-Josephine Job Council for their employees and claimant was placed in the program under CETA funds and paid while in this program. The Referee found that had the Fund not wished to cover claimant it should have advised the Council so that it could have complied with the federal regulations and provided equal insurance. It had not done so and the Referee concluded that claimant was covered under the policy which the Fund had issued covering the Jackson-Josephine Job Council. He reversed the denial.

The Board, on de novo review, affirms the Referee's findings and conclusions.

ORDER

The order of the Referee, dated December 1, 1978, is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee for his services at Board review a sum of $350 payable by the State Accident Insurance Fund.

WCB CASE NO. 78-4414 June 29, 1979

MICHAEL EMME, CLAIMANT
VanNatta & Petersen, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which approved the Fund's denial of her claim for aggravation of a June 12, 1976 industrial injury.

Claimant, 25 years old at the time of the hearing, was employed as a food waitress when she sustained an injury to her low back on June 12, 1976. The injury was in the nature of an occupational disease resulting from walking across floors and lifting food trays over a period of two weeks.

The claim was accepted and closed by a Determination Order dated January 12, 1977 whereby claimant was awarded 32° for 10% unscheduled low back disability. On July 18, 1977 a stipulated order awarded claimant an additional 24°, giving her a total of 56° for her unscheduled disability.

Claimant testified that while working for another employer between May 1977 and February 1978 her condition gradually worsened and in February 1978 she was hospitalized by Dr. Misko, a neurosurgeon. He found no significant evidence of nerve root compromise to warrant a myelogram. A differential spinal block which was performed at the hospital showed a hysterical reaction to the test.

Dr. Korman, a clinical psychologist, and Dr. Marcell, a psychiatrist, both found basic personality disorders and Dr. Carr, an orthopedic physician, who was claimant's last treating doctor, explained to claimant that he did not have any further treatment to offer her; all of the common treatments had been tried without success. He thought that the present diagnosis was chronic back strain complicated by a personality disorder. He felt the prognosis for recovery was probably poor; it appeared that all of her back problems stemmed from her injury in 1976, according to the history she related to him.

The Referee found that the medical reports indicated psychological problems unconnected with the compensable injury, no worsening of claimant's lower back and no objective medical findings supporting her complaints. He, therefore, approved the denial of claimant's claim.

The Board, on de novo review, notes that the denial of claimant's claim was worded in such a way that it reversed the finding of compensability of her original injury in 1976.

Dr. Carr, in his report of April 6, 1978, states his opinion that all of claimant's back problems stem from her injury in 1976; he does indicate that these problems have been complicated by claimant's personality disorder. If such disorder was not causally related to the injury, a denial of that portion of claimant's problems would have been justified. The Fund chose to deny all of claimant's problems, therefore, its denial must be set aside.

ORDER

The order of the Referee, dated November 30, 1978, is reversed.

Claimant's claim for an aggravation of her industrial injury sustained on June 12, 1976 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation commencing on April 6, 1978, the date of Dr. Carr's letter addressed to the Fund, and until closed pursuant to the provisions of ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee for his services both before the Referee at hearing and on Board review the sum of $900, payable by the State Accident Insurance Fund.

WCB CASE NO. 78-1463

LYNDA HEATHMAN, CLAIMANT
Robert J. Miller, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

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

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

ORDER

The order of the Referee, dated September 29, 1979, is affirmed.

Board Member Kenneth V. Phillips dissents as follows:

The opinion of the majority of the Board and that of the Referee seems to hinge on the fact that none of the witnesses could recall the specific date of the alleged injury and there was therefore a discrepancy in the testimony. This apparently led to a conclusion that the claimant had failed in her proof.

There was no discrepancy in the testimony that the incident which was alleged to have created the medical problem did in fact occur. Understandably no one could remember the precise date. It would be subject to some suspicion if they could.

It was the doctor describing the type of activity required to cause such an injury who drew out the information by inquiry which led to the conclusion of causation. Had it not been for the doctor's inquiry it is highly unlikely that the claimant would have related her injury of the right knee to the incident when her left leg stepped into a hole in the truck/trailer bed.

I believe causation has been established and would reverse the finding of the Referee.

WCB CASE NO. 78-1308 July 5, 1979

ARCHIE WHITMAN, CLAIMANT
Ringo, Walton, Eves & Gardner,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On May 24, 1979 the Board entered its Order on Review in the above entitled matter.

On June 8, 1979 the Board received from claimant, by and through his attorney, a motion to reconsider that portion of the Order on Review wherein the Board finds no justification for commencing claimant's award for permanent total disability earlier than the date of the Referee's order.

On June 27, 1979 the State Accident Insurance Fund responded to the motion, stating that it opposed it based upon the Board's ruling in Emery Peterson, WCB Case No. 70-1207 (May 13, 1971) which stated, in part, that in the absence of any contrary specific finding by the Hearing Officer, the Board concludes the better procedural rule is to place the inception of compensation for permanent total disability on the order of the Hearing Officer.

The Board, after giving consideration to both the arguments set forth by claimant in his motion and those made by the Fund in its response, is not persuaded that its Order on Review dated May 24, 1979 should be modified in any way.

THEREFORE, the motion to reconsider a portion of the Order on Review dated May 24, 1979 is hereby denied.

SAIF CLAIM NO. ZC 251934 July 6, 1979

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

Claimant suffered a compensable injury to his left leg on June 23, 1970 while working for Winn's Cutting whose carrier was the Fund. Claimant's claim was accepted and closed by a Determination Order dated March 29, 1973 whereby claimant was awarded compensation for temporary total disability and 97.5° for 65% loss of the left leg. Claimant's aggravation rights expired on March 28, 1978.

On January 16, 1974 a stipulation was approved whereby claimant was granted an additional 20° for his left leg disability making a total of 117.5° for 78.33% of the maximum for such scheduled award.

On August 24, 1976 a Second Determination Order awarded claimant additional compensation for temporary total disability but no compensation for permanent partial disability in excess of the compensation previously granted. Claimant did not appeal from the Second Determination Order.

On October 24, 1978 claimant was seen by Dr. Stanley L. James for reevaluation. Claimant walked with a limp on the left and continues with a foot drop on the left. X-rays of the left knee showed extensive degenerative changes involving all three compartments of the knee but there was no evidence of loose body. Dr. James felt there had been a progression of the degenerative changes in the left knee over the past three years; he was amazed that claimant was still able to continue to do heavy construction work. Claimant, at that time was 36 years old and, in Dr. James' opinion, he will not be able to continue with this type of work indefinitely; at some point in time he will have to seek a sedentary type occupation.

On May 25, 1979 claimant was examined by Dr. Embick. Claimant was complaining of recurrent pain and swelling in his left knee, apparently without any specific injury. He stated that he had been working for Santiam Trenching Com-

pany and had been pulling heavy telephone lines on rough ground. Dr. Embick felt this was probably too heavy for him because of his previous knee problem. It was Dr. Embick's opinion that claimant should again be seen by Dr. James and an appointment was made for June 11, 1979. Dr. Embick stated that claimant's problem at the present time is the result of his former injury rather than a new injury.

On June 21, 1979 the Fund advised the Board that claimant had requested that his claim for the June 23, 1970 injury to his left leg be reopened and, because the aggravation rights had expired, it was referring the matter to the Board to determine whether reopening was justified pursuant to ORS 656.278.

The Board, after reading the reports from Dr. James and Dr. Embick and the other medical documentation, concludes that claimant's present problem is related to his 1970 industrial injury and does represent a worsening of said condition since the last award of compensation which was the Second Determination Order dated August 24, 1976.

ORDER

Claimant's claim for an industrial injury sustained on June 23, 1970 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on May 25, 1979, the date claimant was examined by Dr. Embick, and until his claim is closed pursuant to the provisions of ORS 656.278, less time worked.

WCB CASE NO. 78-2873 July 6, 1979

GEORGE E. FINNEY, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On March 23, 1979 an Own Motion Order Referring for Hearing was entered in the above entitled matter. It specifically requested that the Referee to whom the matter had been assigned for hearing make a determination on the following issue: Can a claim which has been closed and the claimant's aggravation rights thereunder have expired be again closed under the provisions of ORS 656.268 if the claim has been voluntarily reopened or must it be closed under ORS 656.278?

On June 26, 1979 Referee John F. Drake entered his Interim Order and Recommendation to the Board on this issue. The Referee's order is well-written and covers fully the legal aspects of this matter and concludes that the claimant would be entitled to have his claim closed pursuant to the provisions of ORS 656.268. The Board affirms and adopts as its own the findings and the recommendations made by the Referee in his order, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The Own Motion Determination, dated November 22, 1977, which was based upon an advisory rating of claimant's disability furnished the Board by the Evaluation Division of the Workers' Compensation Department is hereby set aside.

The Evaluation Division of the Workers' Compensation Department shall issue a Determination Order, pursuant to ORS 656.268, based upon the same medical documentation it had at the time it made its advisory rating to the Board.

SAIF CLAIM NO. EA 779134 July 6, 1979

ELMER E. HOME, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his legs and left wrist on February 9, 1960 when a hot piece of steel caught on the stranding and fell, hitting him on his leg and igniting his trousers. The diagnosis was third degree burns of the legs and deep burned laceration above the left ankle.

Claimant's claim was reopened by the Board's Own Motion Order of March 30, 1979. A report, dated May 19, 1979, by Dr. Adlhoch indicated claimant had had a left below-knee amputation in November 1977. A prosthesis was fitted in early 1978 and Dr. Adlhoch saw claimant only occasionally after that. He felt claimant's condition was medically stationary as of about April 1978 and his disability was primarily related to the amputation.

On May 29, 1979 the carrier requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted compensation from August 1, 1977 through April 3, 1978 and permanent partial disability equal to 100% loss by separation of the left foot at or above the ankle.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 1, 1977 through April 3, 1978, less time worked, and compensation equal to 100% loss by separation of the left foot at or above the ankle. These awards are in addition to any previous awards claimant has been granted.

Claimant's attorney has already been awarded a reasonable attorney's fee out of the compensation granted claimant for temporary total disability by the Own Motion Order of March 30, 1979. Claimant's attorney is hereby granted an additional attorney's fee equal to 25% of the increased compensation for permanent partial disability granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-3239 July 11, 1979

ALLEN E. BAUER, CLAIMANT
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which found claimant to be permanently and totally disabled as of April 26, 1978 and allowed the Fund credit for all permanent partial disability payments it had made previous to that date.

Claimant suffered a compensable injury on October 17, 1975 when he bumped his head on a steel beam. X-rays revealed no significant abnormality in the skull. On October 20 Dr. Johnson, a chiropractic physicain, examined claimant and found subluxations of the second, third and fourth cervical vertebrae. He reported claimant had returned to work on October 22, 1975.

On October 18, 1975 claimant had been examined by Dr. Ellerbrook who diagnosed contusions and abrasions of the forehead and felt that claimant's condition was medically stationary. He had stated that no further treatment was required and that he did not feel there would be any permanent impairment.

On December 4, 1975 claimant was examined by Dr. Fax, an orthopedic physician, who reviewed the x-rays previously taken and found no abnormality; he also took x-rays which showed some slight foramina narrowing. His impression, based upon his diagnosis, was: "Acute neck strain which seems to becoming chronic". He told claimant to cease receiving chiropractic manipulations because such treatment might be aggravating his neck problem.

After claimant was examined by Dr. Fax he was examined and/or treated by many medical specialists including some of the staff of the Portland Pain Center. All of the medical reports indicate objective improvement, but claimant insists he has persistent pain and his medical management has given him only transitory relief of such pain. Claimant testified that pain increases with activity and is so disabling that he is doubtful he can find any employment because of it.

Claimant gradually returned to his previous employment as a deck man for the employer and through the cooperation of his employer started working two hours per day. He ultimately increased the period to four hours per day. Claimant has substantial seniority which undoubtedly accounts for this accommodation by the employer; however, the mill was destroyed by fire in July 1977 and never rebuilt.

Claimant was placed in a supervisory job and a sheltered workshop setting but he testified that this job did not work out because he over-exerted himself and also for the reason that the long hours on his feet caused his neck to commence to ache. He quit because his neck bothered him.

Claimant has not looked for other types of work. He feels such a search would be useless because he would not have seniority in any other mill, and, therefore, would not be qualified for the lighter, more sedentary positions which he would be more physically capable of doing. He contended that he could not work a full shift and even if accommodations were made for him to work four hours per day, he would not be able to do this on a daily basis.

On April 26, 1978 a Determination Order closed claimant's claim with the award of compensation for temporary total disability and also 64° for 20% unscheduled neck disability.

Claimant was referred for vocational rehabilitation but when he was interviewed by a service coordinator it was felt that little assistance could be provided claimant because he was too disabled for even light type of work. The service coordinator did find, however, that claimant enjoyed working at home on wood working and apparently had the ability to do such type of work, including building kitchen cabinets and repairing appliances, etc.

On April 13, 1978 claimant was notified that his authorized program of rehabilitation was terminated; a handwritten footnote on the notice of termination requested claimant to continue to work with the service coordinator and stated that they were terminating now because of a change in the time loss laws. It further stated that when claimant began his training program again he would be considered for re-referral.

On July 10, 1978 an Administrative Determination Order was issued which stated that claimant had been referred for vocational rehabilitation subsequent to the first Determination Order and that said program had now been interrupted. It granted claimant additional compensation for temporary total disability and re-evaluated his disability to be the same as it was on July 26, 1978.

Claimant is 50 years old and has a high school education. He has worked for the defendant/employer since 1963. There is no accurate documentation of his work history prior to that date, however, it would appear from at least one history in the record that claimant has worked in the lumber industry during most of his working life.

The Referee found that in addition to the neck injury the claimant had pre-existing visual difficulties and was unable to read or do close-up work for more than 30 minutes at a time. He concluded that claimant had met his burden of proving permanent total disability. Wilson v. Weyerhaeuser Company, 30 Or App 403.

The Referee concluded that claimant had more education than the claimant in Wilson but that his education was not of the type which would enhance his employment prospects. Furthermore, the Referee found the claimant's visual difficulties precluded him from being trained for office work or work as a timekeeper even if his neck condition would not prevent him from such type of employment.

The Board, on de novo review, finds the claimant has never had surgery, all of his treatment has been conservative, and he has obtained apparently very good results from his attendance at the Pain Center.

The Board further finds claimant not well motivated to return to work. He advised the service coordinator that he did not feel he could do any type of work that would require him to work more than four hours a day and even then he could not work five days a week and for that very reason, according to the report of the service coordinator, his vocational rehabilitation assistance was terminated. Dr. Buza, who recommended rehabilitation, did not in any way indicate the claimant would be unable to return to some type of employment; only the vocational people expressed an opinion that claimant's disability might be too serious to permit training and a study of the service coordinator's report indicates that opinion is based less on claimant's disability and more on claimant's belief that he can only work a few hours a day and for a limited period of time. Subsequent to the attempt to work in the sheltered workshop, claimant has done nothing on his own to rehabilitate himself. He admittedly has not sought any work, claiming he knew that he could not find a job which would allow him to set his own time schedule.

The Board directs that the Field Services Division again attempt to assist claimant in a vocational rehabilitation program, including but not limited to job search and placement.

Claimant has not established by a preponderance of the evidence that he is permanently and totally disabled. The Board finds an award of 160° which equals 50% of the maximum for an unscheduled disability would adequately compensate claimant for the loss of wage earning capacity he has sustained.

ORDER

The order of the Referee, dated October 19, 1978, is modified.

Claimant is awarded 160° of a maximum of 320° for 50% unscheduled neck disability. This award is in lieu of the award of permanent total disability granted by the Referee's order which in all other respects is affirmed.

The Field Services Division of the Workers' Compensation Department is hereby directed to provide vocational assistance to claimant and make every possible effort to retrain him for some gainful full-time employment.

WCB CASE NO. 79-5015 July 11, 1979

HANNUM H. BOUTIN, CLAIMANT
John H. Bogardus, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 31, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claims for industrial injuries suffered on May 18, 1961 while employed by Loveness Sawmill and Timber Company and on August 4, 1969 while employed by Modoc Lumber Company.

Claimant also has requested a hearing on the issues of compensability for aggravation of a pre-existing disability or, in the alternative, compensability for a new injury while claimant was in the employ of Louisiana Pacific Corporation.

Claimant also requested the Board to consolidate all of these requests for a single hearing.

On June 14, 1979 the Fund, after being advised by the Board of claimant's request for own motion relief and for the consolidation of the matter for hearing with the claim against Louisiana Pacific Corporation, informed the Board that it had no objection to the requested consolidation.

The request for own motion relief was supported by an affidavit of claimant stating the circumstances surrounding his 1961 and his 1969 injury and also the additional problems he has had with his back while working for Louisiana Pacific Corporation in 1974 and 1978. Additional support for the request was in the form of medical documentation from Dr. Gilsdorf.

The Board concludes that it would be in the best interests of all parties concerned to refer the request for own motion relief to its Hearings Division with instructions to consolidate hearing on the issues presented by that request with the request for hearing on the claims against Louisiana Pacific Corporation.

After the hearing on all of these issues, the Referee shall make recommendations with respect to claimant's request for own motion relief and forward them to the Board together with a copy of the transcript of the proceedings. The Referee shall enter an Opinion and Order containing his findings and conclusions with respect to the issues of compensability of the previously denied aggravation claim and compensability of a new injury.

SAIF CLAIM NO. C 332331 July 11, 1979

WILLIAM BRADY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his right knee on December 10, 1970. The claim was accepted, closed and claimant's aggravation rights have expired. Claimant re-injured the knee in February 1971 and apparently it healed without any problems.

Claimant was examined by Dr. Sirounian on April 25, 1975. Dr. Sirounian noted posterior medial capsular and medial collateral ligament laxity of a mild-to-moderate degree. Claimant told Dr. Sirounian of the 1970 and 1971 injuries and stated that arthrograms of his knee had been taken but he did not know of the results. Claimant still wished to defer surgery even though Dr. Sirounian explained the possibility of traumatic arthritis occurring if he did not have the surgery.

On February 22, 1978 claimant was seen by Dr. Adlhoch who, after examining claimant, hospitalized him on September 15, 1978 and performed an arthroscopy of the right knee; excision of lateral meniscus; excision of stump of anterior cruciate ligaments and chondroplasty, right patella. Claimant was discharged from the hospital on September 19, 1978. Dr. Adlhoch stated that he saw claimant on September 25 and was complaining of severe pain in his knee, however, it appeared to be healing very well. He felt claimant had tendinitis; he removed the sutures and placed claimant on medication and told him to return in 10 days. Claimant did not see Dr. Adlhoch again and the follow-up treatment was assumed by Dr. Courogen. Because the knee was still giving claimant pain he was again hospitalized on September 28 and discharged on November 2 with instructions to use oral analgesics, crutches and hot packs.

On January 18, 1979 Dr. Courogen, in behalf of claimant, requested the State Accident Insurance Fund, based upon claimant's recurrent difficulty with the knee and the

treatment and subsequent surgery which he had undergone in September 1978, to reopen his claim for the 1970 injury. Dr. Courogen furnished the Fund with a complete documentation of claimant's course of treatment.

On June 25, 1975 the Fund advised the Board that it had received the request for reopening from Dr. Courogen and because claimant's aggravation rights had expired was referring the matter to the Board to determine if reopening under ORS 656.278 was justified. The Fund said it would not oppose the reopening.

The Board, having read all of the attached medical information, concludes that there is justification for reopening claimant's claim for the treatment and surgery which claimant received since his hospitalization in September 1978.

ORDER

Claimant's claim designated as Claim No. C 332331 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on September 15, 1978, the date claimant was admitted to the hospital, and until his claim shall be closed pursuant to the provision of ORS 656.278.

SAIF CLAIM NO. A 716728 July 11, 1979

RICHARD L. CASEDAY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

An Own Motion Order was entered in the above entitled matter on May 11, 1979 which directed the Fund to accept claimant's claim for a December 4, 1958 industrial injury to his left eye and to commence payments of benefits as provided by law on April 13, 1978 and until the claim is closed pursuant to ORS 656.278, less time worked.

It has been called to the Board's attention that the time loss should have commenced on July 18, 1978 which was the date claimant was first seen by Dr. Aebi.

THEREFORE, the Own Motion Order is hereby amended by deleting from the fourth line of the last paragraph thereof the date "April 13, 1978" and substituting therefor the date "July 18, 1978". In all other respects the Own Motion Order is reaffirmed and republished.

WCB CASE NO. 78-1554 July 11, 1979

DON W. EMRICH, CLAIMANT
Newhouse, Foss, Whitty & Roess,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which granted him 52.5° for 35% loss function of the left leg and 48° for 15% unscheduled disability.

Claimant suffered a compensable injury when, while working in the woods, he fell into a brush pile and over-extended his left knee on April 14, 1975. The injury was originally diagnosed as a torn meniscus. A medial meniscectomy was performed by Dr. Holbert on July 8, 1975 and on December 22, 1975 a high tibial valgus osteotomy was done.

On September 22, 1976 Dr. Holbert indicated traumatic aggravation of the left knee; he stated claimant was able to walk without too much trouble on level ground but was unable to walk in the woods. Dr. Bert, an associate of Dr. Holbert who examined claimant on October 14, 1976, advised that claimant was able to walk only a few blocks without sustaining discomfort and pain. He found substantial amounts of subpatellar pain, crepitus and tenderness to palpation along the medial joint line.

Claimant's primary work has been in the woods. After his operation, he returned to this employment, trying several different types of jobs but experienced problems with his knee. He was awkward and his knee would not bend completely; also he was not as fast as he felt he should be to avoid being reinjured. Claimant suffered some occasional swelling with fluid and had a constant aching in the knee and pain over the medial superior portion of the patella. Claimant was forced to quit and was referred to a vocational rehabilitation program where he was taught to work with myrtle wood. After a short time, claimant was able to open up his own myrtle wood shop.

The claim was first closed by Determination Order dated February 22, 1977 and on February 21, 1978, after the program had been terminated, the Second Determination Order re-evaluated claimant and ordered him additional compensation for temporary total disability but stated that his disability was determined to be the same as it was by the order dated February 22, 1977.

Claimant again saw Dr. Holbert and was put on conservative treatment for arthritis in his hip and also for the pain in his knee. Claimant claimed of more pain in the left hip than he had had previously; he says he presently has to favor his knee which places an increased strain on the left hip.

On August 14, 1978 claimant was examined by the Orthopaedic Consultants who noted claimant's past history of surgery on the knee and also degenerative osteoarthritis of the hips, bilaterally, and in the left knee. It was their opinion that claimant's condition was stationary but that he could not return to working in the woods. They rated the total loss of disability of the left knee at 50% of the leg with regard to the knee and the hip. They felt that the hip was aggravated because of the loss of function of the left knee although there was a pre-existing osteoarthritis in the hip. They found the relationship of claimant's complaints to his original injury to the knee was directly related because of the increased load in the hip. They stated, "He is not responsible for the degenerative osteoarthritis but he is responsible to a degree for an aggravation of a pre-existing illness. As far as we can ascertain, there is no disability in the right knee."

On March 8, 1978 Dr. Holbert had examined claimant and stated that he had found a significant limitation of internal rotation of his right hip and marked limitation rotation of his left hip. His impression was that of bilateral osteoarthritis of the hips.

The Referee found that claimant's primary problem was in his left knee but there undoubtedly was "some disability to his hips, at least, to the the [sic] extent that his injury aggravated a pre-existing condition in the left hip." Claimant has had to give up working in the woods, both because of his knee and the hip.

The Referee found that the knee was greatly disabled although the rest of claimant's leg was in good physical condition. He believed the 50% rating given by the Orthopaedic Consultants was based on both the hip and knee problem but he thought the amount of disability given claimant was probably too small and apparently no consideration had been given to the hip.

He concluded, "Since the hip is the unscheduled area, I feel the disability to the left leg of 35%, which was awarded by the Evaluation Division, is probably a correct amount as far as the leg is concerned. However, there is some disability in the hip and it has affected his earning capacity".

The Referee concluded that although it was difficult to separate the unscheduled from the scheduled and the earning capacity of the hip condition from the impairment factor of the left knee that the combination of 15% for the unscheduled disability and the 35% loss of the left leg was adequate compensation for claimant's industrial injury.

On de novo review, the majority of the Board finds no basis for an award for unscheduled disability. There is no evidence in the record which clearly places the disability in the "hip" into the unscheduled area. The majority of the Board feels that in order to accomplish that it would be necessary to have medical evidence which clearly revealed that the pelvic side of the hip was involved. both the Orthopaedic Consultants' report and the report from Dr. Holbert relate to the hip; the latter indicated, after examining claimant, that he had significant limitation of the internal rotation of his right hip and marked limitation of rotation of his left hip. There is no indication of any involvement of the pelvic side of the left hip. The physicians at the Orthopaedic Consultants found no disability in the right knee, therefore, there is no consideration to be given to the right hip, although the Referee refers to "hips" in his order. With respect to the left hip the Orthopaedic Consultants found it was aggravated because of loss of function of the left knee although there was a pre-existing osteoarthritis in the hip. Again the majority of the Board feels that the word "hip" as used in both of these reports relates to that portion of the hip which has been considered to be a part of the leg rather than in the unscheduled area.

On the question of the adequacy of the award for loss of function of the left leg, the majority of the Board, based primarily on the report from the Orthopaedic Consultants dated August 14, 1978, concludes that claimant is entitled to a greater award for the loss of function of his leg and hip than is represented by the award of 35%.

The majority of the Board concludes that claimant is entitled to an award equal to 50% for scheduled disability which would include 40% loss of the leg for his knee injury and 10% loss of the leg for permanent worsening of the pre-existing osteoarthritis in the upper leg.

ORDER

The order of the Referee, dated January 31, 1979, is modified.

Claimant is awarded 75° of a maximum of 150° for 50% scheduled left leg and hip disability. This award is in lieu of the awards made by the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation which will be received by claimant as a result of this order, payable out of said increased compensation as paid, not to exceed $3,000.

Chairman M. Keith Wilson dissents as follows:

The Referee's order should be affirmed and adopted by the Board at review. To be more accurate in an imprecise area, the award to the claimant should properly be based upon both the scheduled left leg and in the unscheduled area of the hip. The medical evidence before the Referee and the Board is quite consistent in establishing that the condition of the claimant's left knee caused a gait problem and that this aggravated a pre-existing arthritic condition in the hip resulting in hip disability.

Prior to July 1, 1978 the Board attempted to distinguish hip problems between scheduled and unscheduled conditions and took the position that unless some involvement of the hip joint on the pelvic side existed, the hip would be considered to be in the scheduled area of the leg; that if an injury or condition spread through the hip joint into the pelvic structure, the condition would then be considered to be in the unscheduled area.

Chapter 804, Oregon Laws, 1977, charged the Workers' Compensation Board with providing general guidelines for the evaluation of permanent disabilities. On June 20, 1978, the Board adopted Chapter 438, Division 22, "Guidelines for the Evaluation of Permanent Disabilities", after public hearing. Rule 438-22-205, as adopted, is as follows: "Shoulder and Hip. The shoulder and hip are unscheduled areas".

The rationale for this rule appears in the Board's order of adoption, as follows: "The shoulder (Rule 438-22-205) is an unscheduled area by the holding in Audas v. Galaxie, 20 Or App 520 (1970), and the Court's decision is controlling. By analogy, for consistency, and as recommended by the committee, the Board believes the hip also should be considered an unscheduled area".

Under the Board's own rule, which has the full force and effect of law, the hip is to be considered in the unscheduled area. The evidence in this case required the Referee and the Board to evaluate Mr. Emrich's disability on both a scheduled (leg) and an unscheduled (hip) basis.

SAIF CLAIM NO. A 640359 July 11, 1979

LEWIS O. GREGORY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to both feet on November 12, 1957. The claim was accepted and closed by a final order mailed July 10, 1958 which awarded claimant "60° equivalent to 20% loss function of the left foot and 40% of the right foot." Claimant, at the time of the injury, was employed by Willamette Iron and Steel Company whose carrier was the State Industrial Accident Commission, predecessor of the State Accident Insurance Fund. Claimant's aggravation rights have expired.

On May 30, 1979 Dr. Charles T. Weeks, an orthopedic surgeon, advised the Fund that he had seen claimant, who at that time was 82 years old. Claimant was complaining of problems with his right ankle which he related to two injuries which he had suffered in 1957.

The Fund forwarded Dr. Weeks' letter and an x-ray report from Dr. Rademacher to the Board, stating that it would not oppose reopening if the Board found the supporting medical evidence justified a reopening under the provisions of ORS 656.278.

The Board finds that Dr. Weeks' report indicates that the claimant's condition is directly related to the 1957 industrial injury and represents a worsening thereof, therefore, it concludes that the claim should be reopened and claimant granted own motion relief.

ORDER

The claimant's claim for an industrial injury sustained on November 12, 1957 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on May 30, 1979, the date claimant was examined by Dr. Weeks, and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

WCB CASE NO. 78-5455 July 11, 1979

DONALD L. HOSLEY, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an increased award equal to 128° for 40% unscheduled disability. Claimant's claim had been closed on June 26, 1978 by a Determination Order which had awarded him 32° for 10% unscheduled neck disability, 9.6° for 5% loss function of the right arm and 9.6° for 5% loss function of the left arm.

Claimant suffered a compensable injury on August 18, 1977 when he tripped and fell head first into a pipe machine, striking his head. At the time of the injury claimant was a 39-year-old. He had worked for the employer 11 years, the last three years as a "pipe machinist".

Claimant was seen on August 22, 1977 by Dr. Schultz, his family physician, who diagnosed "cervical spine sprain". He complained of pain in his neck and arms. He was released for work on September 6, 1977. Upon returning to work he developed pain in the right elbow. Dr. Schultz referred claimant to Dr. Stevens, an orthopedic specialist, who examined him on September 20, 1977. Dr. Stevens' impression was "Possible anterior elbow strain, secondary to injury at the time of the fall and unconsciousness, 18 August". He prescribed a rigorous physical therapy involving stretching the elbow and wrist for strengthening and observation of symptoms. The claimant continued to experience pain in the right elbow and at the base of the neck on the left. On November 8, 1977 Dr. Stevens reported his impression ". . . the patient had sprained this elbow, from which he should have recovered at this point, and perhaps, had a hyperextension impingement on the facets of his cervical spine." He referred claimant to Dr. Schwarz for neurologi-

cal examination. Dr. Schwartz examined claimant and reported on November 10, 1977 completely negative findings, "with no evidence of neurological problems in this man". Later, because Dr. Stevens was unable to find any objective signs, claimant was referred to Dr. Embick, an orthopedic physician. Dr. Embick felt that claimant's disability was minimal and he should be able to return to work by the first of 1978. In January 1978 Dr. Stevens stated that there was little more that he could offer claimant; that he was essentially medically stationary with no significant disability on a physical basis. However, he was concerned about claimant's continuing to return for medical treatment and his belief that he was unable to return to any type of employment. He suggested psychological testing and consultation.

On January 23, 1978, at the request of the Fund, Dr. Pasquesi, an orthopedic physician, examined claimant. He diagnosed "tendinitis in the distal bicipital tendinous portions, not in the area of the lacertus fibrosis". Dr. Pasquesi reported claimant expressed a desire to return to his former type of work, and he could not be employed in another capacity to receive the wages he receives at his present job. The claimant also expressed reluctance to begin vocational rehabilitation inasmuch as claimant fears that whatever he would be rehabilitated for would result in considerably less income than he now has. Dr. Pasquesi felt that the claimant's injuries were probably aggravated by the constant repetitive motions that were necessary in his work. He did not feel that claimant was poorly motivated to return to work nor did he know of any particular treatment which would help him other than the passage of time.

In March 1978 Dr. Paulson, also an orthopedic physician, examined claimant and expressed his opinion that claimant probably had a degenerative cervical disc but that it was too early at that time to be able to determine which one. From a clinical standpoint, he felt it was most likely a C5-6 disc problem. He stated that claimant was a good example of a person whose condition was so severe that he could not return to work but not so severe that he would show any abnormalities clinically under examination. He felt from examining claimant at that time that he was capable of doing light work. Dr. Paulson placed the claimant in a group with other patients who experience chronic pain problems and went on to say ". . . they look good in the office but when they get on the job, they do have intolerable pain".

Dr. Paulson suggested a diagnostic myelogram and discogram; both procedures were refused by claimant. Later, a psychologist, who was evaluating claimant at Callahan, learned that claimant had had a friend who had been "paralyzed" by such an operation.

At the Callahan Disability Prevention Center, in August 1978, Dr. Van Osdel, a medical examiner, concluded that claimant had demonstrated a capacity for light work only and placed limitations on claimant's work activities relating to lifting and other movements.

According to the service coordinator, the employer had no modified work which claimant, with the medical limitations imposed upon his work activity, was capable of doing. The service coordinator concluded that claimant was vocationally handicapped and in need of vocational rehabilitation. Referral was made on October 11, 1978 for employment re-entry assistance. Claimant was advised that this was not an authorized program of vocational rehabilitation but was only for the purposes of job search assistance.

Claimant completed the 10th grade and then quit to work in his father's automobile wrecking yard until he was 18 years old when he entered the army for three years. After his honorable discharge he returned to this same type of work and stayed with it for approximately 10 years. He then went to work for the employer for whom he worked for 11 years before his injury. Both the job working for his father and the job working for the employer involved heavy physical labor including lifting, pushing, shoving, and carrying heavy materials. Claimant's engagement in these activities have either been completely precluded or at least severely limited by the physicians who examined him. Claimant has had no experience involving light, sedentary or clerical employment.

Claimant testified that prior to the injury he had been in good health and had only missed work occasionally; once, when he had a hernia operation and a couple of times when he was troubled by low back strain. He states that now his neck and arms bother him all of the time no matter what he does. He tried to return to work for the employer on four or five occasions after he had been injured but his condition was so severe that he had to quit. Claimant is now

looking for work as an auto parts clerk. He is seeking this type of employment on the advice of the employment service. Such a job would pay substantially less per hour than claimant was receiving at the time of his injury. Claimant did receive unemployment compensation for a couple of months with a medical release for light work only. Claimant states that he is not familiar with all of the duties of an auto parts man and he is not sure whether he would be able to handle it. He prefers to be in a program for vocational rehabilitation.

The Referee found that the refusal by claimant to submit to the diagnostic myelogram and discogram did not seem unreasonable inasmuch as a myelogram did involve some degree of risk.

The Referee further found claimant was a credible witness who was strongly motivated to return to work but had legitimate restrictions in the type of work which he would be able to do because of the residuals of his industrial injury. The Referee found it difficult to believe that a man who had worked from age 16 to age 39 without significant interruption at one occupation and who had a good rate of pay for 11 years prior to his injury would quit work unless he absolutely had to. He found this belief to be strengthened by the fact that claimant has a wife and two young children and is presently living on unemployment compensation amounting to $119.00 a week.

The Referee felt that the most appropriate disposition of claimant's case might have been a referral to vocational rehabilitation. No evidence had been presented concerning the factors considered by Field Services Division in its presumed decision not to refer him. Based upon the decision of the Court of Appeals in Leedy v. Knox, 34 Or App 911, the Referee, having found that the evidence indicated claimant was medically stationary, felt it was incumbent upon him to make a determination as to the extent of claimant's permanent disability.

The Referee found the evidence supports the conclusions that claimant has a good level of intelligence, is still relatively young, but has medical limitations which make it impossible for him to return to any type of employment in which he has had previous experience. Based on these conclusions he found claimant had sustained a far greater loss of wage earning capacity than was indicated by the award for the unscheduled neck disability made by the Determination Order of June 26, 1978. He increased that award from 10% to 50%.

The Board, on de novo review, does not find sufficient medical evidence to justify an award equal to 50% of the maximum allowable for an unscheduled disability. The Referee did not refer in his order to the scheduled awards made by the Determination Order, therefore, the Board assumes that he felt that claimant had been adequately compensated for his scheduled disabilities. The Board agrees that the scheduled awards for the right arm and left arm adequately compensate claimant for the loss of function of the respective scheduled members.

Neither Dr. Schwarz or Dr. Reilly found neurological problems and Dr. Embick considered the claimant's disability to be minimal and felt that he would be able to return to work shortly after he had examined him in December 1977. Dr. Stevens was concerned about claimant's belief that he could not return to any employment. Dr. Pasquesi thought that there was lighter type of work which claimant could do and there was also a good possibility that he could be retrained. Dr. Paulson found no objective evidence to support claimant's subjective complaints. He did feel that a myelogram/discogram would be of value to diagnosis of the claimant's problem. Although it is claimant's privilege to refuse this type of procedure, nevertheless, it does make it rather difficult to evaluate claimant's condition in the absence of a determination by the physician of just what that condition is. Dr. Van Osdel found that claimant's impairment was mild to mildly moderate; that claimant had a capacity for light work.

The Board concludes, based upon the medical records which fail to show objective signs of physical impairment and also taking into consideration, claimant's age and his capability for retraining, that he would be adequately compensated for the loss of wage earning capacity resulting from his industrial injury by an award equal to 25% of the of the maximum allowable by statute.

The Board instructs the Field Services Division of the Department to continue to offer job placement assistance to the claimant.

ORDER

The order of the Referee, dated January 16, 1979, is modified.

Claimant is awarded 80° of a maximum of 320° for 25% unscheduled neck disability. This award is in lieu of all previous awards granted claimant for unscheduled neck disability. The awards for the right arm disability and the left arm disability granted by the Determination Order of June 26, 1978 are affirmed as is the balance of the Referee's order.

SAIF CLAIM NO. PC 280775 July 11, 1979

FLOYD HOWARD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left eye on November 27, 1970 while working for Fred Era Logging. The claim was first closed by a May 8, 1972 Determination Order with no award of permanent disability. At that time the doctor did warn of the possibility of a future retinal detachment due to the injury.

Claimant saw Dr. Steele on September 8, 1978 with a large retinal detachment of the left eye. He underwent surgery on September 11, 1978 followed by a complicated post-operative course resulting from failure of the retina to reattach satisfactorily. Dr. Steele last saw claimant on December 14, 1978 and found his condition to be stable with little chance that his visual acuity would improve. Claimant's vision was found to be "next to nothing" in the left eye and should be considered as total.

By the Own Motion Order of May 21, 1979 claimant's claim was remanded to the Fund to be reopened as of September 8, 1978.

The carrier on May 10, 1979 requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from September 8, 1978 through December 14, 1978. It also finds that claimant is entitled to compensation equal to 100% loss of the left eye.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 8, 1978 through December 14, 1978 and compensation for 100% loss of vision of the left eye. These awards are in addition to any previous awards claimant may have been granted.

SAIF CLAIM NO. BC 386039 July 11, 1979

RAYMOND A. HUTCHINS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his pelvis, right forearm and left leg on August 9, 1972 while working as a tractor operator for a timber firm. The claim was first closed on November 2, 1973 with awards for 25% unscheduled low back and pelvis disability, 15% loss of the right forearm, and 10% loss of the left leg. A Settlement Stipulation entered on June 13, 1974 granted claimant an additional 10% unscheduled low back disability and 10% loss of the right forearm.

On January 7, 1979 claimant underwent transurethral resection of the prostate for which the Fund agreed to accept 50% liability. On March 28, 1979 an Own Motion Order remanded claimant's claim for the August 1972 injury to the Fund for acceptance and payment of compensation. Claimant was released for work on February 19, 1979 and Dr. Henrich found no residual problems remained as of April 6, 1979.

On June 7, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted compensation for time loss from January 7, 1979 through February 18, 1979 and no additional permanent partial disability.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 7, 1979 through February 18, 1979, less time worked.

SAIF CLAIM NO. 235786 July 11, 1979

MELVIN D. LUTTRELL, CLAIMANT
Collins, Velure & Heysell,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on March 18, 1970 while employed by Klamath Road Department, whose carrier was the State Accident Insurance Fund. The claim was accepted and closed initially by a Determination Order dated October 2, 1970 which awarded claimant compensation for temporary total disability only. Claimant's aggravation rights have expired.

On July 7, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen this claim. Claimant had also sustained an industrial injury on April 7, 1971 for which he had been awarded compensation equal to 48° for 15% unscheduled low back disability.

On January 25, 1978 claimant requested a hearing on the propriety of the Fund's refusal to pay for medical care and treatment relating to both the 1970 and 1971 injuries.

On August 17, 1978 the Board referred both matters to its Hearings Division to be heard in tandem. The hearing was held on December 5, 1978 before Referee Kirk A. Mulder who entered his Opinion and Order on January 3, 1979 denying claimant's request for payment of medical bills and time loss and for penalties and attorney's fees but recommended to the Board that claimant's request for own motion relief be granted on the grounds that claimant's 1978 symptoms were traceable to the 1970 industrial injury and that claimant's condition had worsened since May 1, 1974.

On January 12, 1979 the Board entered its Own Motion Order remanding claimant's claim for the March 18, 1970 industrial injury to the Fund to be reopened for the payment of compensation, as provided by law, commencing on November 25, 1977, the date claimant was hospitalized, and until the claim was closed pursuant to ORS 656.278, less time worked. The order also granted claimant's attorney a reasonable attorney's fee in the sum equal to 25% of the increased compensation for temporary total disability granted claimant by that order payable out of the compensation as paid, not to exceed $500.

On May 30, 1979 Dr. Balme indicated that claimant had returned to work in August 1978 and has continued working since that date. Claimant's job allows him to remain seated while he runs the barker. Dr. Balme said that claimant could continue at this type of work but that he would have to be careful if he took another job which required him to do heavy lifting or any vigorous twisting activities.

On June 7, 1979 the Fund requested a determination of claimant's present condition. The Evaluation Division of the Workers' Compensation Department recommended claimant be granted additional time loss from November 25, 1977 through August 1, 1978 and no additional compensation for permanent disability.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 25, 1977 through August 1, 1978, less time worked.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of January 12, 1979.

WCB CASE NO. 78-1398 July 11, 1979

PEARL (SUE) VAN BUREN MORRIS, CLAIMANT
Franklin, Bennett, Ofelt &
Jolles, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which affirmed the Determination Order of February 2, 1978 which had granted claimant 80° for 25% unscheduled low back disability. Claimant contends that she is permanently and totally disabled.

Claimant was employed as an inventory clerk and on August 14, 1972 she was sitting on the floor inventorying material stored in a bottom drawer and wrenched her back maneuvering the drawer. Claimant has not worked since this injury.

Claimant had a prior back injury with subsequent fusion in the 1960's and received an award of 100% loss function of an arm for that injury.

From this injury of August 16, 1972 claimant was hospitalized with a diagnosis of lumbar strain and probable cervical strain. She came under the care of Dr. Chuinard who prescribed physical therapy.

In September 1973 claimant was hospitalized, underwent a myelogram and on Septebmer 26 surgery for laminectomy with disc excision.

On February 24, 1974 Dr. Chuinard reported that claimant had definite arthritic changes in her lumbar spine. He felt she could not return to any strenuous work and recommended retraining.

Claimant was evaluated at the Disability Prevention Center by Dr. Van Osdel in March 1974. His report indicates a diagnosis of post status laminectomy superimposed on a prior laminectomy and discectomy (related to her August 1972 injury and an aggravation caused by an automobile-taxi collision of March 1973). A psychological evaluation revealed claimant to be a high school graduate with past work experience as a nurse's aide, a medical assistant, cafeteria cashier, barmaid, general office worker in a real estate office and comptometer operator. Claimant's I.Q. was average. Claimant was not motivated to work and felt devastated by her injury.

Claimant's complaints and severe symptoms continued and on May 3, 1974 she was hospitalized by Dr. Chuinard who performed a differential spinal block. On May 5 he performed a paravertebral lumbar sympathetic block at L-2 on the right.

Dr. Chuinard found claimant's condition stationary on May 17, 1974 and indicated she could return to her regular occupation.

A vocational rehabilitation counselor contacted the claimant but she told them she was too busy with physical therapy and that Dr. Chuinard wanted her to do nothing and so they closed her file. In December 1974 claimant applied for social security disability.

Claimant was hospitalized in January 1975 and after a myelgram she had surgery for laminectomy and right decompression L2-L5. Thereafter she suffered several aggravating incidents; in July 1976 her husband struck her, in September 1976 she fell at home, in November 1976 she again fell at home injuring her right shoulder and right back and in October 1977 she reinjured her back carrying a sack of proceries.

On January 4, 1977 claimant was hospitalized again and a myelogram revealed lumbar defect at L3-4 and cervical defect C5-6. On January 6, 1977 she underwent another laminectomy. In addition a spinal fusion was done in an attempt to stabilize her lower back.

On October 6, 1977 claimant was evaluated by Dr. Pasquesi. In his opinion, claimant had benefited maximally from curative care. Claimant has had back problems of one kind or another for 25 years. She needed sedentary employment which would allow her to stand part time. She must avoid repetitive bending, stooping, twisting or any lifting of over 25 pounds. Her condition was medically stationary with the total impairment rated by Dr. Pasquesi at 32% of the whole man.

On November 2, 1977 Dr. Grewe concurred.

A Determination Order of February 2, 1978 granted claimant compensation for temporary total disability commencing in 1972 until 1977 and an award of 80° for 25% unscheduled disability.

On October 13, 1978 claimant was examined by the Orthopaedic Consultants. Their diagnosis was L4-5 instability, chronic sprain, degenerative disc disease L4-5-S1, functional overlay, tension tremor both arms, cervical spondylosis unrelated to this injury, arm symptoms, also unrelated. Her condition was medically stationary. She perceives herself to be permanently and totally disabled but in their opinion she could perform limited to sedentary employment. Total loss of function of the low back due to this injury was rated as moderate.

Claimant testified that she is unable to do anything. She can sit only one hour and if she sits longer she goes numb from the waist down, she limps, she cannot bend, she cannot walk two blocks, she falls, she experiences hand numbness and headaches and is unable to perform even housework.

The Referee found claimant has no motivation and was not permanently and totally disabled. He found her complaints and symptoms the same as prior to the 1972 injury. He affirmed the award granted by the Determination Order.

The Board, on de novo review, after extensive analysis of the medical reports in this case, finds that the injury of August 16, 1972 has resulted in a substantial loss of wage earning capacity. Claimant's impairment from this injury was rated as moderate. Considering impairment together with other well-established factors considered in measuring extent of unscheduled disability the Board concludes that claimant is not permanently and totally disabled, but is entitled to an award of 50% loss of wage earning capacity.

ORDER

The order of the Referee, dated January 11, 1979, is reversed.

Claimant is hereby granted an award of 160° for 50% unscheduled low back disability.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,000.

SAIF CLAIM NO. ZC 381887 July 11, 1979

HOWARD NICHOLSON, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 26, 1979 the claimant, by and through his attorney, requested the Board to exercise its own motion pursuant to ORS 656.278 and reopen his claim for a compensable injury which he sustained to his back on July 18, 1972. Claimant, at the time, was working for Ross Brothers Construction Company whose carrier was the State Accident Insurance Fund. Claimant's claim was accepted and was closed on September 18, 1972 by a Determination Order which granted claimant an award of 32° for 10% unscheduled back disability. Claimant's aggravation rights have expired and he seeks own motion relief.

On January 30, 1979 the Board informed the Fund of the request for own motion relief and requested it to advise the Board within 20 days of its position with respect thereto.

Claimant's request for own motion relief was supported by a medical report from Dr. N. J. Wilson, dated January 19, 1979, in which he opined that claimant's present condition was related to his June 18, 1972 injury and that although the osteoarthritis and degenerative disc disease were contributing to his present condition, claimant's present condition was a worsening of the industrial injury. He recommended that the claim be reopened.

The Fund responded on Feburary 7, 1979, stating they wished to have claimant examined by Dr. Serbu. The examination of claimant by Dr. Serbu was aborted because of the refusal of Dr. Serbu to examine claimant while one of claimant's attorneys remained in the examination room. Subsequently, it was arranged for claimant to be examined at the Orthopaedic Consultants. The Board advised all parties that it would hold its decision on claimant's request for own motion relief in abeyance pending receipt of a report from the Orthopaedic Consultants.

On June 29, 1979 the Board received from the Fund a report from the Orthopaedic Consultants which stated that claimant's condition at that time was not stationary and they would recommend that his claim be reopened for decompression of the lower lumbar areas of the spinal cord as recommended by Dr. Wilson. This report was accompanied by a letter which stated that, based upon this report, the Fund would not oppose reopening the claim.

The Board, having given full consideration to Dr. Wilson's recommendation and the corroboration thereof by the physicians at the Orthopaedic Consultants, concludes that claimant's claim should be reopened as of April 5, 1979, the date Dr. Wilson recommended in his report that a lumbar myelography and consideration of decompression myelography be carried out. Claimant shall be paid compensation, as provided by law, from that date and until his claim is closed pursuant to the provisions of ORS 656.278.

The Board further concludes that claimant's attorney should be awarded as a reasonable attorney's fee for his services a sum equal to 25% of such compensation as claimant may receive as a result of this order, payable out of said compensation as paid, not to exceed a maximum of $750 if only for temporary total disability, but to a maximum of $3,000 compensation is granted for both temporary total disability and permanent partial disability.

IT IS SO ORDERED.

SAIF CLAIM NO. BC 187017 July 18, 1979

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

Claimant sustained a compensable injury on May 28, 1969. By a Board's Own Motion Order, dated June 25, 1979, the Board denied claimant's request to reopen his claim based on the fact that there was not sufficient evidence before it to justify such reopening.

On July 2, 1979 claimant, by and through his attorney, requested that this matter be set for hearing together with a 1977 claim which is presently pending before the Hearings Division. The Board, after thoroughly considering the evidence before it, concludes that there still is not enough medical evidence and a hearing is not justified. Claimant's request to have a hearing on the merits of his request for own motion relief must be denied.

IT IS SO ORDERED.

CLAIM NO. 05 E 910442 July 11, 1979

RICHARD REPIN, CLAIMANT
Steven Yates, Claimant's Atty.
Gray, Fancher, Holmes &
Hurley, Defense Attys.
Amended Own Motion Order

On January 12, 1979 an Own Motion Order was entered in the above entitled matter which directed the employer and its carrier to reopen claimant's claim for the payment of compensation, as provided by law, commencing on the date claimant was hospitalized for surgery recommended by Dr. Donald T. Smith.

On April 30, 1979 the Board was advised that Dr. Thomas L. Gritzka, who had examined claimant subsequent to the issuance of the Own Motion Order, contemplated extensive diagnostic procedures prior to the surgery. Claimant, by and through his attorney, requested a modification of the Own Motion Order with respect to the payment of compensation for temporary total disability during the proposed diagnostic procedures.

On May 9, 1979 the Board asked to be informed of the date Dr. Gritzka planned to commence his diagnostic procedures. The attorney for the employer and its carrier was notified by a copy of that letter to respond, stating their position relating to the commencement of payment of time loss.

On June 28, 1979 the Board was advised by claimant's attorney that claimant would be hospitalized on July 19, 1978 under the instructions of Dr. Gritzka. The Board has not heard from the employer or its carrier and, therefore, assumes that it has no opposition to claimant's request.

The Own Motion Order entered on January 12, 1979 in the above entitled matter shall be amended by deleting therefrom the first paragraph on page two of said order and inserting in lieu thereof the following:

> "Claimant's claim is hereby reopened for the payment of compensation, as provided by law, commencing on July 9, 1979, the date claimant is hospitalized for the procedures recommended by Dr. Gritzka, and until the claim is closed pursuant to the provisions of ORS 656.278, less any time worked during that period."

In all other respects the Own Motion Order entered in the above entitled matter on January 12, 1979 shall be reaffirmed and republished.

IT IS SO ORDERED.

CLAIM NO. AK 304 July 11, 1979

CARROLL ROBERTS, CLAIMANT
Kilpatricks & Pope, Claimant's Attys.
Corey, Byler & Rew, Defense Attys.
Own Motion Order

On May 25, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an industrial injury sustained on October 24, 1972 while working for Shockman Concrete. Claimant's claim was initially closed by the August 10, 1973 Determination Order which granted him compensation equal to 16° for 5% unscheduled disability.

In 1975 claimant's condition worsened and in January 1976 the carrier denied responsibility for his aggravation claim. A stipulation was approved in October 1976 granting claimant an additional 22.19% for his unscheduled disability. Claimant contends that since the time of this stipulation his condition again has worsened and he is permanently and totally disabled. Attached to his petition for own motion relief were a number of medical documents, the most recent of which was two years old. Claimant requested a hearing be set to determine his current disability.

On May 30, 1979 the Board advised the carrier of claimant's request and asked it to inform the Board of its position with 20 days. On June 25, 1979 the carrier indicated it felt claimant was not entitled to any further compensation, but it would not oppose a hearing on the issue.

The Board, after considering the evidence before it, concludes that it would be in the best interests of the parties involved if this matter were set down for a hearing.

Therefore, the request for own motion relief is referred to the Hearings Division to take evidence on claimant's current condition and determine if his disability has worsened since the approval of the stipulation in October 1976. Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation regarding claimant's request.

WCB CASE NO. 78-6186 July 11, 1979

WILBUR SHOPTAUGH, CLAIMANT
Thwing, Atherly & Butler,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the order of the Referee which found claimant was not permanently and totally disabled but awarded him 48° for 25% loss of his left [sic] arm.

Claimant was employed as a driver for Loomis Armored Car Service and on May 19, 1976 he was shifting gears when his hand slipped and his elbow hit the air conditioning console. Claimant continued to work and finally saw Dr. O'Dea on May 26. The diagnosis was bone spur.

Claimant was released for regular work on June 8, 1976. A Determination Order of July 12 granted him time loss only.

On October 21, 1976 claimant was hospitalized and Dr. Robertson performed surgery for neurolysis of the ulnar nerve and excision of the medial epicondyle. Dr. Robertson released claimant for work on January 28, 1977.

In March 1977 claimant was examined by Dr. Mundall who diagnosed bilateral carpal tunnel syndrome.

In April 1977 Dr. Robertson opined that claimant was unable to effectively perform his regular job and recommended retraining.

The claimant was then examined at the Disability Prevention Center by Dr. Halferty. Claimant told him he had made three trial attempts to return to work but he could not lift the money bags. While at the Center claimant underwent a psychological evaluation by Dr. Loeb. His opinion was that claimant was quite straightforward in his desire to obtain

80% of the prior wages in order to retire and devote his energies to his hobbies. The doctor felt claimant would pursue this goal until he decided whether he could accomplish it or not and then he would return to work or retire. The vocational team found claimant was not a vocationally handicapped worker.

On September 23, 1977 Dr. Robertson reported claimant's condition was now medically stationary.

On May 24, 1978 claimant was examined by the Orthopaedic Consultants with chief complaints being constant pain in the right elbow, forearm, hand and second and fifth fingers. The physicians found the range of motion of claimant's elbow, wrist and fingers was normal. The diagnosis was peripheral neuropathy, etiology unknown, possibly related to claimant's prior alcoholism with multiple entrapment neuropathies of both upper arms, marked functional overlay and right medial epicondylitis, mild. Claimant's condition was stationary and he could return to his regular occupation. Total loss of function of claimant's right arm was mild.

On July 28, 1978 a Second Determination Order granted 5% loss of the right arm with compensation for temporary total disability through September 23, 1977.

On December 12, 1978 Dr. Robertson reported that he felt the Orthopaedic Consultant's assessment of claimant's condition was a fair one.

Claimant had had a prior right arm injury in the 1970's. Claimant testified he can't open jars, he is unable to swing a hammer and he has no grip.

The Referee found that the evidence failed to show claimant was permanently and totally disabled and he felt claimant lacked any motivation to return to work. The Referee did find that claimant's loss of function of the arm was greater than that awarded by the Determination Order and granted him 25% loss of the left [sic] arm.

The Board, on de novo review, concludes that the medical reports indicate claimant has difficulty in performing repetitive movements with his right arm and it was recommended that he not perform heavy lifting. Therefore, the Board concludes that claimant has only 75% use of the right arm remaining.

ORDER

The order of the Referee, dated January 15, 1979, is affirmed with this correction: claimant is granted 48° for 15% loss of the right arm.

WCB CASE NO. 78-7449 July 13, 1979

VICTOR A CAPIDIFERRO, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

The claimant seeks review by the Board of the Referee's order which approved the defendant's denial of claimant's claim for an "allergy reaction to materials being handled, eye irritation, swelling of hands, nasal irritation".

Claimant was employed by the defendant on November 7, 1977 as a floral designer. It was necessary in making floral designs to use dried, silk and artificial flowers. In December of 1977 claimant began to develop symptoms including irritation of his eyes and inflammation.

On March 24, 1978 he saw Dr. Anderson, complaining of these symptoms which claimant stated he had never had before. When claimant was away from his work he had no symptoms. Dr. Anderson diagnosed irritative allergic conjunctivitis. On March 20, 1978 claimant filed a claim which initially was accepted by the defendant as a disabling occupational disease.

Dr. Anderson referred claimant to Dr. James Baker, an allergist, who, on September 12, 1978, gave claimant certain skin tests which indicated that claimant had positive reactions to dog fennel, sage, false and short ragweed. These are either species that he works directly with or are in the same family as many of the plants with which he works. Dr. Baker stated claimant experienced not only positive skin tests but also had a mild systemic reaction. Based upon claimant's history and positive skin tests Dr. Baker felt that claimant had allergic conjunctivitis and could not work in an area in which he was exposed to dried flower arrangements. He suggested retraining claimant for a job in a different environment.

Claimant continued to work until July 4, 1978 although, apparently, he suffered an injury to his right leg in May 1978. There is no claim for this injury in the record, however, the Referee refers to the injury in his order, i.e., claimant, at the time of the hearing, was still drawing compensation for temporary total disability for his knee injury.

After claimant was terminated in July 1978 he drew unemployment compensation and has applied for Social Security retirement. Claimant was 62 years old when he was examined by Dr. Baker.

Claimant testified he had been a floral designer for 49 years, working in Arizona and southern California before coming to Oregon in 1977. Before claimant came to Oregon he was known as Victor de Marinis; he changed his last name to Capidiferro on his arrival in Oregon.

The Referee found that the reports of Dr. Baker clearly established that claimant has had an allergic reaction to certain plant materials but claimant had failed to prove the symptoms from which he suffered were causally related to his work activities with the defendant.

The Referee expressed his opinion that claimant was completely unreliable insofar as his credibility was concerned and set forth in his order the reasons for this opinion.

The Referee concluded that without claimant's testimony or the information he gave to Dr. Anderson and Dr. Baker, claimant would not have a case. To prevail claimant would have to present legal evidence that his allergies did not exist when he commenced work; he would have to present legal evidence that some of the materials with which he was working were materials to which he had been found to be allergic. The Referee found no such evidence on either, therefore, he concluded that claimant had failed to establish legal causation.

The Board, on de novo review, agrees with the Referee's conclusion that claimant has not established that his allergic reactions are attributable to his work environment at the defendant's place of employment.

The evidence indicates that claimant is less than credible and, therefore, if his testimony must be considered suspect

then the opinions expressed by Dr. Anderson and Dr. Baker, both of whom relied upon histories given by claimant, must be equally questionable. The evidence reveals that the "history" given to Dr. Baker by the claimant was inaccurate, therefore, Dr. Baker's opinion as to causation cannot be given any weight.

The Board concludes that claimant has failed to prove he has sustained a compensable occupational disease and that his claim was properly denied.

ORDER

The order of the Referee, dated January 17, 1979, is affirmed.

WCB CASE NOS. 78-2427 July 13, 1979
WCB CASE NOS. 78-4946

J. D. CARTER, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant had suffered a compensable injury to his shoulder and back on October 19, 1967 and his claim had been initially closed by a Determination Order dated November 20, 1967 which awarded no compensation to claimant.

Subsequently, the claim was reopened after a hearing and the claim was remanded to the State Compensation Department for medical care and treatment as recommended by Dr. Cherry. The claim was again closed by a Determination Order dated July 28, 1972 which granted claimant compensation equal to 35% unscheduled neck and back disability.

In May 1973 the claim was again reopened to allow claimant to undergo multiple surgeries performed by Dr. Kloos and Dr. Cherry. The last surgery was a lumbar laminectomy and fusion which was performed on September 10, 1974. Since that date claimant has been seen by other physicians all of whom state that he is still unable to return to work but is medically stationary.

On March 8, 1978 a determination of claimant's present condition was requested and on June 6, 1978 the Evaluation Division of the Workers' Compensation Department recommended claimant be awarded additional compensation equal to 15% unscheduled neck and back disability and additional compensation for temporary total disability from May 1, 1970 through April 21, 1978. The Board concurred in the recommendation and on June 22, 1978 issued its Own Motion Determination which granted claimant the recommended compensation.

On June 28, 1978 claimant, by and through his attorney, requested a hearing on the Own Motion Determination, contending that the claim should have been closed pursuant to the provisions of ORS 656.268 rather than 656.278. ORS 656.278(3) provides that the claimant has no appeal from the Own Motion Determination if claimant receives an increased award of compensation.

At the present time, the claimant, by and through his attorney, has also requested a hearing on the propriety of the denial by the Fund dated March 1, 1978 (WCB Case No. 78-2427). The request for a hearing based on the alleged improper claim closure by the Board has been designated as WCB Case No. 78-4946.

The Board concludes that in the interest of all parties concerned it would be best to resolve the issue of proper claim closure at the time the propriety of the denial of claimant's claim by the Fund is determined.

Therefore, Referee Douglas W. Daughtry, to whom the hearings were originally assigned, is instructed to make a determination on the issue of whether claimant's claim for his 1967 injury should now be closed pursuant to the provisions of ORS 656.278 or if claimant still has the right to have his claim closed pursuant to ORS 656.268.

If the Referee determines that the sole remedy available to claimant under the circumstances of this case is the provisions of ORS 656.278, he shall cause a transcript of the proceedings to be forwarded to the Board together with his recommendation that the Own Motion Determination entered on June 22, 1978 was proper. If he determines that claimant is entitled to have his claim closed pursuant to ORS 656.268 then he shall, based upon all of the evidence received, enter his Opinion and Order pursuant to ORS 656.289.

WCB CASE NO. 78-5224 July 13, 1979
WCB CASE NO. 78-7814

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

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests Board review of the Referee's order which granted claimant compensation equal to 40.5 degrees for 30% loss of the left foot, in lieu of the compensation previously granted claimant by the Determination Order, and also granted claimant 32 degrees for 10% unscheduled low back disabilty.

Claimant originally filed a claim for an injury occurring sometime in June 1977 when she fell and injured her left ankle. However, it appears she missed no time from work nor did she seek any medical treatment.

Claimant was employed by Caveman Lumber Company as a head stacker and on July 20, 1977 she developed a backache and stumbled injuring her left ankle.

Dr. Kendall, claimant's treating orthopedic physician, diagnosed acute lumbosacral strain and contusion os calcis left. Claimant's treatment was conservative. On March 6, 1978 Dr. Kendall reported claimant could not return to her regular occupation but her ankle condition was medically stationary. On May 26, 1978 Dr. Kendall did a final examination of claimant's back and diagnosed mechanical low back pain secondary to exogenous obesity. Claimant had no permanent back residuals.

Claimant testified that she worked for awhile in the hop yard and that bothered her back; she also did some painting on the outside of her small cafe which caused her some pain and swelling in the ankle and some low back distress. She said that she could not sit for prolonged periods of time and that she has pain and weakness in her ankles which prevents her from walking at any rapid pace or on irregular ground.

On June 2, 1978 a Determination Order granted 6.5° for 5% loss of the left foot.

On June 19, 1978 a Determination Order granted claimant time loss only on her back claim.

The Referee found that the medical record was quite sparse as it related to claimant's back condition, however, in July 1977 Dr. Kendall did diagnose a lumbosacral strain and noted that claimant was at that time suffering moderate distress.

Claimant testified that for a number of years she weighed between 175 and 185 pounds, however, Dr. Kendall had repeatedly recommended that claimant lose weight. In his evaluation of claimant's back condition in May 1978 he indicated that claimant's weight gain probably precluded her from having a normal or pain-free back in the future. He said claimant has suffered no permanent disabling injury as a result of her industrial care.

The Referee did not agree with Dr. Kendall's opinion that claimant's weight gain was a contributing factor to her inability to return to heavy work. He found the degree of limitation in the functional usefulness of claimant's foot for support and maneuver to be significantly higher than the 5% heretofore awarded claimant by the Determination Order of June 2, 1978. He concluded that the degree of physical impairment of claimant's back was not very severe, but he disagreed with Dr. Kendall's ultimate conclusion that claimant had suffered no permanent disabling injury as a result of the industrial injury and that her low back problem was due primarily to obesity.

The Referee concluded that claimant would probably never have a normal or pain-free back and that it should be attributed, not to her obesity, but to the industrial injury. Therefore, he awarded her 32 degrees for 10% of the maximum for unscheduled disability.

The Board, on de novo review, finds no medical evidence to support an award for unscheduled disability. The Board accepts Dr. Kendall's assessment of claimant's back problem. The Board suggests that claimant be referred to the Field Services Division of the Workers' Compensation Department for job development rather than vocational rehabilitation.

With respect to the award for the left foot, the Board finds that the award made by the Determination Order of 5%

is too low, however, it does not feel that claimant has lost 30% function of the left foot and would, therefore, reduce the award for the scheduled member to 20% of the maximum.

ORDER

The order of the Referee, dated November 29, 1978, is modified.

Claimant is awarded 27 degrees for 20% loss of the left foot. This award is in lieu of the awards made by the Referee for both scheduled and unscheduled disability.

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

WCB CASE NO. 78-9157 July 13, 1979

JAMES CYPERT, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
Roger Warren, Employer's Atty.
Velure & Heysell, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which approved the November 13, 1978 denial by the carrier of claimant's claim for a compensable injury.

The only issue is whether claimant suffered a compensable injury while employed by Marco Plumbing Company.

Claimant, at the time of the hearing, was a 36-year-old graduate from the University of Washington. Between June 1965 and 1976 claimant was engaged primarily as an insurance salesman. He had had some plumbing experience while in college and he took a short course in plumbing in Albuquerque, New Mexico which allowed him to obtain a journeyman plumber's license.

Claimant worked in Albuquerque between 1976 and 1977 and then went to Las Vegas where he first worked approximately four months for Larkin Plumbing as a journeyman plumber. He then worked for Bronze Construction Company. On May 10, 1978 while working for Bronze he injured his low back. He testified that his back continued to bother him for about two-and-a-half weeks and he finally saw Dr. Hito on June 16, 1978, nearly five weeks after the incident. Dr. Hito was unable to find symptoms severe enough to keep claimant from working.

On June 23, 1978 claimant returned to Dr. Hito who this time felt claimant needed an additional week of rest. Claimant had not worked between the two visits to Dr. Hito. On July 5, 1978 Dr. Hito released claimant with instructions to do exercise for his low back.

Claimant decided to move to Portland and he packed his belongings and drove from Las Vegas to Portland; apparently, this caused no back problems. Claimant worked for a week for Burfitt Plumbing and had no injuries nor did he complain of any back problems while he was there. During July he went to work for Marco Plumbing Company but was laid off on August 21, 1978 because of lack of work. He worked for Modern Plumbing commencing the following day and continued until September 1, 1978. Claimant's work at Modern Plumbing involved the laying of foundation that required bending and stooping. Claimant worked an excess of 40 hours a week while employed by Modern and completed the foundations for two or three houses during the week of August 24 through August 30.

In August 1978 claimant had obtained a refill of a prescription for pain medication which, according to the Referee, was for the May 10, 1978 accident in Nevada and for a re-injury while moving water heaters while working for Marco.

Although there is no evidence in the file to corroborate this statement, claimant said he returned to the University of Oregon Health Science Center on September 5, 1978 after resting over the Labor Day holiday and three doctors told him to lie flat on his back for two to three weeks. Claimant went to Olympia where his sister lived and rested. Claimant testified that before he left for Olympia he stopped by and discussed the matter with his attorney and asked him to obtain a claim form for Marco Plumbing.

Claimant was seen by Dr. Borman, an orthopedic physician, on September 22, 1978. He was also seen in consultation by Dr. Aversano. He was hospitalized from September 22 to September 29, 1978 and underwent a lumbar myelogram. After his discharge he received acupuncture which apparently improved his condition. In October 1978 he was seen by Dr. Utterback who stated that claimant told him he continued to have the same radicular-type pain that he had first developed when employed by Bronze in Las Vegas on May 10, 1978. He told Dr. Utterback that his physician in Las Vegas had found no neurologic deficit to support the pain distribution when he diagnosed a herniated nucleus pulposus. Dr. Utterback felt that lack of neurologic deficit is not unusual with an early ruptured disc; many will improve markedly with improved treatment. He thought this would explain claimant's ability to return to work for a period of time prior to the first of September. Dr. Utterback emphasized that his documentation of the chronology of events was entirely based on information given him by claimant. Based upon Dr. Utterback's report, the claim was denied on November 13, 1978.

The Referee, relying primarily on Dr. Utterback's report, found that the denial of claimant's claim for a new injury sustained while working for Marco should be upheld. It was his opinion that claimant had suffered an aggravation of his Nevada injury. Only six weeks had elapsed between the time claimant was released by Dr. Hito and the date of the alleged incident at Marco, and in the Referee's opinion, that was not sufficient time to convincingly insulate the Nevada accident. He was more persuaded that any activity claimant might engage in, on or off, the job would precipitate what eventually was going to happen as a result of the herniated disc which had occurred in Las Vegas. Nothing had occurred on the job with Marco which was serious enough to cause a new injury nor was the evidence convincing that claimant was relatively stable between incidents. He upheld the denial.

The Board, on de novo review, affirms the conclusion reached by the Referee. Claimant contends that he sustained a new injury on August 18, 1978 when he had to move some water heaters. Claimant admitted that the lifting of such water heaters was not very strenuous and that he accomplished the task with the help of a dolly and the assistance of two co-workers. Although claimant testified that he began experiencing low back pain the following day, he did not report such injury to Marco Plumbing. In fact, claimant returned to work on the following Monday and moved other water heaters and apparently experienced no back pain. It was on that day, August 21, that claimant was laid off due to lack of work at Marco. There was no explanation offered by claimant for his failure to report the alleged low back injury to Marco at the time of its occurence. Claimant stated that he had waited to seek medical attention, because it was not convenient for him at the time of the alleged injury to see one.

The Board concludes that claimant failed to establish that the alleged incident on August 18, 1978 constituted a compensable injury.

The case presently before the Board falls squarely within the rule enunciated in Calder vs. Hughes & Ladd, 23 Or App 66 (1975), and Gardner vs. Underwriters Adjusting Company, 27 Or App 433 (1976). In each of these cases claimant had sustained an earlier compensable back injury and had filed a claim for aggravation. In neither case did the claimant meet his burden of showing that the subsequent injuries constituted a compensable aggravation of the initial injuries. The second incident, in both cases, merely precipitated the condition which was rendered inevitable by the first compensable injury.

The Board concludes that in the case before it claimant suffered an injury while working in Las Vegas, Nevada in May 1978; that following the injury claimant was able to return to work and did so after he returned to Oregon. The alleged incident of August 18, 1978, if it did happen (and claimant has failed to establish by a preponderance of the evidence that there was actually an incident on August 18, 1978 which could have caused an injury to his back), was merely a recurrence of the May 1978 injury and did not contribute in the slightest degree to the causation of claimant's disabling condition.

Claimant's present condition might represent an aggravation of his industrial injury sustained in Las Vegas, Nevada. The evidence indicates that claimant requested the Nevada Industrial Commission to reopen his claim but the request was denied. This Board can speak only to the claim filed for the alleged injury of August 18, 1978. It concludes, based upon the total evidence, that claimant did not suffer a new intervening industrial injury on August 18, 1978 while in the employ of Marco Plumbing Company. The denial must be affirmed.

ORDER

The order of the Referee, dated January 12, 1979, is affirmed.

CLAIM NO. 05X-007065 July 13, 1979

ROYCE EMBANKS, CLAIMANT
Welch, Bruun, Green &
Caruso, Cliamant's Attys.
Own Motion Order

On June 1, 1979 claimant, by and through his attorney, petitioned the Board to convene a hearing under its own motion jurisdiction granted pursuant to ORS 656.278 for the purpose of reopening his claim for an occupational disease or injury which he alleged he sustained while employed by Floyd Summers Construction Company. Claimant had filed a claim and it had been denied by the carrier, Argonaut Insurance Company. The petition states that in the summer of 1968 claimant began to develop severe respiratory problems for which he was hospitalized. Claimant was last employed in June 1969. Since that date he has been hospitalized for the same respiratory condition in several hospitals, including the hospital at the University of Oregon Medical School.

Claimant alleges that he is permanently and totally disabled and that such disability is directly related to his occupational disease. He has furnished the Board medical documentation including a report from Dr. Boots, the initial treating physician for claimant in 1968. This report, dated October 6, 1968 and addressed to claimant's attorney at that time, expressed Dr. Boots' conclusions that claimant suffered from an occupational disease arising from the inhalation of rock dust, that the disease arose out of the course of his employment and that, at the date of the letter, claimant's disability was in the active stage and was a total disability.

On June 5, 1979 the Board asked Argonaut Insurance Company to inform the Board of its position with respect to the request for own motion relief, a copy of which had been furnished to the carrier by claimant's attorney. No response has been received as of the date of this order.

The Board concludes the evidence now offered fails to prove that the original denial was erroneous. The original denial was for the condition of silicosis and the medicals furnished do not adequately support a claim for that condition at the present time. The medicals would support a claim for chronic pneumonitis and lung fibrosis initiated by exposure to oil laden particles and would be sufficient to support a new claim, however, five years have expired since claimant's disability commenced, therefore, such a claim would not be timely under the provisions of ORS 656.807(1).

The Board concludes that there is not sufficient justification for exercising its own motion jurisdiction and claimant's request for an own motion hearing must be denied.

IT IS SO ORDERED.

CLAIM NO. U-11807 July 13, 1979

TOM O. KEEN, CLAIMANT
Own Motion Order

On January 11, 1971 claimant suffered a compensable injury to his left knee. The claim was accepted and closed and claimant's aggravation rights have expired.

On April 25, 1979 claimant was examined by Dr. Richard E. James who filed his report based on said examination with Industrial Indemnity and requested that the claim be reopened. Because claimant's aggravation rights have expired, the carrier forwarded Dr. James' report to the Board with a cover letter which stated that, based upon the medical evidence, it would have no objections to reopening the claim.

The Board, after considering Dr. James' report which indicates that claimant's condition is related to his 1971 industrial injury sustained when he fell off a hay wagon at the ranch at which he was working and that it was now necessary for claimant to have a posterior medial meniscectomy to remove a probably retained posterior medical horn which has been the cause of claimant's present condition, concludes that there is basis for reopening claimant's claim.

ORDER

Claimant's claim for an industrial injury sustained on January 11, 1971 while employed by Alpine Angus Ranch, whose carrier was Industrial Indemnity Company, is hereby remanded to said employer and its carrier to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant is hospitalized by Dr. James for the proposed surgery and until the claim shall be closed pursuant to the provisions of ORS 656.278.

WCB CASE NO. 78-5120 July 13, 1979

In the Matter of the Compensation of
KETURA HAYNES, CLAIMANT
W. Eugene Hallman, Claimant's Atty.
Frank A. Moscato, Employer's Atty.
Settlement Stipulation

Based upon the stipulation of the parties that the same may be so done and in appearing to the undersigned Workers' Compensation Board member that the same would be a proper disposition of the Request for Hearing now pending herin, it is

ORDERED:

(1) Claimant was awarded 45 percent unscheduled disability for her hernia by Opinion and Order of Referee Leahy, dated April 24, 1979. On May 22, 1979, claimant filed a Request for Review of the referee's Opinion and Order to the Workers' Compensation Board.

(2) The employer, Marlette Homes, and its insurance carrier, The Home Insurance Company, hereby agree to pay claimant an additional 5 percent unscheduled disability for her hernia making her total award of 50 percent for 160 degrees unscheduled disability.

(3) Claimant's attorney shall receive a fee of $350.00 payable in addition to this settlement and not out of the compensation paid to claimant.

(4) The pending Request for Review before the Workers' Compensation Board in this matter shall be dismissed with prejudice.

WCB CASE NO. 78-4305 July 13, 1979
WCB CASE NO. 78-5090

LEROY E. LEEP, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Velure & Heysell, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Paul L. Roess, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which affirmed both the denial of claimant's claim for aggravation by Mission Insurance dated May 12, 1978 and the denial by the Fund of claimant's claim for an alleged industrial injury sustained in September 1977 dated June 27, 1978.

Claimant, while working as a truck driver for West Coast Trucking, whose carrier was Mission Insurance, filed a claim for a low back strain incurred on June 16, 1975 when he slipped and fell in the bed of his truck. The claim was accepted as a non-disabling injury and subsequently was closed administratively without the entry of a Determination Order. Claimant quit working about six weeks after the injury and bought his own automotive repair business and continues to own and operate it. His workers' compensation coverage has been furnished by the Fund.

Claimant had a prior back injury with subsequent surgery in the early 1960's.

On April 29, 1976 claimant was seen by Dr. Campagna, complaining of low back problems and pain which radiated into his legs. He told the doctor that his condition had gradually worsened since June 1975. Dr. Campagna diagnosed a severe nerve root compression secondary to a recurrent L5 disc problem. Claimant received conservative treatment and by June he was much improved.

On September 12, 1977 claimant again saw Dr. Campagna complaining of problems with his low back and left leg. He said he had been able to tolerate these symptoms until approximately two weeks before when he had strained his back while lifting at work. He also told Dr. Campagna that he had strained his back about 50 times during the prior year. After a myelogram, Dr. Campagna performed a lumbar laminectomy and excision of the old scar on September 16, 1977.

On September 27, 1977 Mission Insurance reopened the 1975 claim and began paying claimant benefits for time loss. Claimant told an insurance investigator on December 7, 1977 that he had not had any specific injury or incident between 1975 and his recent surgery. He was unable to recall any specific incidents in connection with the "50 back strains" which were reported in Dr. Campagna's earlier report. Claimant told the investigator that he had problems with his back when lifting things at work and when doing a variety of minor stressful things at home. He said very little was necessary to cause pain.

In January 1978 claimant again saw Dr. Campagna. Claimant had improved since the surgery, however, he complained of right leg pain. Dr. Campagna diagnosed a lumbar spondylosis of the L4 and L5 and on April 27, 1978 Dr. Campagna stated his opinion that he felt claimant's latest back problems were related to the injury claimant sustained in September 1977 while working. At the hearing claimant denied any specific incident or injury in September 1977 and also testified that the "50 back strains" previously reported were pains he had suffered both on and off the job.

The Referee found claimant not to be a credible witness. He found inconsistencies between claimant's testimony and a signed statement given by him to an insurance investigator and statements made by him to Dr. Campagna, his treating physician. He also found the credibility of claimant was destroyed by the surveillance films. Therefore, he stated that his findings would be based almost entirely on the documentary exhibits.

On May 12, 1978 Mission issued its denial, stating that claimant had sustained a series of back strains immediately prior to September 12, 1977 at his own place of business and that the responsibility for claimant's condition was the Fund.

On June 8, 1978 claimant mailed his claim to the Fund, alleging that he had aggravated a pre-existing injury to his low back. On June 27, 1978 the Fund denied the claim on the grounds that it was untimely filed and there was a lack of evidence to substantiate an on-the-job accident, incident or episode.

The Referee concluded that claimant had shown good cause for the delay and, therefore, he had come within the exception to ORS 656.265(4)(a). This good cause was the receipt of benefits from Mission Insurance for claimant's claim against it until Mission Insurance denied responsibility. Until this denial, claimant had no reason to file a claim with the Fund.

With respect to claimant's claim for a new compensable injury in September 1977, the Referee found no legal causation since there had been no proof of a specific, unusual event, or series of events, at the claimant's automotive shop in September 1977 or prior thereto. He also found that the medical causation had not been established. Dr. Campagna's opinion that claimant's back problems were job-related was based on a specific incident reported to Dr. Campagna as having happened in September 1977 but which claimant later expressly denied. He concluded there was no valid basis for Dr. Campagna's opinion and that the denial by the Fund was proper.

After considering the facts relating to claimant's claim against Mission Insurance for aggravation of his 1975 compensable injury, the Referee found there was no question but that claimant had suffered increased pain and other symptoms which in September 1977 resulted in a second lumbar laminectomy. He found, however, that Mission Insurance could be held responsible only if the worsened conditions were an aggravation of that earlier injury and that there was no opinion from Dr. Campagna or any other doctor to that affect.

The 1975 injury had been non-disabling and without expert medical opinion that claimant's deteriorated condition was a worsening resulting from the injury sustained in 1975 and not simply a further degeneration of disc problems that first required surgery in 1961 the Referee concluded that claimant had failed to establish his aggravation claim against Mission Insurance. He therefore affirmed the denials issued by each carrier.

The Board, on de novo review, finds that the medical evidence, namely, Dr. Campagna's report of April 27, 1978, unequivocally relates claimant's latest low back problem to the injury he sustained on September 12, 1977 while working. There is no medical evidence to rebut this statement. There is no medical evidence to indicate that the necessity for

the surgery performed by Dr. Campagna on September 16, 1977 related clear back to a lumbar laminectomy performed by Dr. Campagna in 1961. Obviously, claimant suffered an injury which required surgery in September 1977. Dr. Campagna was claimant's treating physician, he performed the surgery, and his opinion is persuasive that the surgery was necessitated by the 1977 injury.

The 1975 injury was non-disabling and soon thereafter claimant purchased his present automotive repair business. He bought the business on September 1, 1975 and the medical evidence indicates that as of that date claimant was not having any problems with his back. He did see Dr. Campagna in April 1976 and again on September 12, 1977 when, after examination of claimant, Dr. Campagna operated.

The Board concludes that claimant suffered a compensable industrial injury on September 12, 1977 and that the claim which he filed with the Fund for that injury should be accepted for the payment of compensation as provided by law commencing on the date of the injury.

ORDER

The order of the Referee, dated December 8, 1978, is modified.

The claimant's claim for an industrial injury sustained on September 12, 1977 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on September 12, 1977 and until the claim is closed pursuant to the provisions of ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee for prevailing on a rejected claim a sum of $1,000, payable by the State Accident Insurance Fund. This attorney's fee is awarded for the services rendered by claimant's attorney both at the hearing level before the Referee and on Board review.

The balance of the Referee's order is affirmed.

WCB CASE NO. 78-4981 July 13, 1979
WCB CASE NO. 78-4982

JUNE LYTER, CLAIMANT
Carl H. Brumund, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Order on Reconsideration

On June 26, 1979 the Board entered an Order on Reconsideration in the above entitled matter whereby it set aside in its entirety its Order on Review dated June 18, 1979 and affirmed and adopted the Opinion and Order of the Referee dated December 20, 1978.

Through inadvertence, claimant's attorney was not awarded a reasonable attorney's fee for his services at Board review in the June 26, 1979 order. The State Accident Insurance Fund had requested the Board review and had failed to prevail, therefore, pursuant to ORS 656.382(2) claimant's attorney is entitled to a reasonable attorney's fee payable by the Fund.

The Order on Reconsideration is hereby amended by inserting after the second complete paragraph on page two thereof the following paragraph:

"Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $350, payable by the State Accident Insurance Fund."

In all other respects, the Order on Reconsideration entered in the above entitled matter on June 26, 1979 is reaffirmed and republished.

WCB CASE NO. 78-24 July 13, 1979

FLOYD O. NELSON, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The Fund seeks review by the Board of the Referee's order which awarded claimant 320° for 100% unscheduled neck and left shoulder disability.

Claimant suffered a compensable injury on June 5, 1975 when the truck he was driving backed over an embankment, causing claimant to suffer bilateral frontal abrasions, hematoma of the mid portion of the ulnar aspect of the left forearm, abrasions over both shoulders and the left knee. Claimant has been unable to return to work since the injury.

Claimant has had extensive back surgery performed by Dr. Melgard, a neurosurgeon, and he has also received treatment from Dr. Tiley, an orthopedic surgeon. Both believed that claimant could do some light work.

At the Callahan Center it was recommended that claimant seek a job change inasmuch as he would be capable of doing only light work. The vocational team conference recommended referral to the service coordinator for assistance in returning claimant to work as a trucker on a trial basis. Claimant was discharged from the Callahan Center on April 22, 1977. The vocational rehabilitation people found claimant to be severely disabled and offered no hope of vocational rehabilitation. Dr. Lesh found claimant to be unemployable in the competitive labor market and he doubted the feasibility of retraining claimant.

Claimant has a third grade education and his intellectual and aptitude resources are minimal. His work background has been in heavy work, e.g., farming, dump truck, timber faller, jitney driver, log truck driver and some long-haul driving.

On May 17, 1977 the claim was first closed by a Determination Order granting claimant 128° for 40% unscheduled disability to his neck and left shoulder and 48° for 25% loss of function of the left arm.

On September 21, 1977 the referral for vocational rehabilitation was withdrawn on the basis of the severity of claimant's handicap, his limited education, his age and his limited abilities. Mr. Webb, the counselor, stated that prior to the decision to close the claim, which was discussed with claimant, the possibility of an extended evaluation of his ability to do bench assembly type of work was suggested but claimant said he could not handle such work because of the limited use of his hands. The counselor felt that because the claimant's condition was aggravated by sitting for more than 20 minutes or standing more than 10 minutes that claimant's reluctance to participate in such a program might be justified.

After the referral was withdrawn, an Administrative Determination Order was entered on October 3, 1977 which granted claimant an additional compensation for temporary total disability and, on re-determination, found his disability to be the same as on May 17, 1977.

The Referee, relying on the reports of Dr. Tiley and the report from the Orthopaedic Consultants, found that claimant's limitations and deficiencies resulting from his industrial injuries were substantial. The testimony of the claimant and of the vocational experts standing alone justified a finding of permanent total disability, however, certain factors which had to be considered persuaded him that the total testimony would not support such a finding. Claimant's treating physicians had stated that claimant could do light work but claimant had not made any effort to seek such type of work. The Referee stated that had claimant found such work then there would have been an opportunity to discover whether or not claimant could do it. He found no doctor had suggested that light work would endanger claimant's health and claimant had failed to meet the burden described in ORS 656.206(3) of proving total disability status by establishing that he was willing to seek regular gainful employment and that he had made reasonable effort to obtain such employment.

Taking into consideration claimant's age, inability to return to any of his previous jobs, and his very severe physical disabilities, the Referee concluded that claimant had established by preponderance of the evidence that he had suffered the maximum loss for unscheduled permanent disability allowable by law. He found that the award for the scheduled disability was properly assessed at 25% of the maximum.

The Board, on de novo review, does not contest the Referee's statements that Dr. Tiley, Dr. Melgard and the physicians at the Orthopaedic Consultants felt that claimant could do light type work; however, it is difficult to understand what light type work claimant could do when all of the vocational rehabilitation experts have stated that claimant is not a candidate for retraining for any type of employment. Claimant's physical condition was so bad at the time that he was referred to vocational rehabilitation that he was unable to enter any of the programs and, for that reason, his referral was withdrawn.

Dr. Lesh reported on September 19, 1978 as follows:

> "It is my opinion that without long term evaluation, testing and counseling, and then trial work experience in a totally different work style mode, that Mr. Nelson is not employable in the competitive labor market. Neither am I able to make any specific reccomendations [sic] for vocational training since his functional educational level, and past experience with intellectual material preclude his completely relearning a new vocational identity."

The Board finds that the medical reports make it very clear that as a result of the industrial injury claimant has been left with very severe physical disabilities. Dr. Tiley qualified his statement that claimant could be employed by saying if claimant's intellectual skills were improved he would be employable at a desk type of job. It has been established by the evidence that claimant's intellectual skills cannot be improved.

The Board concludes that the severity of claimant's physical disability is so great that motivation is not a material factor. The medical limitations which have been placed upon claimant's work activities practically precludes re-entry into all types of employment. The doctors state, in a qualified sense, that claimant can do light work but they do not say that this "light work" will assure claimant of gainful employment on a full time basis.

The Board concludes the claimant is permanently and totally disabled.

ORDER

The order of the Referee, dated January 29, 1979, is modified.

Claimant is to be considered as permanently and totally disabled as of January 29, 1979, the date of the Referee's order.

This award is in lieu of the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded a reasonable attorney's fee for his services at Board review the sum of $350, payable by the Fund.

WCB CASE NO. 78-3150 July 13, 1979

HARRY L. REIGARD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Newhouse, Foss, Whitty, & Roess, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order. Claimant had been awarded by Determination Orders dated December 11, 1974 and April 13, 1978 a total of 105° for 70% loss function of his left leg and 6.75° for 5% loss function of his right foot. The Referee granted claimant, in addition to these awards of compensation, 96° for 30% unscheduled low back disability and an additional 30° for 20% loss function of the left leg. Claimant contends that he is permanently and totally disabled.

Claimant, a millwright, suffered a compensable injury on April 3, 1973 when a hold-down fell on him striking his left leg knocking him into the feed chains where a wheel struck him on the right ankle. Claimant had a fracture of the right fibula which has healed well and left claimant with little permanent disability. However, the day after the injury, claimant noted considerable pain in his pelvis and left leg. The pelvic pain disappeared but claimant continued to have difficulty with his left knee.

On May 7, 1973 Dr. A. J. Smith performed surgery on the left knee. Later claimant was able to return to steady work; the knee apparently was improving although at times it was uncomfortable. Dr. Smith noted that claimant was not able to kneel and had very occasional pains with instability and had reduced strength. He believed claimant's disability was minimal of the right knee and mild of the left knee.

On December 11, 1974 the first Determination Order was closed whereby claimant received 30° for 20% loss function of the left leg and 6.75° for 5% loss function of the right foot.

Claimant returned to work for Weyerhaeuser as a hog feeder and on April 18, 1975 he reinjured his left leg when he fell down some stairs. In October 1975 a reformed medial meniscus was excised.

In December 1975 Dr. Smith examined claimant for back pain complaints and diagnosed chronic lumbosacral strain. In February 1976 Dr. Smith performed a high tibial valgus osteotomy on claimant's left knee.

On March 2, 1976 the employer denied responsibility for the back condition, however, on June 23, 1977, pursuant to a stipulated order, the employer accepted claimant's claim in its entirety, including conditions in the low back.

In Dr. Smith's opinion, claimant's back problem was not caused by the April 1973 injury but was aggravated by his altered gait which resulted from the October 1975 left knee surgery. He stated that claimant was, in his opinion, medically stationary at that point in time.

In November 1976 Dr. Bert opined claimant could no longer be a hog feeder or millwright but could perform very light work with no prolonged standing, sitting, bending and lifting of only 10 pounds. Dr. Bert recommended a total knee replacement which he performed on December 14, 1976.

In September 1977 Dr. Bert reported claimant's permanent impairment was almost complete because of the way claimant must walk from the loss of motion of his knee. Claimant's back impairment was rated as minimal from degenerative arthritis.

By March 1978 Dr. Bert found claimant using a cane full time with back pain radiating into his left leg. Claimant had, in his opinion, 50% limitation of back motion. Claimant's back and knee impairment were rated as moderately severe.

On April 13, 1978 the Second Determination Order granted an additional award of 75° for 50% loss of the left leg.

Claimant has a sixth grade education. Claimant has not worked nor looked for work since his re-injury in 1975. Vocational Rehabilitation interviewed claimant and after reading the medical reports rejected him for assistance because of his physical condition.

The Referee found that the injury did not cause claimant's degenerative back condition but the unrebutted medical evidence did indicate that the injury exacerbated the pre-existing underlying condition and made it permanently symptomatic. He concluded that the injury entitled claimant to an award for unscheduled permanent disability.

The Referee also found that claimant had very severe left leg disability. Dr. Bert believed that claimant's knee impairment was almost total and precluded him from returning to work as a carpenter or a millwright. Dr. Bert opined that claimant was not employable on account of his knee and back. Dr. James also felt that claimant would not return to work. Both felt that claimant was not highly motivated to rehabilitate himself.

The Referee felt he was capable of learning to do other types of work. He had completed a community college course in welding and hydraulics in the early 1970's which allowed him to be certified as a millwright. He believed that the only significant factor in reducing claimant's potential job opportunities through retraining efforts was his age. At the present time claimant is 59 years old; however, the Referee did not feel that would completely eliminate the possibility of claimant being retrained.

The Referee concluded that claimant's unemployment by and of itself did not prove he was unable to work nor had claimant exhausted retraining or job change possibilities. He concluded that claimant had lost practically all of the use of his left leg except for some support. He increased the previous awards, which totaled 105°, to 135° or 90% of the maximum for loss of function of a leg.

With regard to claimant's back problems, the evidence was substantial that claimant will not be able to engage in heavy type work and the limitation placed upon him with respect to his work activities when considered in conjunction with his age, education, experience and training, diminishes the opportunities for employment available to claimant in the labor market. The Referee awarded claimant 96° for 30% of the maximum for unscheduled disability. The Referee further stated that the total award which claimant has received as a result of his April 1973 industrial injury amounts to 237.75° when his awards for unscheduled and scheduled disability are combined.

The Board, on de novo review, agrees with the Referee's assessment of claimant's loss of function of his left leg and affirms his award of 135°. The right ankle is apparently healed with very little residual impairment and the loss of function of that scheduled member is adequately reflected by the award of 6.75°.

The Board finds that claimant's loss of wage earning capacity is substantially more than is indicated by the award of 96° which is 30% of the maximum. The fact that claimant was able to complete community college courses in welding and hydraulics in the early 1970's is not now necessarily determinative of a capacity for retraining. Claimant is 59 years old, he has lost practically all of the use of his left leg and he has a disabled back. Because of his leg and back problems, Dr. Bert felt it would be impossible for claimant to return to work as a carpenter or a millwright and that he could not operate any machinery which required using a clutch pedal. Claimant has not finished the seventh grade and his work background has been in fields which must be considered in the heavy-duty labor category. The medical evidence supports a conclusion that claimant is precluded from returning to the type work he was engaged in when injured. However, the Board feels that further efforts should be made by the Field Services Division of the Workers' Compensation Department to assist the claimant to return to work at a job consistent with his physical limitations. The form of assistance may include vocational training in addition to job search and placement.

The Board concludes that to adequately compensate claimant for his loss of wage earning capacity as a result of his April 1973 industrial injury he should be granted an award equal to 256° which represents 80% of the maximum for his unscheduled disability. This award is in addition to the award for 135° for 90% loss function of the left leg and 6.75° for 5% loss function of the right foot.

ORDER

The order of the Referee, dated January 9, 1979, is modified.

Claimant is awarded 256° of a maximum of 320° for 80% unscheduled low back disability. This award is in lieu of the award for unscheduled disability granted by the Referee in his order.

The award of 135° of a maximum of 150° for 90% loss function of the left leg and the award of 6.75° of a maximum of 135° for 5% loss function of the right foot are affirmed as is the Referee's approval of the claimant's agreement with his attorney's for the payment of attorney's fees as set forth in the Referee's order.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation made by this order, payable out of said increased compensation as paid, not to exceed $3,000.

WCB CASE NO. 79-1580 July 13, 1979

GERALDINE REYNOLDS, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Cheney & Kelley, Defense Attys.
Order On Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-7578 July 13, 1979

DEBBIE SOLLARS, CLAIMANT
Panner, Johnson, Marceau, Karnopp & Kennedy, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-429 July 13, 1979

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

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests the Board to review the Referee's order which granted claimant 80° for 25% unscheduled low back disability.

Claimant a 28-year-old high school graduate, injured his low back on November 11, 1976 while lifting a reel of wire. Claimant was employed as a salesman and his duties included loading the materials which he sold, i.e., electrical and plumbing supplies.

Dr. Gilsdorf has been claimant's treating physician since the injury. In 1968 claimant had suffered an injury to his back but he alleged that he had completely recovered from that injury and it had not caused him any problems over the past few years.

Claimant was at the Callahan Center from May 10 to June 9, 1977. It was the opinion of the physicians at the Center that claimant suffered a chronic lumbosacral sprain at the site of a congenital deformity and an asymmetry of L5 vertebrae, especially on the left. At the Center claimant was evaluated by the vocational rehabilitation team who recommended a change of occupations because of claimant's physical limitations. Claimant was assigned to the Oregon Rehabilitation Division for possible rehabilitation plan development.

On December 27, 1977 the claim was closed by a Determination Order which awarded claimant 32° for 10% unscheduled low back disability.

In his final report dated April 3, 1978, Dr. Gilsdorf stated that claimant had an anomalous lumbosacral spine with lumbosacral instability and that such condition was aggravated by his work activity and the industrial injury. He felt that claimant's condition was such that he would not be able to tolerate any repetitive lifting, stooping, or do any bending. His lifting was limited to mild to moderate weights. Dr. Gilsdorf felt that claimant needed to be retrained for employment within his physical capability; it was his opinion that claimant's permanent loss of function of the back was mild to moderate based upon restrictions placed on his work activities.

Dr. Stipek, a vocational consultant, interviewed claimant and reported on June 5, 1978 that claimant had scored very high on his aptitude tests which indicated that claimant had the ability for almost any type of vocational training. Dr. Stipek believed that because of claimant's high level of ability it was unlikely he would remain in any work which did not interest him but that he had the aptitude and ability to be retrained for many types of employment.

The Referee found that claimant has made little effort to return to work, that he has no income but that he is planning to return to school in the fall. He is apparently still working with the vocational rehabilitation personnel and believes that he is to receive assistance from them in returning to school.

Claimant's work background is in sales. He has tried to return to his former employment but worked only a few days and then quit, stating that the work was too heavy for him. He has also sold automobile parts but says that the heavy lifting is basically the same as it was in his former job and he doesn't feel he could return to that type of work. Claimant has also been a shoe salesman but it is his opinion that the bending would be too much for him.

The Referee concluded that the claimant was undoubtedly restricted, based upon the opinions expressed by Dr. Gilsdorf and the physicians at Callahan Center, and that claimant will require retraining to enable him to re-enter the labor market. He found that claimant's potential was outstanding and he felt sure that claimant would take advantage of any retraining and eventually enter a field of endeavor which would be within his physical capabilities and in which he would be successful. However, he felt that claimant must be rated on his earning capacity as it is at the present time, based upon the impairment that he has. He concluded that although claimant's injury had not foreclosed him from any type of sales work, it had precluded him from returning to that portion of sales work in which he had experience. He increased the 10% award to 25% of the maximum.

The Board, on de novo review, finds that claimant has made little, if any, effort to look for work. The restrictions placed upon claimant by Dr. Gilsdorf and the physicians at Callahan Center are not so restrictive as to prevent the claimant from entering into the general field of sales work without retraining. The evidence further indicates that there are many types of employment which claimant could do if retrained.

The evidence indicates that claimant has exceptional aptitudes and can generally engage in any occupation that he chooses which does not involve the use of his back. According to his scores in the aptitude testing claimant's interest tends towards the literary, the outdoors, artistic and scientific skills, therefore, claimant's loss of potential wage earning capacity as the result of his back injury is not as great as it would be to a person who is completely dependent upon the use of his back to earn his livelihood and did not have the aptitude or the ability for job market re-entry and to be retrained for lighter type employment.

The Board concludes that the evidence as a whole does not justify an award of compensation greater than that granted claimant by the Determination Order of December 27, 1977.

ORDER

The order of the Referee, dated September 21, 1978, is reversed.

The Determination Order, dated December 27, 1977 is affirmed.

WCB CASE NO. 78-9165 July 13, 1979

In the Matter of the Compensation of
RAYMOND TRIPP, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
James D. Huegli, Employer's Atty.
Joint Petition and Order Of a Bona Fide Dispute

FACTS

Raymond Tripp sustained an industrial injury arising out of and in the course of his employment on or about November 7, 1975 while employed by Little River Box. Claim for Workers' Compensation benefits was filed on November 7, 1975 and said claim was accepted.

Medical benefits and temporary total disability benefits were paid to the claimant from the date of injury.

On or about February 16, 1978 the claimant made additional claim for psychological problems arising out of and in the course of his employment and directly as a result of his industrial injury of November 7, 1975. Leatherby Insurance Company, private insurance carrier for Little River Box Company, denied said claim on February 16 on the grounds and for the reasons that said psychiatric condition did not arise out of nor in the course of claimant's employment. From this denial claimant appealed.

Hearing was held before William J. Foster, Referee, on or about Wednesday, September 27, 1978 in Eugene, Oregon. Referee Foster reversed said denial and ordered said claim accepted by the employer for psychiatric care. From this Referee's Opinion, the employer appealed to the Workers' Compensation Board.

A bona fide dispute arose between the parties as to whether or not the claimant's psychiatric or psychological problems, including the need for psychological or psychiatric medical care and treatment of any kind or nature arose out of and in the course of claimant's employment. Both parties presented evidence sustaining their views.

PETITION

Claimant, in person and by and through his attorney, Evohl F. Malagon, and the employer, by and through their attorney, James D. Huegli, now make this petition to the Board and state:

1. Claimant, Raymond Tripp, and Leatherby Insurance Company, private insurance company for the Little River Box Company, have entered into an agreement to dispose of the psychiatric portion of this claim for the total sum of $3,000. said sum to include all benefits and attorney fees.

2. The parties further agree that all psychiatric medical care and treatment, including all psychiatric medical bills, will be paid by Leatherby Insurance Company through and including the date of Stipulation and the date this matter is approved by the Workers' Compensation Board.

3. Both parties agree that from the settlement proceeds $750 will be paid to Evohl F. Malagon as a reasonable and proper attorney fee.

4. Both parties agree that this petition is being filed pursuant to the provisions of ORS 655.289(4) authorizing reasonable distribution of disputed claims.

5. All parties understand that if this settlement is approved by the Board and payment made thereunder, said payment is in full, final and complete settlement of any and all claims which claimant, Raymond Tripp, has against respondents for injuries claimed or their results, including attroney fees and all other benefits under the Workers' Compensation Law for this claim for a psychiatric condition and that they will consider said award as being final.

6. It is expressly understood and agreed by all parties that this is a settlement of a doubtful and disputed claim and is not an admission of liability on the part of the respondents by whom liability is expressly denied.

WHEREFORE, the parties hereby stipulate to and join in this petition to the Board to approve the foregoing settlement, to authorize payment of the sums set forth pursuant to ORS 656.289(4) as a full and final settlement between the parties and to issue an order approving this compromise and withdrawing this claim.

IT IS SO STIPULATED:

CLAIM NO. 985 C 3111 July 16, 1979

DIANNA ANDERSON, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury to her left hand on October 10, 1968 when she caught it in the chain roller of the bag sealer machine. She suffered a minor laceration and a severe burn of the 5th finger. This finger was subsequently amputated on October 22, 1968. The claim was first closed on November 21, 1969 with compensation for time loss and an award for permanent disability equal to 8° for loss of the left forearm.

Additional surgeries were performed in 1970 and the claim was again closed by a Second Determination Order which granted claimant an additional award for permanent disability equal to 15° for loss of the left forearm. More surgery was performed in November 1971. Claimant thereafter attended the Callahan Center and was discharged on May 17, 1972. A Third Determination Order, dated June 19, 1972, granted claimant an additional 22.5° for loss of the forearm.

Claimant's claim was reopened and closed both in 1972 and in 1973 for surgery. As of August 30, 1974 claimant had received compensation equal to 60° for loss function of the left forearm.

Dr. Misko, in his May 9, 1978 report, requested the carrier to reopen the claim for additional treatment. His request was denied because claimant's aggravation rights had expired. A Board's Own Motion Order, dated November 9, 1978, reopened the claim as of the date of Dr. Misko's letter.

Claimant underwent surgery on August 9, 1978 for a dorsal sympathectomy, removal of the sympathetic nerve and ganglion from claimant's left upper back. Claimant was referred for a psychological evaluation and, on October 6, 1978, Dr. Duvall recommended enrollment in a multidisciplinary pain center. Claimant was evaluated by the Northwest Pain Center on April 19, 1979; admission was not indicated; they felt claimant should use the transcutaneous electrical stimulator, but further treatment or surgery was not necessary.

Dr. Misko last saw claimant on May 2, 1979 and said claimant was medically stationary.

On June 5, 1979 the carrier requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from May 9, 1978 through May 2, 1979. The combined awards which equaled 60° for 40% loss of the left forearm adequately compensated claimant for her disability.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from May 9, 1978 through May 2, 1979, less time worked.

SAIF CLAIM NO. TA 441689 July 16, 1979

DAVE HENRY BARNETT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right leg on March 11, 1954 when he slipped and fell in the snow while carrying a barrel of garbage down a steep bank. The claim was closed. Claimant's knee was arthrodesed on April 5, 1955 and on February 10, 1956 claimant was granted an award of 50% for the right leg. On May 9, 1958 Dr. Harris recommended claimant be granted 65% of a leg which was done by Commission Order on June 13, 1958.

Claimant's condition later required medical treatment and Dr. Scheinburg performed a total right hip arthroplasty on February 25, 1977. On September 19, 1977 an Own Motion Determination granted claimant compensation for temporary total disability from January 4, 1977 through February 22, 1977.

The claim was reopened and surgery was done on November 11, 1977 to revise his right hip prosthesis. On April 26, 1979 Dr. Manley indicated that the overall prognosis of the revised hip prosthesis was fair. He found claimant's condition to be medically stationary with some additional impairment.

On May 31, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for time loss from Novmeber 11, 1977 through April 26, 1979, with no increase for permanent disability.

The Board concurs in this recommendation.

ORDER

The claimant is hereby granted compensation for temporary total disability from November 11, 1977 through April 26, 1979, less time worked.

WCB CASE NO. 77-3774 July 16, 1979

LAURA BENAFEL, CLAIMANT
Samuel A. Hall, Jr, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order affirming the Determination Order dated June 6, 1977 which granted claimant 16° for 5% unscheduled neck and upper back disability.

Claimant was employed as a laborer for Hanna Mining Company and on October 28, 1976 at 6:15 a.m. she was driving her car on a Hanna-owned road to the mine and the car went out of control, hit a ditch and rolled over. Claimant is 5'5" tall and weighs approximately 105 pounds. Claimant suffered neck and upper back injuries and was taken to the emergency room at Mercy Hospital in Roseburg and x-rayed and given Valium to relieve her pain. The diagnosis was cervical sprain. Claimant was able to return to work the next day and worked about half a shift but quit because of increasing pain. She has not returned to work for the employer.

After seeking medical attention on two other occasions at the emergency room at the hospital, claimant was seen by Dr. Woolpert, an orthopedic surgeon. Dr. Woolpert found claimant continued to exhibit difficulties which were primarily subjective in nature, but consistent with cervical dorsal sprain, unresolved. He stated the claim could be closed, that claimant had reached a medically stationary point. He did not believe claimant could return to heavy type work but he did favor either a job change or rehabilitation.

On June 6, 1977 the aforementioned Determination Order closed the claim.

Claimant moved to Eugene and was referred to Dr. Degge for continued treatment. He felt claimant apparently had sustained a strain of the cervical dorsal area as a result of her injury. He stated she had had a maximum of conservative treatment and her condition was stationary. He found no clinical or x-ray evidence to support the severe degree of disability which claimant alleges she has. He recommended claim closure with no permanent residuals. He released her to return to work on August 11, 1977, the day of the examination.

Claimant was referred to Dr. Baker who examined claimant on May 8, 1978 and reviewed the previous x-rays of the cervical spine. He found no evidence of bony abnormality or injury in the films. He took lumbar spine films which also were normal for bony pathology. He told claimant that her symptoms were purely on the basis of nervous tension and not on the basis of any orthopedic physical pathology which he could demonstrate. He stated she apparently accepted this but she did not know how to deal with it. He suggested psychiatric consultation or counseling, saying he had nothing to offer in the way of orthopedic treatment.

On January 30, 1979 Dr. Ch'en reported that she had been giving claimant acupuncture treatment from May 5, 1978 through September 22, 1978 both for low back pain and pain in the left arm and leg. When she first saw claimant, claimant had pain in her back and on the left side so severe she was unable to sleep and was very depressed. After several treatments there was noticeable improvement but the pain would shift to other places such as her neck and ankles, intermittently.

Claimant also received treatment from Dr. Luethe, a chiropractic physician. His chiropractic manipulations were not particularly effective. He stated, "[d]esk work or high stress work may tend to aggravate it, as may long periods on her feet".

Several witnesses testified that claimant has had continuing upper back problems and also problems with her neck.

Claimant did not graduate from high school but she has three years of college, majoring in art history. She originally worked for defendant during the summer vacation between college terms. Prior to this injury she had decided not to return to college and continued to work for the defendant until her injury in October 1976. In the summer of 1977 claimant worked as a waitress for a month but it was too difficult for her. Subsequently, she drove a seed truck; although this caused some discomfort in her back she was able to tolerate the job for about two weeks. She terminated but there was some question whether or not the termination was based upon her neck problems or whether she was having trouble operating the vehicle.

Claimant has a male friend who is a home designer and contractor and for whom she works intermittently helping him stain wood and remodel homes. Prior to her injury claimant had worked in the art department at the community college and also had worked in the library.

The Referee found that claimant had pain in her upper neck and that she had difficulty turning the neck. Pain was also brought on when it was necessary for her to bend her neck or keep it in one possition for a prolonged period of time. After she commenced receiving acupuncture and chiropractic treatment, claimant developed pain in the low back and hips which continued to bother her. The Referee found no medically verified reason for this shifting of pain; he assumed that it was caused by such treatments. He found no medically established causal relationship between the problems in this area and claimant's industrial injury.

The Referee concluded that claimant had neck and upper back problems even though Dr. Woolpert could find no objective findings to support her complaints. Dr. Woolpert had indicated that claimant could not return to any heavy type employment. Dr. Degge and Dr. Baker, both orthopedic surgeons, each saw claimant only on one occasion and after their respective examinations each indicated he could find nothing objectively wrong.

The Referee concluded that the medical testimony, taken as a whole, did not justify an award greater than that granted by the Determination Order.

The Board, on de novo review, concurs in the findings and conclusions of the Referee. Claimant has failed to prove that she has suffered any disability in excess of that for which she previously had been awarded compensation.

ORDER

The order of the Referee, dated February 27, 1979, is affirmed.

SAIF CLAIM NO. C216399 July 16, 1979

ROY W. GREGORY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable low back injury on November 7, 1969 when he slipped while pushing a loaded cart. Surgery was performed on January 29, 1970. Claimant's condition was found to be medically stationary on May 29, 1970. On June 8, 1970 a Determination Order granted compensation for 25% unscheduled low back disability.

Claimant had a sudden onset of left low back pain in August 1972 and an excision of a recurrent left L4-5 disc was done the following month. The claim was again closed on May 29, 1973 by a Determination Order which granted claimant no additional compensation for permanent disability.

In early 1974 claimant again experienced an increase in symptoms and on February 14, 1974 the surgery was performed. Claimant was referred to the Disability Prevention Center in August 1974. Claimant has had experience primarily in the lumber industry; he has serious reading, educational and intellectual deficiencies, and inadequate personality and unrealistic vocational plans. Claimant's treating physician agreed with this evaluation. The Third Determination Order, dated October 24, 1974, granted claimant an additional 30% for unscheduled low back disability.

On November 4, 1974 claimant's treating doctor recommended further treatment and the claim was reopened by Stipulation, dated January 27, 1975. The conclusion reached was that claimant had had sufficient treatment and had considerable functional overlay. The May 6, 1975 Determination Order granted time loss compensation only.

On October 16, 1975 a Stipulation was approved which reopened claimant's claim and surgery was performed in November 1975. Claimant apparently had worked as a school bus driver in April 1977; however, it was not until October 4, 1977 that he was released for modified work on a trial basis. Claimant was unable to obtain employment and closure was recommended on January 3, 1978. On June 13, 1978 a Determination Order granted claimant an additional award for 10% unscheduled disability for a total award of 65%.

The claimant was again reopened by a Stipulation dated October 26, 1978; the date set for payment of time loss benefits was September 7, 1978.

On May 19, 1979 claimant's treating doctor stated that claimant was medically stationary and that the claim could again be closed. A request was made by the Fund in June 1979 for a determination of claimant's present condition.

The Evaluation Division of the Workers' Compensation Department recommended that the Board grant claimant additional compensation for temporary total disability from September 7, 1978 through May 23, 1979.

The Board concurs.

ORDER

Claimant is granted an award of compensation for temporary total disability from September 7, 1978 through May 23, 1979. This award is in addition to all previous awards received by claimant for his November 7, 1969 industrial injury.

WCB CASE NO. 78-7254 July 16, 1979

In the Matter of the Compensation
of the Beneficiaries of
THEODORE L. LASZLO, DECEASED
VanNatta & Petersen, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Cross-request by Employer

Reviewed by Board Members Wilson and McCallister.

The beneficiaries of Theodore L. Laszlo, deceased, requested Board review of the Referee's order which found that the employer had properly paid the balance of the compensation for permanent partial disability previously awarded to the deceased worker to his widow, Verna Laszlo. The Referee also decided that Perry Laszlo, the deceased's sole surviving child, had a statutory right pursuant to ORS 656.218(4)(5) to contest the sufficiency of the award but declined, in view of his ruling that Verna Laszlo would be entitled to any increase in the award, to consider the sufficiency of the amount of the award granted by the Determination Order.

The employer cross-requested Board review of that portion of the Referee's order which related to Perry Laszlo's right to contest the sufficiency of the permanent partial disability award.

Perry Laszlo was the son of the deceased and his former wife. The deceased was widowed in July 1973 and on June 7, 1975 married Verna Laszlo. In November 1976 the parties separated and Verna instituted proceedings to dissolve the marriage.

On February 20, 1977 the deceased sustained a compensable injury and on May 2, 1978, he died of causes unrelated to this compensable injury.

Pursuant to the provisions of ORS 656.218(2) the claim was requested to be closed and a Determination Order dated May 15, 1978 awarded the deceased compensation for temporary total disability from August 3, 1977 through April 10, 1978 and compensation equal to 16° for 5% unscheduled neck, upper back and right shoulder disability.

On June 8, 1978 the claims administrator for the employer paid the entire amount to Verna. Perry Laszlo contends he has been deprived of his rightful and just share of the award and that the award was inadequate.

ORS 656.218(4) provides that if a worker dies before filing a request for hearing, the person described in subsection (5) shall be entitled to file a request for a hearing and pursue the matter to final determination as to all issues presented by request for hearing. Subsection (5) provides that the payments provided for by ORS 656.218 shall be made to the persons who would have been entitled to receive death benefits if the injury causing the disability had been fatal.

Therefore, it becomes necessary to look to the provisions of ORS 656.204. That statute provides that, after the cost of burial is paid, if the worker is survived by a spouse the monthly benefits shall be paid to the surviving spouse until remarriage. It also provides that surviving spouse shall be paid a certain amount for each child of the deceased until such child becomes 18 years of age.

The Referee found that Verna was the surviving spouse of the deceased until the marriage was actually dissolved and that had claimant suffered a fatal industrial injury Verna, as the surviving spouse, would have been entitled to receive death benefits. Benefits are only payable directly to a child if the worker leaves neither a wife or a husband. ORS 656.204(4).

The Referee concluded that the provisions of ORS 656.218 (4)(5) indicated to him that the right to contest the correctness of a Determination Order was not an exclusive right of the surviving spouse. He interpreted the legislative intent to be that any and all persons, jointly and separately, who would have been entitled to receive death benefits if the injury had been fatal may request a hearing. He concluded that Perry Laszlo had statutory standing to contest the Determination Order; however, in view of the fact that any increase in compensation obtained as the result of the efforts of Perry Laszlo would be paid to Verna as the surviving spouse, he did not consider the issue of extent of disability.

The Board, on de novo review, agrees that pursuant to the provisions of ORS 656.218(5) the balance of payments of compensation due claimant from the award made by the Determination Order of May 15, 1978 must be paid to his surviving spouse, Verna Laszlo. However, the existence of the surviving spouse obliterates the right of any other beneficiaries to contest the adequacy of the Determination Order.

Therefore, the Referee's order must be modified. The exclusive right to contest the correctness of a Determination Order is that of the surviving spouse.

The Referee in his order dismissed the request for hearing when, in fact, a hearing was held. The Board finds it more appropriate that the Referee deny the relief requested rather than dismiss the hearing requested.

ORDER

The order of the Referee, dated January 19, 1979, is modified.

Perry L. Laszlo, the sole surviving child of the deceased worker, has no right to contest the sufficiency of the award for permanent partial disability. In all other respects, the order of the Referee remains the same.

SAIF CLAIM NO. A 81412 July 16, 1979

BERTIL E. LUNDMARK, CLAIMANT
Cheney & Kelley, Claimant's Attys.
Lindsay, Nahstoll, Hart, Neil & Weigler, Defense Attys.
Own Motion Determination

Claimant sustained a compensable injury on April 15, 1948 while employed for C. J. Montag Construction Company. His claim was originally closed with an award for 55% loss function of a leg. Claimant's aggravation rights have expired.

Surgery was performed on January 23, 1976 which Dr. Harder indicated was definitely related to claimant's 1948 industrial injury. The claim was reopened by a Board's Own Motion Order, dated January 24, 1979.

Claimant returned to modified work on February 15, 1976 and regular work on March 16, 1976. Dr. Duff examined claimant on June 6, 1979, finding a moderately severe and permanent degree of degenerative osteoarthritis in the right knee with severe limitation of motion and considerable muscular wasting. He felt claimant was in a good job considering his limitations. He recommended no further surgery.

On June 14, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from January 23, 1976 through February 14, 1976 and temporary partial disability from February 15, 1976 through March 15, 1976.

The Board concurred in this recommendation.

ORDER

The claimant is hereby granted compensation for temporary total disability from January 23, 1976 through February 14, 1976 and temporary partial disability from February 15, 1976 through March 15, 1976.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of January 24, 1979.

WCB CASE NO. 78-1654 July 16, 1979

RONALD M. OLSON, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Motion For Reconsideration

The Board issued its Order on Review in the above matter on June 22, 1979 affirming the Fund's denial of claimant's claim for aggravation.

The claimant, by and through his attorney, on July 2, 1979 requested the Board to reconsider its order, contending that the Board order did not discuss the order of the Referee, dated February 13, 1979, which reinstated his Opinion and Order entered on November 20, 1978.

After the November 20, 1978 order had been entered claimant, by and through his attorney, filed a motion for reconsideration with the Referee and submitted a medical report from Dr. Richard M. Strom. The Referee, after reviewing the motion and the arguments with respect thereto, concluded that the report from Dr. Strom should not be admitted into evidence. He reinstated the Opinion and Order of November 20, 1978 as of February 13, 1979.

The Board affirmed and adopted the Opinion and Order of the Referee dated November 20, 1978 as reinstated by the February 13, 1979 order.

The Board, after reviewing the facts set forth in the motion for reconsideration, and the response thereto from the Fund, concludes that claimant's pre-existing poliomyelitis condition was so obvious that the incorrect assumption by the Referee that Dr. Strom was unaware of such condition is not material.

The Board concludes that the motion for reconsideration should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-3907 July 18, 1979

SALLY AKIN, CLAIMANT
Gary J. Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order Referring
For Consolidated Hearing

Claimant has requested that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an injury sustained on March 30, 1972. The claim was initially closed on October 4, 1972 and apparently claimant's aggravation rights have expired.

Claimant had previously requested a hearing on the Determination Order issued on August 10, 1977. This case is designated WCB Case No. 78-3907 and the issues involved are whether claimant was stationary at the time of claim closure; entitlement to compensation for temporary total disability from July 26, 1977 forward, and extent of disability.

On May 12, 1978 the State Accident Insurance Fund denied claimant the right to reopen her claim on the basis that she had sustained a new injury rather than an aggravation of her pre-existing condition.

The claimant requested the Board to refer his petition for own motion relief to its Hearings Division to be heard at the same time the issue created by the Fund's denial of May 12, 1978 was heard.

The Board concludes that it is in the best interests of all parties involved to comply with the request made by claimant and refer the petition for Board's own motion to its Hearings Division with instructions to set the matter down to be heard at the same time the issue of the propriety of the Fund's denial dated May 12, 1978 is heard.

After the hearing, the Referee shall cause a transcript of the proceedings to be furnished to the Board together with the Referee's recommendation with respect to claimant's request for own motion relief. The Referee shall also issue an appropriate Opinion and Order with respect to the issue of the propriety of the Fund's denial dated May 12, 1978.

WCB CASE NO. 78-3918 July 18, 1979

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

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which affirmed a Determination Order dated August 11, 1978 whereby claimant received compensation for temporary total disability only.

Claimant was a 24-year-old rigging slinger who suffered a compensable back injury on October 14, 1977 when a mainline struck him in the side and back. He was hospitalized with multiple abrasions, contusions and fractures. X-rays showed fractures involving the transverse processes of L1 through L5 vertebrae bodies on the right side.

On December 6, 1977, Dr. Buza, a neurosurgeon, saw claimant. He was complaining of pain in his right flank, numbness and tingling in the right fifth finger, pain with neck movement and a lump on the right side of the area between his neck and shoulder. He could not tolerate prolonged sitting or standing nor could he walk long distances. However, Dr. Buza felt claimant was improving and recommended only conservative treatment. He felt claimant would heal without residuals.

On December 15, 1977 Dr. Reilly, a neurologist, did a right radial nerve conduction velocity study which proved to be normal.

On June 8, 1978, after examining claimant, the Orthopaedic Consultants reported that claimant had multiple lipomas which were not job-connected; however, an injury in the area of the lipomas, in their opinion, could be an aggravating factor. They diagnosed fracture of transverse process at L1, 2, 3 and 4. At the time of the examination, claimant

was complaining of backaches, especially in the lower dorsal and lumbar areas with pain down the back of the right leg. They felt claimant could return to his former job without limitations. The total loss of function was minimal. Based upon this report a Determination Order was issued on August 11, 1978 which awarded claimant compensation for temporary total disability from October 14, 1977 through June 8, 1978, less time worked.

On August 8, 1978 Dr. Cronk examined claimant. Claimant had returned to work and reported increasingly severe right leg pain and numbness, the severity of which caused him to cease working approximately three weeks before Dr. Cronk examined him. Claimant said that during the three-week period his symptoms had improved but he still had frequent leg pain. Dr. Cronk found claimant's symptoms out of proportion to his objective findings but recommended further studies.

Dr. Girod, claimant's family doctor, hospitalized claimant for three days in October 1977 and recommended a consultation with Dr. Cronk. However, on October 27, 1978, Dr. Miller, a chiropractic physician, treated claimant with chiropractic adjustment and ultrasound.

The claimant, a high school graduate, has worked almost exclusively in the woods. He had no back problems prior to this industrial injury. Following the injury he developed bumps on his stomach and back. Claimant found that rest was very helpful and he also continued to take chiropractic treatment. He had returned to work in September 1978, originally as a chaser on flat ground which was easier work than he had done prior to his injury; later he returned to work at his original job, pulling rigging. Claimant feels he is improving physically, however, he still has numbness and stiffness when he sits for prolonged periods of time and he is not able to lift as much as he did before. He has missed some time from work since he returned because of his back problems; his main problem now is a burning in his right leg. Claimant feels he can handle any problems in his back and arms. He presently works six days a week but he is of the opinion that he cannot work on steep or hilly ground.

The Referee found that although claimant had suffered a serious injury in October 1977 he had been able to return to work and his coordination and strength was approximately the same as it had been prior to his injury. Claimant takes no pain medication. The Referee did not take into consideration the burning sensation or pain claimant complained he had in his leg because it did not appear, by itself, to be disabling.

He concluded that impairment was irrelevant unless it interfered with the worker's earning capacity and in the instant case claimant had been able to return to his occupation, a strenuous one, and work regularly six days a week. There is no evidence, in the opinion of the Referee, to indicate claimant is precluded from any segment of the labor market because of this impairment, therefore, claimant has suffered no unscheduled disability.

The Board, on de novo review, finds that although claimant is able to work a regular six-day schedule, he still has problems in his back and in his right leg and that these problems preclude him from working on steep terrain. Working as a rigging slinger requires claimant to work on uneven ground and in hilly country. Furthermore, there are other types of work in which claimant cannot engage because he must confine his work to level ground if he wishes to continue to work without suffering re-injury. Therefore, claimant has lost some wage earning capacity because of his injury which resulted in a small decrease in claimant's availability for general employment. This is the test which was applied in Ford vs. SAIF, 7 Or App 547.

Dr. Fleshman, in his report of October 20, 1978 stated that,

> "I talked rather frankly with the patient about the aging process, about the residua [sic] of injuries, about the immeasurable factor of nerve-fiber healing, and residual sensation which did not produce real disability. I I tried to explain that he might have residual symptoms and that he might in fact be less able to carry out tremendous physical tasks that had been in the past, but that he should not consider this to be disability and should simply moderate his activities to continue to work in a fashion to which his aging body would accommodate."

The Board notes that at the time of the injury claimant was 24 years of age.

Dr. Miller, in his report of October 27, 1978 says, " . . . I also advised him he should control activities which require any heavy lifting or repeated bending."

The Board concludes that claimant has lost some of his wage earning capacity as a result of the industrial injury and that he is entitled to compensation equal to 32° for 10% of the maximum allowable for unscheduled back disability.

The Board further concludes that there has been minimal loss of function of claimant's right leg based upon the medical reports and awards claimant compensation for 10% loss function of that scheduled member of the body.

ORDER

The order of the Referee, dated February 8, 1979, is reversed.

Claimant is awarded 32° of a maximum of 320° for 10% unscheduled back disability and 15° of a maximum of 150° for 10% loss function of the right leg. These awards are in addition to the award of compensation for temporary total disability granted by the Determination Order of August 11, 1978.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

SAIF CLAIM NO. KC 58912 July 18, 1979

BRAIN E. GRIFFEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right leg on December 31, 1966. After two surgeries in 1967 the claim was closed with an award for 15% loss of use of the right leg. The claim was reopened in December 1968 and additional surgery was done. On August 7, 1970 the claim was again closed with an additional award for 15% loss of use of the right leg. In August 1973 Dr. Slocum performed extensive surgery. A July 10, 1974 Determination Order granted the claimant an additional award for 10%, making a total award for 40% loss of use of the right leg.

The claim was voluntarily reopened for a right medial meniscectomy performed on January 25, 1979 by Dr. Slocum. On May 4, 1979 Dr. Slocum indicated claimant was complaining of intermittent pain in the right knee with popping and snapping. He had moderate discomfort when he walked on uneven ground and he could only walk 3 to 4 blocks at a time. He was unable to run or jump and avoided squatting, kneeling and lifting. Dr. Slocum found claimant's condition to be medically stationary and felt he no longer needed active treatment. He felt claimant's claim should be closed with a mildly moderate permanent partial disability.

On May 18, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for 25% loss use of the right leg. This would give claimant a total award of 65%. Also they recommended compensation for temporary total disability from January 4, 1979 through May 4, 1979.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 4, 1979 through May 4, 1979, less time worked, and compensation equal to 25% loss of use of the right knee. These awards are in addition to any previous awards claimant has been granted for this injury.

WCB CASE NO. 78-2257 July 18, 1979

BILLY HILBURN, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the employer, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-4087 July 18, 1979

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

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review of the Referee's order which denied penalties and attorney's fees for unreasonable resistance to payment of compensation.

The only issue before the Referee was whether the State Accident Insurance Fund's refusal to pay claimant compensation for permanent and total disability from January 17, 1974, the date of claimant's disabling injuries, to February 6, 1976, the date of Circuit Court Judge Alfred T. Sulmonetti's order which directed the Fund to pay claimant compensation for permanent and total disability.

Claimant's claim had been accepted by the Fund on March 7, 1974 and four days later the Fund formally denied responsibility for any permanent partial or temporary total disability resulting from claimant's heart attack. This denial was affirmed by a Referee and the Board. Claimant appealed to the circuit court. On January 14, 1976 Judge Sulmonetti issued his memorandum opinion which reversed the Board and awarded claimant permanent total disability benefits from January 17, 1974. The judgment order prepared for Judge Sulmonetti's signature inadvertently omitted the commencement date for the payment of benefits for permanent total disability.

On March 10, 1978 the Fund advised claimant it would pay his benefits for permanent total disability only from the date of Judge Sulmonetti's order, not from the date of the injury. On March 3, 1976 the Fund had filed a notice of appeal to the Court of Appeals from Judge Sulmonetti's order. On June 14, 1976 the Court of Appeals reversed Judge Sulmonetti's order which declared claimant to be permanently and totally disabled. The decision did not mention the issue of the Fund's refusal to pay disability benefits between the date of claimant's injury and the date of Judge Sulmonetti's order.

Claimant requested a hearing on the Fund's refusal to pay benefits for the period between his injury and the circuit court's order. Both the Referee and the Board, on de novo review, decided that claimant was not entitled to benefits for that period but the Court of Appeals, on April 17, 1978, reversed the Board and ordered the Fund to pay compensation from January 17, 1974 to February 6, 1976. The Fund complied but claimant asked for penalties and attorney's fees because of unreasonable delay in the payment of compensation.

The Referee concluded that because the wording of the circuit court judgment order which was prepared by claimant's attorney, stated payments for permanent total disability were to commence within 14 days of the date of that order which was February 6, 1976, caused the confusion, therefore, claimant could not now collect penalties and attorney's fee for the delay in the payment of compensation which resulted from this confusion.

The Board, on de novo review, finds that the Fund had knowledge of the law which requires that payment of disability benefits shall commence at the onset of the disability and continue notwithstanding any appeal. The Fund's continuing refusal for more than two years to pay claimant compensation due and owing him, despite a judgment order and a subsequent Referee's opinion ordering such payment must be considered as unreasonable to the extent that claimant is entitled to penalties and attorney's fees.

ORDER

The order of the Referee, dated November 8, 1978, is reversed.

Claimant is awarded additional compensation equal to 10% of the compensation due him between January 17, 1974 and February 6, 1976 as a penalty for the Fund's unreasonable refusal to pay compensation to claimant.

Pursuant to the provisions of ORS 656.382(1) the Fund is directed to pay claimant's attorney as a reasonable attorney's fee a sum of $300.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

CLAIM NO. D53-116518 July 18, 1979

QUENTIN RABIDEAU, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Own Motion Order

On June 20, 1978 claimant, by and through his attorney, requested a hearing on his request for own motion relief relating to an injury suffered on March 14, 1967, therefore, the request was delivered to the Hearings Division.

The Board did not receive the file until October 1978. On October 6, 1978 the Board advised claimant's attorney that it would need medical documentation to support claimant's claim.

On May 30, 1979 the carrier's attorney asked the Board the status of the matter and the Board, on June 19, 1979, informed him that the case was still pending until medical reports in support of the request were received and if such medical documentation was not received by July 2, 1979 the matter would be deemed abandoned and the request for own motion relief would be denied.

As of this date, nothing has been received from the claimant. The Board concludes that claimant has abandoned his request for own motion relief.

ORDER

The claimant's request for own motion relief on his industrial injury of March 14, 1967 is hereby denied for failure to furnish medical support therefor.

WCB CASE NO. 8-848 July 18, 1979

FRANK M. RIVERS, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On June 28, 1979 the Board entered its Order on Review in the above entitled matter which affirmed and adopted as its own the Opinion and Order of the Referee dated July 24, 1978. This order had approved the denial by the Fund to make certain reimbursements for medical services received by claimant outside the state of Oregon. It stated it was the intent of the Legislature to grant the right of choice of physicians within the state of Oregon and to negate that choice outside the state, without otherwise affecting the worker's entitlement to receive medical services as provided by ORS 656.245(1).

On July 11, 1979 claimant, by and through his attorney, requested the Board to reconsider its order. The motion basically asks the Board to determine the constitutionality of the statute. That is not within the province of the Board.

The Board concludes that the motion to reconsider is without merit and, therefore, should be denied.

IT IS SO ORDERED.

CLAIM NO. 65-77592 July 18, 1979

JOHN L. THOMPSON, CLAIMANT
D.S. Denning, Jr., Claimant's Atty.
Order Denying Motion

On May 25, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an injury sustained on January 18, 1973. Claimant's claim was first closed on February 20, 1974 and his aggravation rights have expired. Attached to the request was a medical report dated May 2, 1979 from Dr. Tanaka indicating claimant's condition was an aggravation of his 1973 injury, and a psychological evaluation of October 9, 1973 by Dr. Perkins.

On May 30, 1979 the Board acknowledged claimant's request for own motion relief and asked him to advise the Board whether American Hardware or the Fund was actually the carrier in this claim. When claimant's attorney failed to answer the Board's letter, the Board, on June 4, 1979, advised American Hardware of claimant's request and gave it 20 days to respond.

On June 29, 1979 the Board received from American Hardware a Motion to Dismiss on the grounds that claimant's Claim for Aggravation and Request for Hearing which had been attached to his request for own motion relief was filed after the 5-year period had expired and, therefore, should be dismissed.

The Board finds that the Motion to Dismiss was based on the expiration of the aggravation period and because claimant has requested the relief under the Board's own motion jurisdiction the 5-year aggravation period does not apply.

The motion is hereby denied.

Claimant's request for own motion relief is referred to the Hearings Division with instructions for the Referee to take evidence and determine whether or not claimant's present condition is actually an aggravation of his January 18, 1973 industrial injury. Upon conclusion of the hearing, if the Referee finds that claimant's present condition is the result of his 1973 injury and represents a worsening thereof he shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation that claimant's request for own motion relief be granted. If he does not so find, he shall recommend to the Board that the request for own motion relief be denied.

WCB CASE NO. 78-4118 July 18, 1979

WILLIAM A WILSON, CLAIMANT
Charles Seagraves, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which approved the denial of his claim for an industrial injury.

On March 5, 1978 claimant sustained an injury when he slipped and fell while cleaning up after a poker game in which he had participated as a "houseman". The incident took place at the Owl Club where Peggy and George Word were apparently operating some gambling tables. Two poker tables had been set up and claimant, who had done gambling in the past, asked the Word's if he could run the poker game at one of their tables. They agreed to pay claimant 50% of the "contributions" made by the players in the poker game. This amount is set by the people that operate the game and is characterized as purchase of time. At the end of his shift claimant would turn in the "contribution" receipts to Mrs. Word who would pay him 50% of those funds.

A "worker" is defined by ORS 656.005(30). Remuneration is an essential element of a determination under this definition, as is the element of control over the manner in which the work is performed as well as the right to "hire and fire".

The game in which claimant participated was a "social game" authorized under local ordinance adopted pursuant to ORS 167.117 and .121. This law absolutely prohibits house income from the operation of the game. There is a legal presumption that the law has been observed. Both claimant and the alleged employers, the Words, testified that any contribution by the players was voluntary.

The Referee found that any remuneration for claimant's services would be speculative and that it was unlikely that a real contract of employment would have been entered into under such circumstances.

The Referee further found that the "social game" law clearly does not contemplate any employer-employee relationships. He found that this feature of the law was so integral to the social games scheme that to violate it would render the activity illegal. He concluded that claimant had failed to prove that he was an employee within the meaning of the Workers' Compensation Law.

The Board, on de novo review, finds that claimant is a subject worker within the provisions of the Oregon Workers' Compensation Law. The evidence indicates that the people who were running the card game, the Words, indicated and directed claimant as to the stakes that were to be played and directed him on the conduct of the game. His duties also included keeping the table area clean, sweeping off the table, wiping up any spills, serving coffee, soft drinks and alcoholic beverages to the patrons. Claimant was allowed to play, as long as the table wasn't full, and when the table filled up, he was then to step out of the game and merely supervise it. The cards used by the players and the chips were furnished by the Words.

The Board finds that claimant suffered this injury when he was the process of taking glasses which had been left at the card table back to the bar area of the Owl Club to be washed. The bar had been closed and the janitor was mopping the floor. Claimant slipped on the wet floor and fell breaking the glasses he was carrying in his right hand. He suffered multiple lacerations to the right hand.

The Board finds that the operator's of the game had a right to hire or fire claimant, they had a right to control his activities. They furnished the equipment necessary for the game and they had complete supervision over his activities during the course of his employment. It has been argued, with merit, that contracting to perform an illegal act defeats a worker's right to compensation, however, in this case there was nothing about the employment activities of claimant which was illegal. Whether, under the facts of this case there has been a violation of the social gambling law is not for the Board to determine.

ORDER

The order of the Referee, dated December 6, 1978, is reversed.

Claimant is a subject worker within the provisions of the Oregon Worker's Compensation Law and was so on March 5, 1978 when he suffered an industrial injury. Claimant's claim is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on March 5, 1978 and until the claim is closed pursuant to the provisions of ORS 656.268.

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

SAIF CLAIM NO. HB 119465 July 19, 1979

CAROLYN E. BECKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to her back on November 6, 1964. She had suffered an earlier injury in March 1963 and a laminectomy was performed in February 1964. In April 1965 a hemilaminectomy and spinal fusion were performed and on July 13, 1967 a re-fusion was done from L4 to the sacrum. The claim was first closed on September 25, 1968 with an award equal to 87° for 60% loss of an arm for unscheduled disability.

Claimant continued to be treated for low back and hip pain and on June 23, 1972 the claim was ordered reopened by a circuit court order for further medical treatment and surgery. Surgery was performed on July 13, 1972 and the September 5, 1973 Determination Order granted time loss benefits only.

Claimant, pursuant to a Stipulated Judgment Order, was granted an increased award of 43.5° for a total of 130.5° for 90% loss of an arm for unscheduled disability.

In 1974 and 1975 claimant continued to receive treatment. Her claim was reopened on August 20, 1974 for time loss payments only, and her award for 30% loss of an arm for unscheduled disability granted by the Stipulated Judgment Order, dated May 10, 1974, was cancelled at the request of claimant.

On December 16, 1975 a Determination Order granted claimant an additional award of 15% which gave her a total award of 75% loss function of an arm for unscheduled disability. Claimant, thereafter, filed a petition for rehearing which was denied.

Claimant was hospitalized from February 27, 1976 through March 20, 1976 and from April 18, 1977 through May 14, 1977.

The claim was ordered reopened as of February 27, 1976 by a Stipulated Judgment Order dated June 17, 1976. On September 13, 1977 a Stipulated Judgment Order directed that the claim again be reopened as of April 18, 1977. Between August 29, 1977 and May 12, 1978 claimant was evaluated and treated at the Pain Evaluation Clinic.

The Orthopaedic Consultants, on June 2, 1978, indicated claimant's condition was stationary and no further active treatment was recommended at that time. They felt she could perform her nursing occupation with limitations on lifting and the necessity for her to change position from standing to sitting as needed. They found her total loss of function of the lumbar spine due to the injury to be moderately severe.

The Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted additional compensation for temporary total disability from April 18, 1977 through May 24, 1978 only.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 18, 1977 through May 24, 1978, less time worked.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $700.

WCB CASE NO. 78-3892 July 19, 1979

DAVID LAYMAN, CLAIMANT
Myrick, Coulter, Seagraves, Nealy & Myrick, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-request by the Fund

Reviewed by Board Members Phillips and McCallister.

The claimant seeks review by the Board of the Referee's order which granted claimant 80° for 25% unscheduled low back disability and an additional 22.5° for 15% right leg disability. Three previous Determination Orders had granted claimant awards totalling 22.5° for 15% loss of the right leg.

Claimant suffered an injury to his right knee in October 1975. A previous hearing had been terminated when it appeared that the employer would provide claimant with a suitable job. The representative of the employer, a vocational rehabilitation consultant, a rehabilitation counselor, and claimant developed an on-the-job training program. Claimant was to be trained to operate a sander and grade plywood and given a 90-day trial period during which he could set his own work pace. This particular job was felt to be suitable because it required primarily pushing buttons and turning valves. It also gave claimant the option of sitting or standing and did not involve heavy physical labor.

The worker who trained claimant not only pushed the buttons and turned the valves but also maintained the machine. The maintenance involved climbing up and down and around the machinery and also freeing jammed plywood which required frequent trips up and down the stairs leading to the control platform. The person training claimant told him he was to push the buttons and set the valves, however, he did not mention the other things although claimant observed all these things being done and apparently felt they were part of the job.

On a certain day claimant was performing the job by himself when a "rush period" occurred. The foreman temporarily replaced claimant with a more experienced operator and, according to claimant's testimony, claimant was told to help the lift truck driver mark loads. This involved some lifting and bending and claimant developed neck, back and leg pains. He went home shortly thereafter and did not return to work. The foreman denied that he ordered claimant to help the lift truck driver; he said he told him not to do it if it bothered his knee.

The Referee found that there was apparently a lack of communication and for that reason the on-the-job training effort failed. Because of misunderstandings and/or misconceptions claimant left the job feeling he had been mistreated and the employer apparently felt that claimant had not given the job a fair trial.

The Referee found that claimant, who was 53 years old, has an eighth grade education and has obtained and held numerous jobs. After terminating the on-the-job training program, claimant has not looked for work; he states he didn't know of any jobs which he could do.

The Referee found that the fact that claimant was not presently employed did not prove that he was unable to work. He further found that claimant had exaggerated his disability. Claimant has described his leg disability as mainly loss of balance; he described his low back pain as being intermittent depending upon his activity level. The back symptoms have been present since claimant fell at home when his injured leg went out from under him. The Referee concluded that the medical evidence connected the fall to the industrial injury as a consequential event and, therefore, claimant did have unscheduled disability as a result of his industrial injury.

The Referee found that the evidence, both lay and medical, indicated claimant could no longer return to heavy duty work and that this preclusion is partly attributable to his back based upon a medical opinion connecting some of claimant's disability to an unrelated unscheduled cervical spine condition. He felt that claimant would be adequately compensated for his loss of wage earning capacity by an award of 80° which represents 25% of the maximum.

With respect to the loss of function of the right leg, the Referee found that claimant had had a medial meniscectomy in December 1975 and in March 1976 returned to work with only slight swelling which was reduced at night. He had some disabling pain and stiffness towards the end of each work week and the knee continued to be painful, unstable and weak.

The Referee concluded that the loss of function was characterized as moderate and he felt that the prior awards did not adequately represent the true impairment of the scheduled member. He felt that an award of 30% more nearly approximated the actual loss of function. Therefore, he increased the previous awards by 22.5° giving claimant a total of 45° of a maximum of 150° for 30% loss function of the right leg.

The Board, after de novo review, on the issue of extent of unscheduled disability finds the medical evidence shows the claimant had a low back strain with minimal loss of function. The evidence further indicates that claimant can be retrained in many types of work activities insofar as his back problems are concerned. His leg problems cannot be considered under these circumstances in determining claimant's loss of potential wage earning capacity.

The Board concludes that claimant will be adequately compensated for his loss of wage earning capacity by an award equal to 48° which represents 15% of the maximum. It further concludes that the Referee correctly determined the loss function of the claimant's right leg and would uphold the award of 45°.

The Board is of the opinion that the Field Services Division of the Workers' Compensation Department should attempt to assist claimant in either a vocational rehabilitation program or through an on-the-job training program to enable him to return to the labor market.

ORDER

The order of the Referee, dated November 29, 1978, is modified.

Claimant is awarded 48° of a maximum of 320° for 15% unscheduled low back disability. This award is in lieu of the award granted claimant for unscheduled disability in his order which in all other respects is affirmed.

The Field Services Division of the Workers' Compensation Department is directed to furnish claimant with such assistance as it can either through vocational rehabilitation or on-the-job training to enable claimant to obtain suitable and gainful employment on a regular basis as quickly as possible.

WCB CASE NO. 78-4471 July 19, 1979

MAX McKENZIE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Roger R. Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted claimant compensation equal to 48° for 15% unscheduled low back disability.

Claimant, a 23-year-old burner operator, suffered a compensable back sprain on February 6, 1974 while lifting up a piece of steel on a burner table. Claimant finished the morning shift and on the same day was seen by Dr. Buell, osteopathic physician. He diagnosed an acute lumbosacral strain. After claimant had been hospitalized and placed in traction, he was examined by Dr. Fax, an orthopedic surgeon, whose diagnosis was lumbosacral strain with a possible herniated nucleus pulposis. Claimant was given conservative treatment.

On March 7, 1974 Dr. Buza, a neurosurgeon, examined claimant and found a muscular ligamentous strain. A myelogram performed on April 2, 1974 was negative.

On May 8, 1974 Dr. Hogue, a psychiatrist, evaluated claimant's condition because of progressive despondency claimant had experienced following his injury. Dr. Hogue felt it was appropriate to prescribe an anti-depressant.

On May 18, 1974 Dr. Buell released claimant for modified work although he stated that claimant continued to have low back pain. Claimant attempted to return to his old job on July 25, 1974 but had to quit within a month because he was continually reinjuring himself as a result of the heavy lifting involved in the job. Dr. Buell had recommended he return to light work but claimant ignored that and was lifting weights from 50 to 75 pounds.

Dr. Tsai, in October 1974, found no need for surgical, diagnostic or therapeutic procedure. He did recommend vocational rehabilitation. When Dr. Tsai saw claimant again on December 4, 1974 his impression was that of a right lumbar spasm with some right S1 herve root irritation. Again conservative treatment was recommended.

On February 5, 1975 when claimant again saw Dr. Hogue he was going to school with assistance from the Department of Vocational Rehabilitation. Claimant found it difficult to sit through four hours of classes because of his back pain and he was developing an increasing dependency on pain medication. Because of claimant's feelings of hopelessness, worthlessness and loss of former identity, Dr. Hogue considered claimant to have a depressive reaction, secondary to his injury. He again prescribed anti-depressant medication and said absent side effects such medication should be continued for at least one month.

Claimant was enrolled at Callahan Center where his condition was diagnosed as a strain, chronic, lumbar muscle and ligaments, superimposed on asymmetric facets at the L4-5 and L5-S1 innerspace with mildly moderate to moderate degenerative disc disease at the lumbar joint with subluxed, narrow, and sclerotic lumbosacral facets. They recommended claimant change occupations and do no lifting over 50 pounds, no repetitive bending, stooping or twisting.

Dr. Dawson, a clinical psychologist, examined claimant on November 11, 1976, at the request of Dr. Buell, to determine to what degree claimant might benefit from a program of relaxation training and pain management. He worked with claimant for about a month attempting to train claimant in the pain management and relaxation techniques. Claimant showed marked improvement both in his ability to cope with pain and in the level of pain experiences.

On June 12, 1978 the claim was closed by a Determination Order which awarded claimant compensation equal to 16° for 5% unscheduled low back disability.

Claimant is a high school graduate and has 2-1/2 years of college. He started to school in the fall of 1975 and graduated in the spring of 1978 and has a teaching certificate. Claimant's background consists of working as a mechanic, a grocery clerk, truck driver, carpenter and a farmer. Prior to his industrial injury he had had no back problems. Following his injury he had attempted to return to work but was unable to because of the increased back pain. Later he again attempted to return to work but was advised by the defendant that there was no light type work available.

The Referee found that claimant, because of his industrial injury, has restrictions on his job activities. The determination of earning capacity is made by attempting to ascertain what the future holds for claimant. An injury which is substantially physically disabling is likely to reduce the earning capacity even of a person whose mental capacity, education and experience is such that many avenues of employment not involving heavy physical labor are open to him, but not to the same extent as it would in the case of a person who was limited in education and mental capacity and not trainable for employment which does not involve heavy manual labor.

The Referee found that claimant had above average education, had a teaching certificate and that his future lies not in heavy manual labor but in the area in which he is trained. He concluded, after considering claimant's youth as a plus factor and his physical impairment as a minus factor, his disability was greater than the award of 16° which represented only 5% of the maximum for unscheduled disability. He increased the award to 15% of the maximum.

The Board, on de novo review, finds that it is necessary to take into consideration claimant's adaptability to different occupations in the broad field of general industry and not just his ability to obtain and hold a particular job at a given time. In this case, claimant is precluded from any type of employment on a full time basis which involves substantial physical labor, whether moderate or heavy. Claimant's treating physician, the doctors at Callahan Center and Dr. Hogue all have recommended claimant be employed only in work which involves no repetitive bending, lifting or stooping. The evidence indicates that claimant is precluded from the entire manual labor field; employers would be very hesitant to hire him to perform any physical labor if they found out about his back disability. This is borne out by the fact that claimant has applied for several jobs and has been turned down because he revealed to the employer that he had had a back injury.

The Referee assumed that claimant's future employment would be in the teaching profession and, therefore, this would naturally reduce his loss of earning capacity; however, there is no evidence as to when, if ever, claimant will find a job in the teaching profession or to indicate that he would be able to hold a job permanently. The evidence indicates claimant has had no success to date in finding employment as a teacher.

Prior to his injury claimant had substantial experience in the manual labor field; he can't return to it. Therefore, he must seek work in fields of endeavor in which he has no practical experience.

The Board concludes that claimant's loss of earning capacity is substantially greater than indicated by the award made by the Determination Order of December 12, 1978 and also is greater than the award granted by the Referee's order. The Board concludes that claimant is entitled to an award equal to 80° which represents 25% of the maximum for unscheduled disability to adequately compensate him for his loss of wage earning capacity resulting from the industrial injury of February 6, 1974.

ORDER

The order of the Referee, dated October 23, 1978, is modified.

Claimant is awarded 80° of the maximum of 320° for 25% unscheduled low back disability. This award is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000

WCB CASE NO. 78-3656 July 19, 1979

WILLIAM D. SHEPARD, CLAIMANT
Starr & Vinson, Claimant's Attys.
Samuel Hall, Jr. Claimant's Atty.
Cheney & Kelley, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, Phillips and McCallister.

The employer requests review by the Board of the Referee's order which found claimant to be permanently and totally disabled as of December 4, 1978, the date of the Referee's order.

For the past 20 years claimant's primary work experience was selling and repairing automotive and industrial tires. On July 19, 1974 claimant injured his back while lifting a tire. On August 4, 1974 he exacerbated and re-injured the back when he lifted a tire and his right foot slipped causing him to twist his back. Claimant has not worked since August 4, 1974.

Claimant has had problems with his back since 1961; in 1969 he had a laminectomy. After the 1974 injury claimant was given conservative treatment which proved unsuccessful. A myelogram was performed and on September 20, 1974 claimant submitted to a hemilaminotomy. On June 12, 1975 claimant had additional surgery for L4-5 exploration with bilateral L5 neurolysis.

The second back surgery was performed by Dr. Robert W. Williams, a neurological surgeon in Las Vegas, who had also performed the surgery in 1969. Dr. Tennyson had performed the back surgery in 1974. Dr. Williams, on May 21, 1976, advised the carrier that claimant suffered from a vacant disc space and was markedly disabled. He stated there was no real solution for his problem other than anti-inflammatory medication and limitation of environmental activities. In his opinion claimant was completely disabled from any reasonable gainful employment. On May 30, 1976 Dr. Eskey, an orthopedic surgeon, advised the carrier that he did not feel claimant would be able to return to his former employment; he stated:

> "I feel that the only type of employment for which he would be suited would be, of necessity, sedentary, but, as you note in my report, the alleged sciatica related to sitting and motivational factors and psychological factors, I think, would preclude his returning to any type of gainful employment."

On January 13, 1978 a neurologist and two orthopedic surgeons examined claimant at the Orthopaedic Consultants. Their report, dated January 22, 1978, sets forth a full medical history and concludes with the comment that claimant's condition is medically stationary and he has no need for further treatment. It was their opinion that claimant could not return to his former occupation even with limitations, however, they felt that he would be able to return to some form of reasonably continuous gainful employment on the basis of physical findings. They did not recommend psychiatric or psychological evaluation to be repeated. In estimating impairment of claimant's back, they found the total loss of function at the time of the examination to be in the moderate category and the loss of function due to the 1974 injury in the mild to moderate category.

On April 17, 1978 a Determination Order closed the claim with an award of compensation for temporary total disability and 96° for 30% unscheduled low back disability.

Claimant has a bilateral foot drop and, after trying on one occasion, no longer drives any type of vehicle. Because of the vacant disc syndrome, claimant has been advised never to bend nor to perform any motion of the spine. Dr. Eskey suggested that claimant be referred to the Pain Clinic or to a rehabilitation program; Dr. Williams stated that claimant could possibly benefit from some type of multi-discipline program such as Dr. Eskey suggested. Dr. Williams later, after claimant discharged himself from the rehabilitation/pain clinic stated he believed the claimant to be permanently and totally disabled from any reasonable gainful employment and he saw nothing to be gained by treatment at a rehabilitation/pain clinic.

Claimant is 61 years old and his work experience has, for the most part, involved substantial physical activity. He tried unsuccessfully to sell insurance. He has not looked for any work since his injury because he feels he is unable to perform any type of employment.

The Referee found that claimant had numbness and abnormal sensation in both legs which caused him to stumble and fall frequently.

The Referee, relying upon the attending surgical specialists who treated claimant, concluded that claimant had established by a preponderance of the evidence that he was permanently and totally disabled.

The majority of the Board, on de novo review, finds that claimant is not permanently and totally disabled nor is the claimant's disability so great as to preclude consideration of motivation. The majority concludes the opinions of Dr. Williams (report of May 21, 1976 and September 30, 1977) and Dr. Eskey (May 30, 1976) are not sufficient by themselves to preclude a consideration of motivation. The majority of the Board finds that claimant has made no attempt to look for work and the only excuse which he offers is that he doesn't feel that he is able to work. The three physicians who examined claimant at the Orthopaedic Consultants felt that there were other types of gainful employment which were within claimant's physical capabilities.

The Claimant signed out of Rancho Los Amigos Hospital where he had been referred for physical rehabilitation "against medical advice". The treating physician concluded that claimant was totally disabled from his previous occupation, however, he was not totally disabled from some other occupation. Dr. Lipovitch stated on April 5, 1977 that there is no way at present to assess the total disability as manifested by claimant in relationship to his recent automobile accident.

The majority of the Board feels that claimant has suffered a substantial loss of wage earning capacity as a result of his 1974 industrial injury and is entitled to an award of 240° which represents 75% of the maximum allowable by statue for unscheduled disability.

The Board also directs the Field Services Division of the Workers' Compensation Department to provide claimant with such assistance as it can with a goal of returning claimant to the labor market in some suitable and gainful employment which is within his physical capabilities.

ORDER

The order of the Referee, dated December 4, 1978, is modified.

Claimant is awarded 240° of a maximum of 320° for 75% unscheduled low back disability. This award is in lieu of the award of permanent total disability granted by the December 4, 1978 order of the Referee which in all other respects is affirmed.

Board Member Kenneth V. Phillips dissents as follows:

Claimant has a long history of back problems and has undergone three surgeries, two as a result of this industrial injury.

The medical reports reveal objective severe disability from loss of disc space, bone spurring, compression fracture deformity with residual nerve root entrapment. Claimant's treating physician, Dr. Williams, opined that claimant was completely disabled from any reasonable gainful employment. Dr. Eskey found claimant's complaints were borne out by objective physical findings.

The medical evidence in this case, together with other factors of claimant's age of 61, his high school education and the fact that his entire work history has been in heavy physical labor occupations now prevent claimant from being employed in any occupation in the broad labor market. The Referee's finding that claimant was permanently and totally disabled was correct and I so find.

SAIF CLAIM NO. HA 716728 July 20, 1979

RICHARD L. CASEDAY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

An Amended Own Motion Order entered in the above entitled matter on July 11, 1979 directed the Fund to accept claimant's claim for a December 4, 1958 industrial injury to his left eye and to commence payment of benefits, as provided by law, on July 18, 1978 and until closed pursuant to ORS 656.278.

On June 22, 1979 a request was made for an evaluation of claimant's present condition; claimant's physician, Dr. Aebi, had reported on June 8, 1979 that, in his opinion, claimant had been medically stable on September 19, 1978 and as of that date he released him to return to work.

The Evaluation Division of the Workers' Compensation Department recommended that claimant be awarded compensation for temporary total disability from July 18, 1978 through September 19, 1978, less time worked, and an additional award of compensation equal to 50% loss vision of the left eye. This additional award would give claimant a total of 100%. He was granted an award of 50% loss of vision of the left eye on March 14, 1960.

The Board concurs in the recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from July 18, 1978 through September 19, 1978, less time worked, and compensation equal to 50% loss vision of the left eye. The scheduled award of permanent partial disability is in addition to the previous award received by claimant for his industrial injury of December 4, 1958.

WCB CASE NO. 78-8752 July 20, 1979

FIORE M. BASTINELLI, CLAIMANT
Welch, Bruun, Green & Caruso,
Calimant's Attys.
Conn & Lynch, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks Board review of the Referee's order which directed it to pay the attorney fee ordered by Referee J. Wallace Fitzgerald notwithstanding the appeal of claimant's disability award, and to further pay claimant's attorney an additional sum equal to 15% of the attorney's fee that was payable out of claimant's increased compensation award, and awarded claimant's attorney an attorney's fee of $100.

The sole issue is whether the refusal on the part of an employer to pay an attorney's fee pursuant to an order of a Referee while such order is pending appeal constitutes unreasonable resistance to the payment of compensation.

Claimant had been awarded 80° for 25% unscheduled disability resulting from an injury sustained in April 1976. Claimant requested a hearing on the adequacy of this award and, after a hearing, a Referee increased the award to 224° and ordered claimant's attorney to be paid an amount equal to 25% of and from the increased disability made payable by the order, not to exceed the sum of $2,000. Since the issuance of the Referee's order, claimant has been receiving payments for his increased award but no payments have been made to the attorney. The employer has appealed.

ORS 656.313 provides that the filing of a request for review or court appeal shall not stay payment of compensation to a claimant. Is an attorney's fee based upon a percentage of the compensation paid to claimant and payable out of said compensation a part of the compensation paid claimant? If the answer is "yes", then the provisions of ORS 656.313 apply to the attorney's fee.

The Referee concluded that the employer's refusal to pay the attorney's fee pursuant to Referee Fitzgerald's order represented unreasonable refusal to pay compensation and entered his order as recited above. In the body of his opinion the Referee indicated great reluctance to find that an attorney's fee payable out of the compensation was compensation, relying basically upon the definition of compensation as a benefit.

The Board, on de novo review, agrees with the ultimate conclusion reached by the Referee but disagrees with the reasoning set forth in his opinion, which, if used as a basis for a conclusion, would have led to one diametrically opposed to that reached by the Referee.

The Board finds nothing in the employer's brief which would persuade it to change its position as set forth in an earlier case designated Richard Carlson, Claimant, WCB Case No. 77-1598 (1978). A portion of this order was set forth in the Referee's order clearly and concisely sums up the Board's interpretation of attorneys' fees which are payable out of compensation awarded to claimant.

In its de novo review of Carlson, the Board said that when the claimant's attorney's fee is based on a certain percentage of the compensation awarded claimant and payable out of said compensation as paid, it is compensation and must be timely paid to the attorney at the same time that claimant is paid.

ORDER

The order of the Referee, dated June 21, 1979, is affirmed.

SAIF CLAIM NO. NC 282160 July 20, 1979

MARVIN CHAPMAN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 21, 1978 claimant, by and through his attorney, requested an own motion hearing for an injury sustained on December 18, 1970. After some delay, the Board received a copy of this request on June 28, 1979 with supporting medical documents attached. Claimant's aggravation rights have expired.

Dr. Rosenbaum, on June 13, 1979, stated claimant was suffering from rheumatoid spondylitis. He felt claimant's previous peptic ulcer disease was related to this present condition. He indicated that rheumatoid arthritis is a progressive disease and claimant's condition has become worse since he first saw claimant in 1975. He said claimant could not do work which required the use of his back or heavy physical labor and, because of his morning stiffness, it would be hard for him to work a fixed time schedule.

On July 3, 1979 the Board requested the Fund advise it of its position with respect to claimant's request for own motion relief.

The Fund, on July 11, 1979, replied that claimant was receiving medical care under the provisions of ORS 656.245 and it opposed the reopening of claimant's claim.

The Board, after considering the evidence before it, finds no proof that the rheumatoid arthritis condition is related to his 1970 industrial injury.

It concludes that the medical evidence is insufficient at this time to support a reopening and that claimant's request for own motion relief for his Decemer 18, 1970 industrial injury should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-1463 July 20, 1979

LYNDA HEATHMAN, CLAIMANT
Robert J. Miller, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Order

On June 29, 1979 the Board entered its Order on Review in the above entitled matter. The majority of the Board affirmed and adopted the Opinion and Order of the Referee dated September 29, 1979 which had affirmed the defendant's denial of February 8, 1978.

On July 16, 1979 claimant, by and through her attorneys, moved the Board for reconsideration of said order on the grounds and for the reasons that on June 15, 1979 a Judgment Order was entered by the Multnomah County Circuit Court in favor of claimant as plaintiff in a third party action to recover damages for the injuries that are the subject of the above claim. On June 21, 1979 a copy of that judgment and the motions were mailed to the Board requesting reversal of the Referee's order on the grounds of res judicata. In the alternative, the Board was requested to remand the claim to the Referee with instructions to receive evidence which was not available at the original hearing before the Referee.

On June 25, 1979 the employer, by and through its attorney, responded in opposition to the motion.

The Board, after giving due consideration to the motion which was submitted, a copy of the Judgment Order and the affidavit by Dr. John J. Higgins, concludes that the evidence which claimant now seeks to have the Board, or one of its Referees, consider was available at the time of the hearing before the Referee; furthermore, the Judgment Order entered in the circuit court for Multnomah County is not relevant to the case before it.

Therefore, the motion to reconsider the Board's Order on Review entered in the above entitled matter on June 29, 1979 should be denied.

IT IS SO ORDERED.

ORDER

SAIF CLAIM NO. YC 30245 July 20, 1979

RACHEL MADER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to her back on July 25, 1966 while employed by Stockton Cafe. A laminectomy was performed that year and claimant was granted compensation for 30% loss of an arm by separation for unscheduled disability by the November 22, 1968 Determination Order. The claim was reopened and closed in 1969 with compensation for time loss only.

On August 15, 1972 a Determination Order granted claimant an additional award for 30% unscheduled low back and emotional condition disability equal to 57.6° and for 15% loss of the left leg equal to 16.5°.

Claimant's claim was reopened on November 7, 1977 and in April 1978 she underwent a laminectomy and re-exploration of her previous fusion. She remained under the care and treatment of Dr. Donald D. Smith until his closing examination of May 3, 1979. He indicated in that report that claimant continued to have rather severe low back pain and left leg pain without any real improvement. He stated she was working at the time and he recommended no further treatment.

On May 10, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended claimant be granted additional time loss from November 7, 1977 through December 4, 1977, from January 9, 1978 through January 29, 1978, and from April 17, 1978 to May 3, 1979, less time worked.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 7, 1977 through December 4, 1977, from January 9, 1978 through January 29, 1978, and from April 17, 1978 through May 3, 1979, less time worked.

CLAIM NO. D53-142786 July 20, 1979

WILLIAM B. ROTHWELL, CLAIMANT
Own Motion Order

Claimant suffered a compensable injury which fractured his pelvis on August 20, 1971 while employed at Roseburg Lumber Company. The claim was accepted, closed and claimant's aggravation rights have expired.

Claimant's claim was later reopened and in 1973 reports by both Dr. Stanley Donahoo and the Back Evaluation Clinic stated a right inguinal hernia was part of the initial diagnosis of the 1971 injury. Dr. Donahoo indicated that claimant, at that time, was having trouble with it and it could possibly need to be repaired in the future.

In early 1979 claimant and his treating physician, Dr. James Edwards, requested that his claim be reopened for the repair of a hernia. Dr. Edwards could not say for certain that the hernia was related to claimant's 1971 industrial injury but he felt it was conceivable that it could have been aggravated by an injury to his pelvis or his groin.

On May 1, 1979 surgery was performed by Dr. Edwards and the operative report indicated claimant had a right inguinal hernia which was repaired.

No comment was made by the carrier as to its position at the time it forwarded the medical reports to the Board.

The Board concludes that claimant's claim should be reopened under its own motion jurisdiction for the surgery performed on May 1, 1979.

ORDER

Claimant's claim for an industrial injury sustained on August 20, 1971 is hereby remanded to the carrier to be accepted and payment of compensation, as provided by law, commencing May 1, 1979 until closed pursuant to ORS 656.278.

WCB CASE NO. 78-3631 July 20, 1979

ROSENA WHEELER, CLAIMANT
James F. Larson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order dated April 5, 1978 awarding claimant 19.2° for 10% loss function of the right arm. The claimant, on appeal, raises the issue that the Referee's ruling on the extent of permanent partial disability is premature because claimant, subsequent to the hearing, was enrolled in a rehabilitation program, her claim reopened and temporary total disability is being paid.

Claimant suffered an injury to her right hand and arm on February 5, 1976 while employed assembling a display case. Her work required her to repetitively squeeze glue from a plastic bottle. She claims the injury was caused by the repetitive squeezing of the plastic glue bottle. Dr. Robert Smith, who examined claimant four days after the injury, diagnosed mild fasciitis, right forearm, flexor compartment. After receiving conservative treatment, claimant was found to be medically stationary by Dr. Smith on February 24, 1978. He felt she had no permanent impairment. Later, on April 26, 1976, Dr. Smith reported claimant's condition was not medically stationary. A Determination Order entered on April 16, 1976 awarded claimant compensation for temporary total disability from February 7, 1976 through February 24, 1976, less time worked.

Claimant continued to be symptomatic and requested that the claim be reopened. Dr. Richard Robertson examined claimant on October 7, 1976 at which time claimant was wearing a neck collar and complained of headaches and spasm in the back of her neck radiating down into the left arm. He recommended orthopedic consultation. X-rays of the cervical spine showed no significant abnormalities.

On January 11, 1977 Dr. Paul Eckman examined claimant; he found normal range of motion of the neck without limitations. He found no evidence of cervical radiculopathy. He felt the claimant might have an early bilateral carpal tunnel syndrome more prominent on the right than the left.

On April 13, 1977 Dr. John Carroll operated on claimant for carpal tunnel syndrome. Claimant continued to have tenderness over the base of her thumb and a right trigger finger release and surgery was performed on September 28, 1977. Good results were obtained from both surgeries. On October 6, 1977 Dr. Carroll reported that claimant had obtained 100% results from the surgery and commented ". . . it is interesting to note that her neck and shoulder pain is almost resolved". He felt the carpal tunnel syndrome was related to the work activity (squeezing the plastic glue bottle), that the pain in her right shoulder and stiff neck also developed from the work activity. He found her condition almost completely resolved and would continue to improve with no permanent residuals.

On March 10, 1978 Dr. Robert Anderson examined claimant. Claimant had been working regularly since October 1977 and she felt could continue to do her job as long as it did not involve continued and extensive use of her forearm and hands, particularly above her head. Dr. Anderson found claimant's condition stationary and that the claim could be closed.

Dr. Carroll concurred with this recommendation and the claim was closed by a Determination Order dated April 5, 1978 which awarded claimant compensation for temporary total disability from April 13 through October 9, 1977 and temporary partial disability from October 10, 1977 through March 10, 1978, less time worked, and 19.2° for loss function of the right arm.

Dr. Ray Miller, a neurosurgeon, evaluated claimant in July 24, 1978 for her back pain, occipital headaches, low back and bilateral leg pain. He found no abnormal neurological findings from an objective standpoint.

The Referee concluded that the compensation for temporary total disability was properly terminated by the Determination Order of April 5, 1978, that claimant had suffered injuries to her right arm and hand and that the Determination Order of April 5, 1978 had adequately compensated claimant for the loss function of her right arm. He concluded that claimant had not proven a causal connection between the injury to her right arm and hand and the neck pain, headaches, low back and leg pain.

The Board first disposes of the issue that the Referee prematurely rated the permanent partial disability. We find under Leedy v. Knox, 34 Or App 911 (1978) 921, he did not and that rating the disability was proper. The claimant was not, at the time of the hearing, enrolled in an approved rehabilitation program, therefore, under Leedy it was proper based on the facts then before him to rate the disability and further it is proper that the Board on de novo review do likewise.

The Board concurs in the Referee's assessment of claimant's loss of function of her right arm.

The Board, based on Dr. Carroll's report, finds that the claimant's neck pain is related to the industrial injury of February 5, 1976 and, therefore, is compensable. However, claimant has suffered no loss of wage earning capacity as a result of her neck pain, therefore, she is not entitled to an award of unscheduled permanent partial disability.

The Board found many of the exhibits were illegible. If an exhibit cannot be read, obviously it cannot be understood and it serves no purpose in the record. It is the responsibility of the attorneys offering the exhibits to insure that each and every exhibit offered is legible and if it is not it is the obligation of the Referee to refuse to accept it in the record.

ORDER

The order of the Referee, dated January 26, 1979, is affirmed.

WCB CASE NO. 78-2059 July 24, 1979

SHIRLEY BALEY, CLAIMANT
Dye & Olson, Claimant's Attys.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the denial dated February 15, 1978.

The only issue is whether claimant suffered a compensable injury.

The employer is engaged in the meat processing business and claimant has worked for it since June 1966; the last four years claimant worked as a stapler. This job required claimant to look down and in January 1976 she started developing pain in her neck and also having headaches.

Claimant first was treated by Dr. Cook, a chiropractic physician, at her own expense. In July 1976 claimant reported the problem to her employer and filed a claim which was accepted as a non-disabling injury. From that date the employer proceeded to pay for claimant's medical care and treatment and claimant continued to work. On July 30, 1976 Dr. Cook reported that initially claimant had a stool upon which to sit but that it was taken away and claimant was required to stand all day. In his opinion the strain was built up over a period of time. He diagnosed claimant's condition as a cervical lumbar strain with right sciatic radiculitis. On December 8, 1976 Dr. Cook reported that claimant had been transferred to another job in October and November which she thought might relieve her neck and upper back problems. This job required lifting 80-pound rolls and imposed a substantial strain to her legs. When she was examined on October 24 her thighs, hips and rib cage were bruised and she had severe muscle sprains in her low back. The new job was too much for claimant to handle and she has returned to her old job. She continued to have neck and shoulder complaints, however, she apparently had some relief from the pain when she was not required to lift the heavy trays of meat. Dr. Cook indicated that claimant was not stationary and he recommended that she seek other employment.

In January 1977 claimant terminated her employment due to her physical difficulties.

Dr. Cook died in 1977. Dr. Gross, who took over Dr. Cook's practice, referred claimant to Dr. Anderson, an orthopedic surgeon, who, on November 30, 1977, reported that claimant was suffering from a chronic cervical strain with possible headaches, secondary to the cervical muscle symptoms. He indicated there was no specific history of injury and he could not relate her neck symptoms to an industrial accident.

On February 15, 1978 the employer denied any responsibility for claimant's condition.

The employer relied upon the Court's ruling in Weller to support his contention that the work only caused symptoms during her employment and, furthermore, that Dr. Cook had said that when claimant terminated such employment her neck condition would improve. Claimant followed this advice and is now attempting to find work in another field of employment.

Claimant contends that, based upon Dr. Cook's reports, the employer accepted her claim and paid for her treatment, but later, relying upon a report from Dr. Anderson, the claim was denied. At the time of the denial Dr. Cook was deceased and claimant was precluded from obtaining any current medical reports from him to establish the causal relationship between her employment and the neck injury. She also contended that Dr. Anderson did not see her until a substantial period of time had elapsed since Dr. Cook had treated her. She also contended hei did not have proper knowledge of the circumstances of the injury.

The Referee found that the medical testimony of Dr. Cook did not refer to any specific accident.

The Referee found the medical evidence did not support the compensability of claimant's claim. Dr. Cook's reports indicated an aggravation of a condition caused by her work. Dr. Anderson stated that there was no causal relationship between the neck and claimant's work and that the neck problems she was having at the present time were relatively minor and would be resolved with proper exercise. He concluded that the denial of the claim was proper even though the carrier had waited a substantial period of time between the filing of the claim and the denial thereof.

The Board, on de novo review, finds that claimant has been prejudiced by the delayed denial by the employer and its carrier. Claimant was treated primarily by Dr. Cook and, based upon his reports, her claim was accepted. Dr. Cook is now deceased and claimant has no opportunity to present a current report reflecting Dr. Cook's opinion of her condition and the relationship thereof to her employment.

The claimant's testimony, the testimony of two fellow-workers and the reports of Dr. Cook indicate a relationship between her neck problems and her employment. The Board finds no evidence in the record to rebut this testimony. The employer has a right to deny a claim, at any time, however, in this case claimant has been prejudiced by the delay.

Claimant's condition does not represent a temporary exacerbation of her symptoms, therefore, the ruling in Weller is not applicable.

ORDER

The order of the Referee, dated February 22, 1979, is reversed.

The claim is remanded to the carrier for acceptance and payment of compensation as provided by law until the claim is closed pursuant to ORS 656.268.

The claimant's attorney is awarded as a reasonable attorney's fee for his services at the hearing and at Board review a sum equal to $1,000.

WCB CASE NO. 76-573 July 24, 1979

ALAN B. BANKS, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which directed it to pay for the medical services rendered claimant by Dr. Dunn and Dr. Stover and disapproved the Fund's partial denial. The order affirmed the termination of temporary total disability compensation on December 1, 1975 and directed the Fund to pay claimant's counsel an attorney's fee of $300 for prevailing with respect to the Fund's partial denial and payment of temporary total disability. The claimant was awarded claimant compensation equal to 192° for 60% unscheduled disability, and his attorney was granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation, payable out of said compensation as paid, not to exceed $2,000.

Claimant, a 53-year-old pipe fitter, fell 18 feet from a scaffolding on April 2, 1974. Dr. Ellison, an orthopedic surgeon, on May 1, 1974, found contusion with myofascial injury to the lumbar spine without bone or neurologic damage; also a possible cervical disc syndrome, secondary to the fall, involving C7, C8 and T1 levels.

After claimant was treated by Dr. Ellison he came under the care of Dr. Dunn, a chiropractic physician, who has continued to treat claimant. Claimant also received "skull adjustments" from Dr. Stover, also a chiropractic physician, to whom claimant was referred by Dr. Dunn.

Claimant sees Dr. Stover every six or eight weeks for an adjustment which gives him substantial relief and has substantially reduced his headaches which he describes as

"electric shock type". These headaches originate at the back of the skull and cause blackouts. Claimant also stated that Dr. Dunn's chiropractic treatment has improved the strength in his left leg and and reduced the pain in his back.

In July 1974, Dr. Harwood, medical examiner for the Fund, felt that claimant was dramatizing his problems. Dr. Dunn, after 13 sessions with claimant, was convinced that despite such dramatics claimant had a legitimate falling problem. He stated that subsequent to being seen by Dr. Harwood, claimant bent forward while holding a running skill saw and fell severing the tip of his little finger on his left hand. Claimant testified he had also fallen and broken his wrist and that he continued having falling episodes to the date of the hearing with a substantial degree of frequency.

In September 1974, Dr. Parson, a neurosurgeon, diagnosed a back injury, with possibly revolving spinal cord contusion in the lower thoracic area. He believed that claimant was improving; if claimant did not have to work at heights he would be capable of returning to employment at that time.

Dr. Mason, at Callahan Center, suggested a change in jobs; he also felt that claimant should not work at heights nor do any work with forward flexion until his left leg strength improved. He did feel claimant could return to a modified job in the near future.

In September 1975 the Orthopaedic Consultants evaluated claimant's low back disability as minimal and they felt that he could return to his regular employment. It was their belief that further chiropractic treatments would be palliative only and were not indicated. The following month Dr. Dunn noted that, after considering claimant's continued problems with falling, it would be "murder or suicide" to send him back to his regular employment.

On December 1, 1975 Dr. Parson rated claimant's permanent partial disability at minimal to moderate.

On January 28, 1976 a Determination Order was entered awarding claimant 48° for 15% unscheduled low back disability and 7.5° for 5% left leg disability. The Determination Order also recited that,

"There is conflicting medical opinion as to whether your condition is medically stationary. It is the determination of the Board that the preponderance of evidence indicates that your condition has become medically stationary; and that your further requirement for medical treatment may be only palliative and not curative; that you remain entitled to receive treatment and drugs ordered by your doctor as reasonable and necessary for your injury even though a determination of your claim is now appropriate; . . ."

In February 1976 Dr. Stover reported that he had treated claimant six times and there had been improvement in claimant's vision and balance, with reduction of headaches but there had been no improvement in the loss of consciousness pattern. He felt that claimant had a brain lesion of the epileptoid type.

In May 1976 the Fund denied further treatment for "condition of undetermined etiology, possibly involving the central nervous system".

The Referee found that this partial denial was not proper. The early onset of claimant's head pains and blackouts, when viewed in conjunction with the medical reports and claimant's testimony that he was receiving benefits from both Dr. Dunn and Dr. Stover, supported the conclusion that claimant was entitled to receive continuing treatment from both of these doctors and from other doctors for his head pain, blackout spells, tendency to fall and the limitation of function of his back and leg. He set aside the partial denial and held the Fund responsible for the payment of the medical treatment furnished claimant by both Dr. Stover and Dr. Dunn.

The claimant has a high school education and a year-and-a-half at a community college where he studied aeronautical engineering. Claimant also has trade school training in pipe fitting and welding. At the present time he is receiving social security benefits of $273 a month and he also received $200 a month from the sale of some property. The claimant's work background includes experience in complex layout work, and he has been employed as a supervisor, including supervising the plumbing of the construction of a three-story office building in Eugene. He

has not worked since his injury although he has had several excellent job offers from apprentices that he formerly supervised who now were in business for themselves. He refused such work because of his tendency to fall and his feeling that if he did so that he would not only re-injure himself but would be a hazard to others.

Claimant was evaluated in March 1975 by Dr. Hickman, a clinical psychologist, who had a guarded prognosis for claimant's restoration and rehabilitation. Dr. Mundall, a neurologist, felt that claimant's reported loss of consciousness represented vasovalga syncope possibly related to the muscular pain in the back of claimant's neck. Claimant should avoid working in high places and around dangerous heavy machinery. Dr. Throop, also a neurologist, reported in July 1976 that he found no organic lesion and noted some aspects of his examination and presentation were characteristic of a functional disorder. The EEG, skull x-ray series, brain scan and chemical screen tests were all normal.

In December 1976 Dr. Stainsby, a neurosurgeon, reported that, after seeing claimant and examining him, he was somewhat skeptical at the present time that claimant was having true post-traumatic convulsions. It was his opinion that if he actually was having blackout spells they were probably on the basis of a psychological problem. He suggested a psychiatric examination.

In April 1977, Dr. Parvaresh, a psychiatrist, after evaluating claimant's problems, stated that it seemed clear that the combination of physical and psychological damage which claimant had sustained has had a serious adverse impact on his ability to return to the remunerative employment that he was engaged in prior to his industrial injury.

The Referee concluded, based on all of this medical evidence, that the chance of claimant returning to a level of earning similar to that which he enjoyed prior to his injury appeared quite remote and he believed that claimant had suffered a greater loss of wage earning capacity than that for which he had previously been awarded. He increased the award of 192° which is 60% of the maximum. He did not increase the award for the left leg.

The Fund contended that claimant's compensation for temporary total disability should have been terminated as of March 12, 1975 rather than December 1, 1975. The Referee found that it was appropriate to consider Dr. Dunn as claimant's treating physician and on October 7, 1975 Dr. Dunn challenged the correctness of the Fund's request for a determination of claimant's condition. This request stated that claimant was medically stationary and that his "treating doctor" had approved his return to work. Apparently, the Fund was relying upon a statement contained in Dr. Parsons' report of December 1, 1975. However, Dr. Dunn had referred claimant to Dr. Parsons and when Dr. Parsons concluded in his report of December 1, 1975 that claimant was medically stationary he merely added that he had considered claimant medically stationary when he had seen him on March 12, 1975 and did not find any significant change in his examination of claimant since that date. Claimant did not challenge the December 1, 1975 date. The Refereee concluded that when Dr. Parsons saw claimant in March it was not upon referral from Dr. Dunn, but claimant had been referred to Dr. Parsons in December, therefore, Dr. Parsons could, at that time, be considered as claimant's physician. The Referee concluded that the termination of compensation for temporary total disability on December 1, 1975 was proper.

Because of the Fund's refusal to pay for the medical services rendered by Dr. Dunn and Dr. Stover and because it failed to prevail on the issue of an earlier termination of time loss, the Referee awarded claimant's attorney an attorney's fee payable directly by the Fund.

The Board, on de novo review, finds no medical evidence which establishes a causal relationship between claimant's head problems and his industrial injury. Therefore, the denial by the Fund in May 1976 of responsibility for further treatment for a condition of undetermined etiology, possibly involving the central nervous system, must be upheld. Inasmuch as the only treatments claimant received from Dr. Stover related to his head problems, the Fund is not responsible for the payment of such medical services.

The medical services which claimant received from Dr. Dunn, however, directly relate to his back condition and the refusal on the part of the Fund to pay for such medical services was improper and the Fund is subject to penalties and attorney's fees for its refusal to pay for such services.

The Board agrees with the Referee that the benefits for temporary total disability properly were terminated on December 1, 1975. The report from Dr. Parsons on that date which indicated that he had considered claimant medically stable when he had seen him on March 12, 1975 and found no significant change since that date and December 1, 1975 is not sufficient to justify cutting off time loss benefits as of March 12, 1975. On that date Dr. Parsons could not speak as claimant's treating physician. Claimant was not referred to Dr. Parsons by Dr. Dunn until a later date.

The medical evidence in this case will not support a finding that claimant has lost 60% of his wage earning capacity. Much of claimant's disability relates to his head problems which are not related causally to his industrial injury according to the comments made by Dr. Throop in July 1976 and Dr. Stainsby in December 1976.

The Orthopaedic Consultants evaluated claimant's low back disability as being minimal. They felt he could return to his regular employment. Dr. Mason, at Callahan Center, after examining claimant, suggested a job change. The Referee has found that claimant's work history, education, intelligence and mechanical and technical aptitudes appeared to reflect basic competencies compatible with re-employment in a substantial part of the labor market and a good capacity for retraining if that should be proven necessary. The Board agrees with this finding. The fact that claimant cannot return to work at heights is because of his head problems not his industrial injury.

Claimant is 53 years old, he has better than average education, and, in the opinion of the Board, there are many types of employment in which claimant could engage, either with or without retraining. The Board feels that claimant would be adequately compensated for his potential loss of wage earning capacity by an award equal to 80° which represents 25% of the maximum allowable by law for an unscheduled disability. The Board agrees that the 7.5° granted claimant for his loss function of the left leg adequately compensates claimant for his loss of function of that scheduled member of the body.

Because claimant's attorney prevailed only on the issues of the Fund's responsibility for Dr. Dunn's medical bills and the proper termination of compensation for temporary total disability he is not entitled to the attorney's fee awarded him by the Referee's order. The Board feels that a reasonable attorney's fee would be $150 to be paid by the Fund.

ORDER

The order of the Referee, dated November 2, 1978, is modified.

The State Accident Insurance Fund, is directed to pay for the medical services rendered to claimant by Dr. Dunn.

Claimant's partial denial, dated May 13, 1976, is approved.

Claimant's attorney is allowed as a reasonable attorney's fee an amount of $150 for prevailing on the issue of the responsibility for the payment of medical bills submitted by Dr. Dunn and the issue of termination of temporary total disability benefits.

Claimant is awarded 80° of a maximum of 320° for 25% unscheduled disability (the award of 7.5° for 5% loss function of the left leg awarded by the Determination Order of January 28, 1976 was not mentioned in the Referee's order but it is considered by the Board to be adequate). The award made by this order for unscheduled disability is in lieu of the award for unscheduled disability made by the Referee's order, the remainder of which, with the exception of the directive that the Fund pay for the medical services rendered claimant by Dr. Stover, is affirmed.

WCB CASE NO. 78-5158 July 24, 1979

RALPH E, CROSS, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
Keith D. Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Referee's order which awarded claimant additional time loss and an additional award equal to 80°, making a total of 128° for 40% unscheduled low back disability.

On June 21, 1974, claimant, a logger, was struck in the back and left shoulder when he was hit by a rolling log. Dr.Holbert diagnosed possible crack in one of the bones of the spine in the low back and found a birth defect in the spine near the pelvis. His claim was accepted and claimant received conservative treatment although a myelogram revealed defects at L3-4 and L4-5 on the right and L4-5 on the left.

Claimant's condition has varied since the industrial injury. He has been able to do some light seasonal work such as supervising the building of fire trails by young boys, however, he has not been able to return to his former job of logging which included chasing on the landing, using a chain saw and walking on uneven terrain. He attempted to return to this type of work in the winter of 1976-77 but it was too much for him.

Claimant is 48 years old and he has a ninth grade education with no special training. His work background consists of working as a flagman, mill laborer and in logging, mostly in the latter field where he has done everything from setting chokers to supervising.

Dr. Holbert, an orthopedist, is claimant's treating physician. He agrees with claimant's assessment of his inability to return to logging. He and the other doctors who have either examined and/or treated claimant recommend

claimant do no repetitive bending nor attempt to lift more than 50 pounds. It was suggested that claimant could return to logging with such limitations, however, the weight of the evidence is to the contrary.

Claimant's claim was initially closed by a Determination Order which awarded claimant 16° for 5% unscheduled disability. The claim has been reopened and closed twice since the first closure and as a result of the three Determination Orders claimant has received compensation equal to 48° for unscheduled low back disability.

The Third Determination Order entered on May 26, 1978 terminated claimant's compensation for time loss as of December 22, 1977. On that date claimant had been examined by the physicians at the Orthopaedic Consultants who believed claimant's condition was stationary. The previous report from claimant's treating physician, Dr. Holbert, was in November 1977; in this report he did not say claimant was medically stationary. On April 12, 1978 Dr. Holbert again examined claimant and stated that he was medically stationary.

Claimant feels he is entitled to additional compensation for temporary total disability because he was not medically stationary until April 12, 1978.

The Referee found that the Evaluation Division apparently relied on the report of the Orthopaedic Consultants as a basis for terminating time loss benefits. The Orthopaedic Consultants' involvement was limited to a single examination of claimant which took place more than three years after claimant was injured. The claimant's claim had been closed twice prior to this Determination Order and preceeding each of the first two Determination Orders a closing report was received from Dr. Holbert indicating claimant was medically stationary. Dr. Holbert has been claimant's treating physician throughout and his assessment of claimant's condition has been accepted previously by Evaluation and, in the opinion of the Referee, he is in the best position to judge the affects of claimant's industrial injury and to determine when claimant's condition ceases to change. For that reason he relied upon Dr. Holbert's opinion and granted the additional compensation from December 22, 1977 through April 12, 1978, less time worked.

The Referee found, based upon claimant's testimony and the employer's admission that claimant was not suited for work as a logger, that the only type of work claimant could do at the present time would be light to moderate work. Claimant is neither trained for, nor does he have any experience in that type of work. The Referee concluded that claimant should be compensated for his inability to do the heavier type of work from which he is now precluded because of his industrial injury and that he has in effect lost 40% of his wage earning capacity.

The Board, on de novo review, finds that the physicians at the Orthopaedic Consultants, after examining claimant on December 22, 1977, said that claimant could return to his same occupation with limitations of repetitive bending or lifting more than 50 pounds and that he could also perform other similarly limited occupations. They did not recommend referral to the Division of Vocational Rehabilitation for retraining but did feel that job placement services might be helpful. They rated the total loss function of the back as of the date of the examination in the mild category and, due to the injury in the minimal category.

The evidence indicates that claimant has made very little, if any, efforts to secure any kind of employment and the Board concludes that the totality of the evidence does not justify a finding of 40% loss of wage earning capacity.

The Board concludes that claimant would be adequately compensated for his loss of wage earning capacity resulting from the industrial injury with an award equal to 80° which represents 25% of the maximum for unscheduled disability.

With respect to the award for additional temporary total disability from December 22, 1974 through April 12, 1978, less time worked, the Board agrees with the Referee that Dr. Holbert's opinion regarding when claimant became medically stationary was the most reliable.

The Board concludes a further effort should be made by the Field Services Division to assist the claimant with employment problems.

ORDER

The order of the Referee, dated January 11, 1979, is modified.

The claim is remanded to the Field Services Division with instructions to offer the claimant their assistance.

Claimant is awarded 80° of a maximum of 320° for 25% unscheduled low back disability. This award is in lieu of the award of 128° made by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-4221 July 24, 1979
WCB CASE NO. 78-4222

HARRY GETTMAN, CLAIMANT
Bloom, Reuben, Marandas, Berg, Sly & Barnett, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request fot Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The Fund requests the Board to review the Referee's order which found claimant to be permanently and totally disabled as defined by ORS 656.206.

On May 3, 1976 claimant suffered a compensable injury to his left leg diagnosed as a possible left knee meniscus rupture. A medial meniscectomy was performed by Dr. Khan in August 1976 and in January 1977 claimant was released to return to work.

In March 1977 claimant returned to see Dr. Khan complaining of pain at the site of the incision and also for pain in his low back. Dr. Khan found the symptoms were rather vague and inconsistent. At the same time claimant saw Dr. Khan, he saw Dr. Satyanarayan to whom he complained of pain in his left knee but stated nothing about pain in his back. On March 21, 1977 Dr. Satyanarayan reported claimant had pain in his low back without radiation.

On April 1, 1977 claimant's claim for his leg injury was closed by a Determination Order which awarded claimant 7.5° for 5% loss of the left leg.

Claimant had filed a claim for a back injury on March 16, 1977. This claim had been accepted and ultimately closed by a Determination Order, dated April 21, 1978, which granted claimant an award of 112° for 35% unscheduled low back disability.

Claimant has not worked since March 18, 1977. Based upon his doctor's advice, he applied for disability benefits under the provisions of the Public Employees Retirement System and his application was approved.

Claimant filed a claim for aggravation of his leg injury and also a claim for an aggravation of his low back disability. On November 13, 1978 the Fund denied both claims, stating there was no medical evidence to indicate that the claimant's leg injury had worsened since April 1, 1977 nor that his low back disability had increased since April 21, 1978.

The Referee found that claimant has had a gradual improvement of his knee condition rather than a worsening of this scheduled injury. Dr. Khan reported two months after the issuance of the Determination Order that claimant might have chondromalacia, secondary to the knee injury; however, the knee was stable. The Referee found it was borderline, with the added diagnosis of chondromalacia, that there was a worsening. He concluded that claimant had failed to meet his burden of proving a worsening of the knee condition since the date of the last award or arrangement of compensation.

The Fund argues that claimant's back problems is simply a result of degenerative joint disease and that the award of 112° should be reduced. The Fund further argues that Dr. Satyanarayan had not seen claimant for over a year and when he did see him in July 1978 the symptoms were nearly ten days old. The Referee was unable to know just which particular doctor at Kaiser examined or treated claimant at any particular time but that Dr. Satyanarayan stated on September 25, 1978 that he felt claimant was totally disabled for the type of work that he had done for the past 27 years.

At the request of the Fund claimant was examined at the Orthopaedic Consultants on October 14, 1977. This was eight months after the injury to the back and approximately six months prior to the Determination Order which closed the claim for that injury. The physicians of the Orthopaedic Consultants felt that claimant was stationary and recommended no treatment. They agreed with claimant that he could not do too much walking but did feel that he could do some occupations with limitations. The loss of function due to the back injury was mild. Dr. Satyanarayan did not agree with this report but, on December 1, 1977, did concur that claimant's condition was medically stationary. He also recommended that claimant apply for retirement.

The Referee, relying upon the provisions of ORS 656.206 which defined a suitable occupation as one which the workman has the ability and training or experience to perform or an occupation which he is able to perform after rehabilitation,

found that claimant, who had worked for the Park Bureau for the city of Portland as a laborer for 27 years, was qualified only for that type of job and obviously he could not return to that type of work.

The Referee, citing Wilson v. Weyerhaeuser, 30 Or App 403, stated motivation was not essential to the establishment of a claim of permanent total disability. He found that the medical evidence was convincing that claimant could not perform work which required a strong back and that the non-medical evidence was convincing that claimant's ability to perform heavy physical labor was his only employment asset. Therefore, although claimant had made no effort to find employment, it was excusable because it would have been futile in view of his physical condition. He found claimant to be permanently and totally disabled.

The Board, on de novo review, finds that claimant filed his claim with regard to his low back condition within a year after the issuance of the Determination Order of April 21, 1978, therefore, it does not necessarily have to be treated as a claim for aggravation and medical verification of inability to work is not required. It is a question of extent of disability.

The Board does not find that claimant's condition is such that motivation need not be considered. Actually, motivation is always a factor, however, when the other conditions which must be considered are such that the worker would be unable to find employment regardless of his motivation, a worker can be found to be permanently and totally disabled without a showing that he sought gainful employment.

The medical evidence in this case does not support a finding of permanent and total disability. Claimant was awarded 7.5° for 5% loss of his leg and has failed to show that his condition with respect to that scheduled member has worsened.

The sole criterion for determining unscheduled disability is loss of wage earning capacity. There is no question but that claimant cannot return to the type of work which he has done for the previous 27 years but there is no evidence to support the conclusion that there are no other types of employment available to claimant either at the present time or after receiving vocational rehabilitation or on-the-job training.

Claimant has voluntarily removed himself from the labor market by retiring, however, claimant took "early retirement" under the disability provisions of the Public Employees Retirement System and it is reasonable to assume that had he not suffered the injury to his back claimant would have been able to continue to do the same type of work that he had been doing.

The Board is convinced that claimant has not been adequately compensated for his loss of wage earning capacity, both present and potential, by the award of compensation equal to 35% of the maximum for his unscheduled low back disability. Taking into consideration claimant's age, work background, potential for retraining, the Board concludes that he is entitled to an award equal to 60% of the maximum for his unscheduled disability.

ORDER

The order of the Referee, dated January 16, 1979, is modified.

Claimant is awarded 192° of a maximum of 320° for 60% unscheduled low back disability. This is in lieu of the award granted claimant by the Referee's order which in all other respects is affirmed.

CLAIM NO. A 42 CC 117252 RG July 24, 1979

SUSIE M. GRIFFIN, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Own Motion Order

On May 4, 1979 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury sustained on March 30, 1970 while employed by Rapid American Corporation. Her claim was first closed on October 22, 1970 with an award of compensation equal to 7° for partial loss of the left foot. In late 1971 claimant injured her back in two separate incidents, both of which were attributed to instability of her left ankle. An April 20, 1973 Determination Order granted her compensation for 20.25° loss of the left foot and 48° for 15% unscheduled low back disability.

After a twisting incident in November 1973 a Third Determination Order awarded claimant no additional compensation for permanent partial disability. A lumbar laminectomy was performed on October 11, 1974. On June 16, 1975 a Determination Order granted claimant an additional 10% unscheduled disability. The claimant requested a hearing and the Referee's Opinion and Order, entered on December 10, 1975, awarded claimant an additional 10% unscheduled low back disability and 10% loss of the left foot.

On August 13, 1976 claimant re-injured her back while employed by J. Burton whose workers' compensation coverage was furnished by Industrial Indemnity.

Claimant filed a claim for aggravation against Rapid American Corporation, whose coverage was with Aetna Insurance Company. This was denied on March 23, 1977 and again on June 7, 1977. On November 4, 1977 a bona fide dispute settlement between claimant and Rapid American Corporation whereby claimant released all claims against that employer and its carrier for the alleged aggravation of August 1976 was approved.

Claimant filed a claim for an industrial injury against her employer, J. Burton, and its carrier, Industrial Indemnity, which was denied on April 26, 1977. On November 18, 1977 a bona fide dispute settlement between claimant and J. Burton and its carrier whereby claimant released her claim for a new injury against that employer and its carrier was approved.

Claimant's petition for own motion relief sets forth the chronology of events and indicates that on February 14, 1979 claimant commenced experiencing increasing chronic low back pain which was diagnosed by Dr. Berselli as a herniated nucleus pulposus, left L4-5, and he performed an intralamina laminotomy. Claimant alleges that Dr. Berselli has related her current symptoms directly to her previous back condition of April 20, 1973, the date the Second Determination Order was entered, and the back condition was accepted as a natural consequence of her left ankle injury of March 30, 1970. The Board finds that between March 30, 1970 and February 14, 1979 claimant suffered an intervening injury on August 13, 1976, therefore, her present symptoms cannot "bridge over" the 1976 injury and be related to the 1970 injury.

Claiant's claim for the August 13, 1976 injury remains in a denied status, as does her claim that the 1976 incident was an aggravation of her 1970 injury.

The Board concludes that because of the two Bona Fide Disputed Settlements claimant is not entitled to the relief requested.

ORDER

Claimant's request for own motion relief is hereby denied.

CLAIM NO. D53-104976 July 24, 1979

VINCENT JAGIELSKI, CLAIMANT
Rankin, McMurry, Osburn, Gallagher
& VavRosky, Claimant's Attys.
Daivd O. Horne, Defense Atty.
Own Moiton Order

Based upon the stipulation of the parties that the same may be so done and in appearing to the undersigned Workers' Compensation Board member that the same would be a proper disposition of the Request for Hearing now pending herein, it is

This matter coming on regularly before the Workers' Compensation Board for review of an Opinion and Order of Referee Daughtry issued May 23, 1979, and the parties having resolved their differences, hereby stipulate and agree as follows:

dismissed with prejudice and he shall thereafter be barred from asserting any further claim for compensation in that he agrees that he has been fully and adequately compensated for any transient symptomatology resulting from his underlying condition. That claimant agrees that if he does suffer continuing temporary or permanent disability it is not related to his industrial injury but is due to his underlying non-compensable degenerative condition.

IT IS FURTHER UNDERSTOOD AND AGREED that in the event this agreement and stipulation shall hereafter be set aside by any administrative agency or court that the sums paid herein shall be an offset against any compensation ordered.

CLAIM NO. AC 313656 July 26, 1979

ANGEL ALBAREZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order

Claimant sustained a compensable injury on July 14, 1971. The diagnosis was a compression fracture of the lumbar spine and a laminectomy and fusion were done on July 19, 1971. The claim was closed on May 25, 1972 with an award for permanent total disability.

Subsequent to this injury claimant was involved in a vocational rehabilitation program as an upholsterer but quit this in the summer of 1974 to move to Florida where he eventually began raising and training horses. On December 2, 1977 claimant quit this employment and returned to Oregon where he became employed by 7 Star Ranch. He made $4,175.24 during the rest of that year. He is now working in Seattle, Washington, training and raising horses. He was still employed as of June 5, 1979.

The Fund requested a re-evaluation of claimant's permanent total disability status pursuant to ORS 656.206.

The Evaluation Division of the Workers' Compensation Department, after fully considering claimant's present condition, concludes that his award for permanent total disability should be terminated and claimant should receive, from this date, compensation equal to 50% unscheduled disability, 20% loss of the left leg and 40% loss of the right leg.

The Board concurs in this recommendation.

ORDER

Claimant's award for permanent total disability is hereby terminated as of the date of this order and claimant is granted compensation from this date equal to 160° for 50% unscheduled disability, 30° for 20% loss of the left leg and 60° for 40% loss of the right leg.

WCB CASE NO. 78-4825 July 26, 1979

KENNETH E. FREE, CLAIMANT
Crane & Bailey, Claimant's Attys.
Giacomini, Jones & Zamsky, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks Board review of the Referee's order which affirmed the denial of claimant's request for vocational rehabilitation and awarded compensation for temporary total disability from August 20, 1977 to November 1, 1977, less time worked. The order allowed any compensation for temporary total disability paid beyond November 1 to be used as an offset against the award for permanent disability. The Referee awarded claimant 64° for 20% unscheduled (bronchial asthma) disability, and granted claimant's attorney a fee equal to 25% of the additional compensation made by his order, payable out of said compensation as paid.

The sole issue on appeal before the Board is the extent of disability.

Prior to the request for the hearing which is now before the Board on review claimant had requested a hearing on a denial by the carrier of his condition of bronchial asthma. After a hearing, the Referee, by his order dated June 16, 1977, found the condition to be compensable and directed the employer to pay compensation from October 22, 1976 until the claim was closed pursuant to ORS 656.268. This order was affirmed by the Board's Order on Review dated November 3, 1977.

After the hearing on the denial of his claim, claimant and his family had moved to Arizona where claimant worked in November 1977, operating a filling station. Claimant stayed in Arizona until August 1978 when he returned to Klamath Falls where he has taken a job as a security guard.

At the hearing on the propriety of the denial of claimant's claim, the evidence indicated that claimant worked on an overhead trimmer and trimmed primarily Ponderosa pine in which there was heavy sawdust. Claimant wore a paper mask as much as possible but it caused his glasses to steam and blew sawdust in his eyes. After two weeks of exposure to the sawdust, he began having the bronchial asthma problems. He told his foreman who stated he would try to get him something else to do. At the end of the first week of being exposed to the sawdust, claimant reported to his doctor and received medication. After working two days in January 1977 claimant quit. Since leaving the trim saw job claimant has felt better.

Dr. Conn has been claimant's primary treating physician, having treated claimant for bronchial asthma for the past six years. Claimant has had bronchial asthma problems since he was 21 years old. Most of the problems existed prior to his exposure in the mill. Dr. Conn believed it was reasonably probable that claimant's employment which required using the trimmer saw where high concentrations of dust and sawdust were present at all times would be an aggravating factor. He stated that claimant's allergic condition was present prior to his employment but it was exacerbated by it. After claimant started taking shots he felt somewhat better.

While claimant had been in Arizona he was treated by a Dr. Stricke who reported to Dr. Conn on November 21, 1977 that he felt claimant had extensive asthma and that the pulmonary function studies done by him indicated that claimant had a mild chronic obstructive lung disease.

After claimant returned to Klamath Falls he continued to take allergy shots but he had no undue problems. Claimant believes that he cannot return to his former job as a carrier operator or trim saw operator because of the exposure to dust on either of these jobs. At the present time he is making about one-half of the wages he was earning while working in the mill. He supplements his income by working at night for a skating rink.

The Referee found that claimant's present problems were basically the same as he had before he started working on the mill but that he was precluded from returning to working in the mill because the surrounding conditions exacerbated his condition. The Referee thought that under the rationale of Weller there was some question of compensability, however, that issue was res judicata as a result of the Referee's Opinion and Order dated June 16, 1977.

The Referee concluded that claimant had a pre-existing asthmatic condition but that there had been some exacerbation of that condition on a permanent basis. Claimant had been able to work for several years in the mill and now he is unable to return to that type of work according to the medical opinions expressed by Dr. Conn and Dr. Stricke. Therefore, claimant has had to seek other employment and as a result is now earning less money than he did before.

The Referee found that the denial of claimant's request for vocational rehabilitation was not arbitrary or capricious, there was a valid reason for the refusal to refer, i.e., claimant had returned to work. He, therefore, affirmed that denial.

With regard to compensation for temporary total disability, the Referee found no indication that claimant was ever released from medical treatment and it is questionable that he ever will be. It will be necessary for claimant to continue to receive medical treatment indefinitely; at the present time he is taking one shot a week.

The Referee concluded there was no basis for terminating the compensation for temporary total disability as of August 19, 1977; the temporary total disability should have continued until claimant returned to work operating the filling station in Arizona which was in November 1977. The Referee found the evidence was not clear as to the exact date claimant commenced operating this filling station but felt that additional compensation for temporary total disability should be paid from August 20, 1977 to November 1, 1977. The evidence indicated that the carrier did pay such compensation until the Determination Order was issued on November 3, 1977, therefore, it was entitled to an offset for the compensation for temporary total disability paid between November 1 and November 3, 1977.

With respect to the permanent partial disability, the Referee concluded that claimant, despite his pre-existing condition, had been able to work until his asthmatic condition became so bad because of the exposure to the dust on the job that he was forced to quit. At the present time, his asthmatic condition apparently is back to his pre-exposure status, however, if he should attempt to return to mill work, undoubtedly the condition would again flare up.

The Referee concluded there were many fields of employment available to claimant but that he had lost some earning capacity because of his inability to work in the mill and he awarded claimant 64° which represents 20% of the maximum for unscheduled disability.

The Board, on de novo review, agrees with all the rulings made by the Referee although the only issue actually before it was the extent of claimant's permanent disability.

The Board notes that actual wages are not determinative of permanent partial disability. The loss of potential wage earning capacity is the basis for determining unscheduled disability, not the loss of wages.

ORDER

The order of the Referee, dated February 7, 1979, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $300, payable by the employer, DG Shelter Products, and its carrier, Di Giorgio Corporation.

WCB CASE NO. 77-7639 July 26, 1979

EARL HAZELTT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Rankin, McMurry, Osburn, Gallagher & VavRosky, Employer's Attys.
Bruce Bottini, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which approved the denial by Burns International Security Services (Burns) and its carrier of claimant's claim for an aggravation of his June 3, 1973 industrial injury.

The request for hearing on the propriety of the denial was heard in tandem with claimant's request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen claimant's claim for an injury which occurred on February 5, 1968. The only issue before the Board on review is the propriety of the denial by Burns.

Claimant, at the time of the hearing, was 47 years old. He had undergone an amputation of his right leg in 1964. While claimant was home recuperating from this surgery he fell down a flight of stairs and fractured his left ankle. This fracture occurred on the outside of the foot and the subsequent problems which claimant developed with the skin ulcer occurred on the inside of the left leg above the ankle. Between the 1964 ankle fracture and the first industrial injury of February 5, 1968 claimant experienced no problems with the skin on the side of his left ankle. Both Dr. Simmons and Dr. Inahara were of the opinion that the 1964 fracture to claimant's foot created a chronic venous insufficiency.

Claimant had suffered his initial injury on February 5, 1968 while working for Cascade Corporation, whose carrier was Industrial Indemnity. He scraped the inside of the left ankle on a piece of steel which resulted in a small abrasion. Subsequently, an ulcer problem developed with claimant's left ankle which Dr. Short initially diagnosed as an infected abrasion of the left ankle superimposed on pre-existing circulatory deficiency.

From the date of the injury until September 16, 1971 the ulcer was a problem for claimant. Dr. Kuge reported on May 9, 1970 that the ulcer was completely healed.

The claim was closed on June 4, 1970 with an award of 14° for loss of the left foot.

Subsequently, the ulcerated area broke down, became infected and broke down again. On September 16, 1971 claimant's ulcer once again was healed.

On June 3, 1973 claimant was working for Burns on a fire security watch for a roofing company. While moving a barrel with a hand truck he again scraped the ulcerated area on his leg. On November 27, 1973 Dr. Inahara examined claimant and diagnosed a post-thrombotic syndrome of the left lower extremity with trophic changes in evidence of healed ulcerations.

Claimant had left Burns and commenced receiving compensation for temporary total disability on September 30, 1973. The ulcerous condition later improved. It was not disabling and claimant commenced working for Reynolds High School in a janitorial capacity from November 2, 1973 until June 1977. He started working for Mt. Hood Community College on August 16, 1977 and remained so employed until January 31, 1978.

Dr. Simmons, who treated claimant after June 1975, thought surgery might help but stated there was no guarantee that it would cure the problem entirely. Claimant would still be predisposed to injury notwithstanding. Dr. Simmons believed that there was no medical emergency or immediate need to perform the surgery on the damaged skin. He felt it could be done at the convenience of claimant and claimant continued to refuse surgery.

Dr. Inahara agreed with Dr. Simmons that each time the ulcerous left ankle condition healed, the illness terminated upon that particular healing. When claimant sustained a subsequent injury with the resulting ulceration, then the causal relation was directly related to the latest injury until such time as the ulcer had again healed.

After claimant left his employment at Reynolds and during a period of time when his ulcerous condition was healed, claimant went rock hunting in the Prineville area and scraped his leg, reopening it. As a result of this incident, claimant again saw Dr. Simmons who stated that claimant's condition would remain chronic with repeated areas of breakdown unless definite surgical therapy was instituted. He stated that on November 11, 1977 when he last examined claimant the wound was again ulcerated to the extent equal to or greater than his initial examination in 1975.

In February 1978 Dr. Simmons performed a skin graft at St. Vincent's Hospital.

The Referee concluded that the incident while rock hunting in the Prineville area must be considered as an intervening independent non-industrial injury which caused the ulcerous condition to break down again and resulted in the February 1978 surgery. The ulcerous condition had healed at the time of the incident in the summer of 1977.

The Board, on de novo review, affirms the conclusions reached by the Referee. There is no question but that claimant reinjured a previously ulcerated area on his leg while working for Burns on June 3, 1973, however, this ulcerous condition healed at least two different times after the date of that injury and was not disabling as evidenced by the fact that claimant was able to continue to work first for Reynolds High School and Mt. Hood Community College.

The Board concludes that the non-industrial-related rock hunting incident precipitated the need for surgery and the resulting medical bills are not the responsibility of the employer, Burns International Security Service, or its carrier, Underwriters Adjusting Company. The denial was proper.

ORDER

The order of the Referee, dated January 19, 1979, is affirmed.

WCB CASE NO. 78-4305 July 26, 1979
WCB CASE NO. 78-5090

LEROY LEEP, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Velure & Heysell, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Paul L. Roess, Defense Atty.
Order

On July 13, 1979 the Board entered its Order on Review in the above entitled matter. This order modified the order of the Referee dated April 8, 1978 and remanded claimant's claim for an industrial injury sustained on September 12, 1977 to the State Accident Insurance Fund to be accepted and for the payment of compensation as provided by law commencing on September 12, 1977 and until the claim was closed pursuant to the provisions of ORS 656.268.

The State Accident Insurance Fund, by and through one of its attorneys, requested the Board to reconsider its Order on Review on the grounds that the evidence indicated that claimant, through his own testimony, denied suffering any industrial injury in 1977, therefore, the Board could not find that claimant had carried his burden of proof on the issue of causation. The Fund contends that the Referee's Opinion and Order dated December 8, 1978 should have been affirmed.

The Board, after further reviewing the record, concludes that there is no justification for any conclusion different than that at which it arrived in its Order on Review. Therefore, the motion for reconsideration of said Order on Review dated July 13, 1979 should be denied.

IT IS SO ORDERED.

CLAIM NO. 131 4A 1724 July 26, 1979

MARGARET REIS, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury to her right arm on July 1, 1972 when she slipped and fell, hitting it on the rim of a tub she was trying to move. The first Determination Order, dated February 20, 1973, granted time loss benefits and compensation equal to 15° for 10% loss of the right forearm.

Claimant continued to receive medical treatment and the Second Determination Order, dated January 14, 1977, granted her compensation for 28.8° for 15% loss of her right arm, in lieu of the earlier award. Claimant requested a hearing and the case was settled on February 28, 1977 with an additional award equal to 38.4° for a total award of 67.2° for 35% loss of the right arm.

Dr. Eckhardt performed surgery to remove an olecranon bursa and free the ulnar nerve from scar tissue and transplant it anteriorly. Dr. Eckhardt indicated that after the surgery claimant continued to have variable paresthesias but much less frequently than before the operation. He said she has some discomfort and swelling around the area of the incision. He found her medically stationary as of January 23, 1979 and stated she had returned to work.

The carrier requested a determination of claimant's present disability on April 2, 1979. The Evaluation Division of the Workers' Compensation Department recommended claimant be granted time loss benefits from September 19, 1978 through January 23, 1979 with no additional permanent partial disability.

The Board concurs in this recommendation.

ORDER

The claimant is hereby granted compensation for temporary total disability from September 19, 1978 through January 23, 1979, less time worked.

WCB CASE NO. 78-6186 July 26, 1979

WILBUR SHOPTAUGH, CLAIMANT
Thwing, Atherly & Butler,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Amended Order On Review

On July 11, 1979 the Board entered its Order on Review in the above entitled matter. In the third line of the first paragraph on page three of said order the figure "15%" should be corrected to read "25%". In all other respects, the Order on Review should be reaffirmed and republished.

IT IS SO ORDERED.

WCB CASE NO. 78-3452 July 27, 1979

HELGA JOHNSON, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Flinn & Brown, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which affirmed the Determination Order dated March 24, 1978 which had granted claimant 48° for 15% unscheduled low back disability.

The sole issue is extent of disability.

Claimant suffered a compensable injury to her low back on September 16, 1975 while lifting boxes which weighed 15 to 65 pounds. She has not returned to work since that date. At the time of her injury claimant was 39 years old, married and had four children. She was born and educated, through the eighth grade, in Germany. She also worked in a paper mill in Germany. When she came to the United States she became a nurse's aide, worked as a turkey processor and also worked in a moulding plant. Prior to going to work for the employer, claimant had spent 10 years as a housewife raising her children. Twenty-nine days after she started working for the employer as a case sealer, she suffered the injury.

Claimant was seen on September 19, 1975 by Dr. Fitchett who diagnosed acute musculoligamentous strain of the low back. He treated claimant conservatively. On December 2, 1975 Dr. Fitchett reported that claimant could not return to her regular job or do any type of work which involved heavy lifting. On December 23 Dr. Fitchett found her medically stationary but placed restrictions upon repetitive bending, stooping or lifting over 20 pounds.

Claimant was accepted into a plan of vocational rehabilitation training with courses designed to enable her to obtain a GED.

After a year-and-a-half claimant obtained her GED and was placed in a program designed to train claimant to be a dental assistant. Claimant was in this program only three weeks and then quit because of "nerves". She testified that the vocabulary was too difficult for her and she almost had a nervous breakdown. Her rehabilitation counselor felt that claimant had a substantial vocational handicap due to her disability and lack of previous training.

On March 31, 1977 claimant was suffering from pain in her low back with radiation into her left leg and she returned to see Dr. Fitchett. He felt that EMG studies should be taken. Dr. Throop, a neurologist, did an EMG and a nerve conduction velocity examination on April 8, 1977. Both were normal and Dr. Throop believed that if claimant's symptoms were neurologically based, an irritable lesion was most likely present.

On February 2, 1978 Dr. Fitchett noted that claimant was suffering from episodes of spasm which would result in her need to rest; the spasm would occur after repetitive lifting or twisting.

On March 24, 1978 a Determination Order was entered which granted claimant compensation for time loss and an award equal to 48° for 15% unscheduled low back disability.

On September 6, 1978 Dr. Martens examined claimant and found no neurological deficit but recommended claimant not return to her regular occupation. He placed the same restrictions upon her work activities as had Dr. Fitchett.

Claimant testifies she has constant burning pain in her back with spasms and shooting pain in her left leg. She is able to walk a mile-and-a-half a day and is able to ride in a car for approximately four hours at one time. She has numbness on top of her left foot and states that she limps all the time and drags her left leg. She is unable to stand for more than 20 minutes but she does do her own housework.

The Referee found that since the injury claimant has only applied for one job; that of tagging Christmas trees. He found it understandable that claimant lacked motivation

but nevertheless she was not entitled to a greater award than that which she had been granted by the Determination Order and which he affirmed.

The Board, on de novo review, finds little, if any, objective findings of impairment. In 1978 claimant and her family drove to Minnesota in a period of two days. Claimant is able to maintain her garden and it appears from the testimony that claimant wants to return to being a full-time housewife and mother. She has voluntarily taken herself out of the labor market in order to fulfill this desire.

The Board agrees with the Referee that the Determination Order awarding claimant 48° for 15% unscheduled low back disability has adequately compensated claimant for the loss of potential wage earning capacity resulting from her industrial injury.

ORDER

The order of the Referee, dated February 15, 1979, is affirmed.

WCB CASE NO. 77-819 July 31, 1979

LEO ALBERTSON, CLAIMANT
Own Motion Determination

Claimant suffered a compensable injury on May 20, 1970 to his head. His aggravation rights have expired. On February 2, 1977 claimant requested the Board to exercise its own motion jurisdiction and reopen his claim. The Board ordered the request be transferred to its Hearings Division because the carrier opposed the reopening. After a hearing, a Referee found claimant's present condition was related to his 1970 injury and the Board, on his advice, reopened the claim.

Surgery was performed by Dr. Campagna in January 1976 and April 1978 resulting in the fusion of the 5th, 6th and 7th cervical vertebrae. The Orthopaedic Consultants, on May 22, 1979, found claimant's condition to be medically stationary and recommended no further treatment. They felt claimant could not return to his former occupation but could do some occupation in the light to sedentary category. The total loss of function was in the mildly moderate category and related entirely to the May 20, 1970 industrial injury.

On June 20, 1979 the carrier requested a determination of claimant's present condition. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for 20% disability based on the fact that he could not perform all of the duties required of a working owner-manager of a farm equipment dealership which is what he is at the present time.

The Board, after fully considering the evidence before it agrees with Evaluation as far as it went but also finds that claimant is precluded from a much wider field of employment than just the supervisory capacity in which he is now engaged. Based on the Orthopaedic Consultants' report and upon consideration of claimant's age, work background and training, the Board concludes that claimant is entitled to compensation equal to 128° for 40% unscheduled head and neck disability. Claimant is also entitled to compensation for time loss from January 16, 1976, per the Own Motion Order, through May 14, 1979, less time worked.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 16, 1976 through May 14, 1979, less time worked, and compensation equal to 128° for 40% unscheduled head and neck disability. These awards are in addition to any previous awards claimant has been granted.

WCB CASE NO. 78-210 July 31, 1979

VERNON DOSSEY, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-request by the SAIF

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review and the Fund seeks cross-review by the Board of the Referee's order which awarded him an additional 176°, making a total award of 272° for 85% unscheduled back disability.

The issues before the Referee were: (1) extent of permanent partial disability; (2) additional temporary total disability benefits, and (3) penalties. Only the first issue was appealed.

Claimant, a 53-year-old brick mason/hod carrier, suffered a compensable injury to his low back in February 1974 while lifting a scaffold plank. His treatment was conservative and claimant worked for the next several months before the pain worsened to the extent that he had to quit.

Claimant's treating physician was Dr. Buza, a neurosurgeon. Dr. Reilly, a neurologist, did three EMG studies, the last on August 11, 1975. These studies suggested probable radiculopathy at L4 on the right. Dr. Buza performed a myelogram which was normal and claimant continued to receive conservative treatment.

Claimant was examined by the Orthopaedic Consultants in December 1975 who diagnosed a chronic low back strain with no surgery or other treatment recommended. They believed claimant could work, however, he could not return to his former job because of the heavy lifting and straining involved. The claim was first closed on February 12, 1976 by a Determination Order which granted claimant compensation for temporary total disability and 32° for 10% unscheduled low back disability.

On July 28, 1976 Dr. Reilly did another EMG; this time no abnormalities were noted.

Claimant still did not return to work and in the fall of 1976 he was referred to Callahan Center for physical and psychological evaluation. Dr. Halferty didn't believe that claimant could return to heavy type work. Claimant did poorly in both verbal or non-verbal tests and was found to have a serious reading deficiency. His aptitudes were not useful in identifying possible alternative employment. Claimant wanted to become a television or radio repairman but his aptitude tests scores were below the acceptable minimum for such type of work.

Claimant was concerned about providing for his family; he is married and has five children. A moderate depressive reaction with anxiety was diagnosed. This, when combined with claimant's physical condition, indicated to the evaluating psychologist that claimant would have significant difficulty returning to work. Claimant has a limitation of lifting no more than 10 pounds. He is considered physically capable of light work which does not require prolonged standing or walking nor repetitive stooping, bending or twisting. Claimant did not go beyond the eighth grade and the vocational assistance team at Callahan recommended retraining which would involve little, if any, academic work.

Claimant was referred for vocational rehabilitation; it was felt he would be able to do bench work from a physical standpoint. Claimant was instructed how to apply for work and how to gain assistance in locating it. He went to several cities in the Willamette Valley looking for work in retail sales and working as a night watchman but met with no success. In the late 1977's claimant began an on-the-job training program in a shoe repair shop. The job required standing from nine to ten hours a day. Although claimant was able to learn rather simple repetitive tasks, the prolonged standing and the jarring sensation resulting from the use of a hammer forced him to quit. Claimant's vocational rehabilitation file was closed with a statement that further rehabilitation service did not appear feasible.

On December 28, 1977 an Administrative Determination Order was issued which stated that subsequent to the Determination Order of February 12, 1976 claimant had been referred to vocational rehabilitation and that his program had been completed and it therefore awarded claimant additional benefits for time loss. On re-determination the Department found claimant's disability to be 96° for 30% unscheduled back disability.

In November 1977 Dr. Anderson, an orthopedist, examined claimant and felt he had a mildly moderate loss of spinal function but he could work as long as it did not involve lifting heavy objects, stooping or bending.

The claimant testified that prior to this injury he did not have any back problems and now he has constant low back pain which occasionally radiates down his right leg. The Referee concluded that even though the actual injury was minor and no surgery was performed, that the effect on claimant's employability was severe. The medical, psychological and vocational education clearly proves that claimant could not return to work which he had formerly done. The only possible work claimant can do now is light type work and, from a vocational rehabilitation standpoint, the probability of a successful retraining program for claimant is remote.

The Referee concluded that there was a small portion of the labor market available to claimant but what work he would be able to do would provide him with a substantially reduced income with little hope of advancement. He found that claimant had lost approximately 85% of his earning capacity as a result of his industrial injury and he increased the awards previously granted claimant accordingly.

The only issue presented to the Board for de novo review was the extent of claimant's permanent disability. Therefore, the other issues resolved by the Referee in his order will not be addressed in this order.

The Board, on de novo review, based primarily on the medical reports of Dr. Anderson and the Orthopaedic Consultants, finds that there are certain types of employment which claimant is physically able to do. Dr. Anderson limited claimant's work activities by eliminating any type of work which required heavy stooping, lifting or bending but suggested that job placement service be of help to him. The three physicians at the Orthopaedic Consultants examined claimant on December 17, 1975 and stated that although they did not feel that claimant could return to his former occupation, there were other occupations in which he could be engaged. They also stressed the necessity of eliminating any heavy lifting or straining and suggested referral to the Division of Vocational Rehabilitation for job placement.

The medical evidence indicates that claimant has lost a substantial amount of wage earning capacity as a result of his industrial injury, however, the Board concludes that an

award equal to 70% of the maximum would compensate claimant for his loss of wage earning capacity and is more in line with the medical evidence than the award granted by the Referee.

ORDER

The order of the Referee, dated December 28, 1978, is modified.

Claimant is awarded 224° of a maximum of 320° for 70% unscheduled low back disability. This award is in lieu of the previous awards granted claimant for his unscheduled disability including the award made by the Referee's order which in all other respects is affirmed.

SAIF CLAIM NO. GB 66126 July 31, 1979

BARBARA J. FOSS, CLAIMANT
John M. Parkhurst, Calimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained on June 22, 1964. Her claim was first closed on November 24, 1964 and her aggravation rights have expired.

In support of her request claimant forwarded medical reports from Dr. Cherry and Dr. Berkeley. Dr. Cherry, in his June 25, 1979 report, indicated claimant was suffering from recurrent low back strain with severe sciatic involvement. He felt she was completely disabled at that time and if she did not improve he would hospitalize her for treatment. Dr. Berkeley, on July 10, 1979, stated that myelography was done on that date revealing entrapment of the root at L5-S1. He felt this should be corrected surgically.

The Board, on July 16, 1979, informed the Fund of claimant's request for own motion relief and asked it to advise the Board of its position within 20 days.

The Fund, on July 24, 1979, responded, stating it opposed the reopening of her claim.

The Board, after fully considering the medical evidence before it, concludes that the preponderance of the medical evidence supports claimant's need for surgery even though prior reports did not. It feels claimant's claim should be reopened as of the date of hospitalization for the recommended treatment or surgery.

ORDER

Claimant's claim for an injury sustained on June 22, 1964 is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation, as provided by law, commencing on the date claimant is hospitalized for the surgery recommended by Dr. Cherry, and until her claim is closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

SAIF CLAIM NO. KC 180017 July 31, 1979

ANN JANE FOSTER, CLAIMANT
Leeroy O. Elhers, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 3, 1979 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained on April 18, 1969. Claimant's aggravation rights have expired. Attached to her request were medical reports from Dr. Donald D. Smith which indicated that claimant's back pain had become worse several months before his examination in March 1979. He stated that the pain in her lumbosacral area is aggravated by walking very far or bending or sitting for any length of time. She is unable to do any of her housework which requires twisting or lifting. He recommended no specific treatment but felt her present impairment should be reconsidered. He felt claimant's condition was directly related to her 1969 industrial injury.

The Board, on May 8, 1979, informed the Fund of claimant's request and asked it to advise the Board of its position within 20 days. The Fund indicated on May 17, 1979 that it was having claimant examined by the Orthopaedic Consultants and would state its position when it had received the results of the examination.

The Fund forwarded the Orthopaedic Consultant's report to the Board on July 17, 1979. This report indicated claimant's condition was stationary and there was no objective evidence that her condition resulting from the injury had deteriorated. They found degenerative disc disease, osteoarthritis, diabetes and osteoperosis all of which contributed to her present disability but were unrelated to the industrial injury. The low back impairment due to the 1969 injury was, in their opinion, mildly moderate.

The Board, after considering the medical evidence before it, concludes that it would be in the best interests of the parties to refer the matter to its Hearings Division for a hearing on claimant's request for own motion relief.

Therefore, this matter is remanded to the Hearings Division with instructions to set it down for a hearing on the issue of whether claimant's present condition is directly related to her industrial injury of April 18, 1969 and, if so, constitutes a worsening thereof. Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board with his recommendation on claimant's request for own motion relief.

SAIF CLAIM NO. C 90833 July 31, 1979

REX L. HARRIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order

Claimant sustained a compensable injury to his head on September 6, 1967 when he was struck by a rock. After receiving several years of treatment his claim was closed by a Determination Order, dated June 3, 1970, which granted him compensation for permanent total disability. Near the time of this closure claimant became involved in a program of vocational rehabilitation, taking courses in real estate sales. In 1972 he became licensed as a real estate agent and has since become quite successful in this endeavor. His gross income in 1977 was over $23,000 and in 1978, over $50,000. The carrier requests reduction of claimant's permanent total disability award pursuant to ORS 656.206.

An investigative report by the Fund indicates claimant finds it necessary to take a short "break" each day and occasionally takes one to three days off work to rest. Although claimant can no longer be considered permanently and totally disabled, the Evaluation Division of the Workers' Compensation Department recommends that the payments to claimant for permanent total disability be terminated and that claimant, after the date of this order, be paid compensation equal to 48° for 15% unscheduled head disability.

The Board concurs.

ORDER

Claimant's award for permanent total disability is hereby terminated as of the date of this order and claimant is granted compensation from this date equal to 48° for 15% unscheduled head disability.

WCB CASE NO. 78-4343 July 31, 1979

TIMOTHY J. HOWARD, CLAIMANT
Ringle & Herndon, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Employer

The employer seeks review of that portion of the Referee's order which directed it to pay claimant's attorney as a reasonable attorney's fee a sum of $500.

Claimant was a 36-year-old waiter who sustained a compensable injury on May 20, 1978 when he cut his right thumb on a broken wine glass. He was given treatment at the emergency room of the Holladay Park Hospital by Dr. Howell who stitched the wound and bandaged it. On May 30, 1978 the stitches were removed by the nurse at the doctor's office.

At the hearing, claimant had asserted that he was entitled to temporary total disability benefits from May 20 to June 2, 1978, the latter day being the date claimant testified he was able to return to work. Dr. Howell's medical report indicated claimant was disabled for one day only.

The Referee concluded that claimant had sustained the burden of proving that he was entitled to compensation for temporary total disability from May 20 to June 2, 1978, less time worked. Because of the unique situation, the Referee found no justification for penalties, but he did award an attorney's fee of $500, payable by the carrier.

The only issue before the Board on appeal is whether claimant's attorney is entitled to an attorney's fee not payable out of the compensation.

The Board, on de novo review, finds the claim was never denied by the carrier; it was claimant's decision not to return to work until June 2, 1978. His attorney has not prevailed on a rejected claim, therefore, he is not entitled to an attorney's fee payable by the carrier pursuant to ORS 656.386(1). However, claimant's attorney is entitled to an attorney's fee payable out of the compensation for temporary total disability which the Referee awarded claimant.

ORDER

The order of the Referee, dated February 27, 1979, is modified.

Claimant's attorney is awarded as a reasonable attorney's fee a sum equal to 25% of the compensation for temporary total disability awarded claimant by the Referee's order. This is in lieu of the award of $500 granted claimant's attorney by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-3191 July 31, 1979

ROBERT A. MARQUEZ, CLAIMANT
Bruce A. Botinni, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks review by the Board of the Order of Dismissal entered by the Referee on September 25, 1978.

The issues to be determined at the hearing were premature closure of claimant's claim by the Determination Order, dated May 11, 1978, and that claimant's condition was not medically stationary or, in the alternative, that the award made by the Determination Order was inadequate.

The Referee stated that after reviewing the evidence, including the testimony of claimant, he concluded that claimant had failed to establish the required burden of proof on either issue because he had failed to seek or follow medical treatment, had failed to participate in or complete physical restoration and had failed to pursue vocational rehabilitation programs prescribed for him.

The Referee cited ORS 656.325 and further concluded that claimant was entitled to no further benefits at this time beyond those which were awarded in the Determination Order of May 11, 1978 and that the claimant's present hearing request should be dismissed without prejudice.

The majority of the Board, on de novo review, finds that the transcript of the proceedings indicates that before cross-examination of claimant had been completed the Referee dismissed the hearing because he found that claimant had failed to comply with the requirements set forth in ORS 656.325. That statute permits the employer to request permission to suspend payment of compensation if claimant fails to do certain things or engages in injurious practices but there is no indication in the record that such was the case before the Referee.

ORS 656.283 provides that any party may at any time request a hearing on any question concerning a claim. In the case before the Referee the request was made by the claimant who was dissatisfied by the Determination Order of May 11, 1978.

The majority of the Board concludes that the Referee, in dismissing claimant's request for hearing, has prevented the case from being properly, completely and otherwise sufficiently developed. Therefore, pursuant to the provisions of ORS 656.295(5), the matter should be remanded to Referee Joseph D. St. Martin with instructions to continue the hearing and allow all parties concerned to have the opportunity of being fully heard on the issues presented.

ORDER

The Order of Dismissal, dated September 25, 1978, is hereby set aside and the above entitled matter is hereby remanded, pursuant to the provisions of ORS 656.295(5), to Referee Joseph D. St. Martin with instructions for him to have this matter set down as soon as possible and to allow all parties to completely and sufficiently develop their respective cases on all of the issues presented.

Chairman M. Keith Wilson dissents as follows:

While a disagreement with the majority of the Board is meaningless in the future development of this case (the order proposed by the majority being an interim order without appeal rights), I feel constrained to note on the record my disagreement with the majority and my complete agreement with the Referee in dismissing the request without prejudice. If anything, the Referee's action gave the claimant more rights to pursue the matter than he was entitled to, based upon the record before the Board.

The claimant has consistently failed to cooperate with the medical and rehabilitation professionals who have attempted to treat him. The evidence is overwhelming that the claimant's condition was stationary and that the Determination Order of May 11, 1978 was not premature. The other issue of extent of disability was completely heard and developed at the hearing; the medical and oral testimony was presented, and at that point, it was obvious that the letter and intent of the Workers' Compensation Law had been thwarted at every opportunity by the claimant. The Referee thereupon announced his conclusion and finding that the claimant was entitled to no further benefits beyond those ordered in the Determination Order of May 11, 1978 and that the request for hearing should be dismissed without prejudice. Thereafter, and on August 16, 1978, claimant tendered to the Referee an order of dismissal and requested the Referee to sign the same. The Referee complied by adopting the proffered order as tendered and issued his order of dismissal on September 25, 1978. The claimant should not now be allowed to prolong this process and to reopen the issues, already completely heard and on the merits decided against him.

SAIF CLAIM NO. C 190401 July 31, 1979

GEORGE E. SCOTT, JR., CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requested that his claim for a right eye injury of July 11, 1969 be reopened. Because claimant's aggravation rights had expired, the Fund forwarded the medical reports claimant furnished it to the Board for consideration and to determine if the Board should exercise its own motion jurisdiction and re-open claimant's claim.

Dr. Tanner, on August 23, 1978, indicated that he saw claimant on June 21 and found a retinal detachment. He referred claimant to Dr. Klein and it was the feeling of both doctors that claimant's eye condition was a result of the industrial injury in 1969. Claimant underwent a repair of the retinal detachment on January 12, 1979. The repair was successful and Dr. Waldman, on June 5, 1979, indicated no further treatment would be necessary. He was not certain how claimant's eye developed such condition.

The Board, after consideration of the evidence before it, concludes that claimant's claim should be reopened for the eye injury suffered on July 11, 1969. Dr. Tanner related claimant's condition to his 1969 injury and the Board agrees.

ORDER

Claimant's claim for an industrial injury sustained on July 11, 1969 is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation to which he is entitled, commencing January 12, 1979, the date of the surgery, and until closed pursuant to ORS 656.278.

WCB CASE NO. 78-5432 July 31, 1979

CHARLES TAYLOR, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks review by the Board of the Referee's order which set aside its denial of claimant's claim and remanded it for acceptance and payment of compensation, as provided by law, and awarded claimant's attorney an attorney's fee of $1,200 to be paid in addition to and not out of compensation.

The issue is compensability. The question is whether or not the facts of this case are sufficient to constitute an exception to the "going and coming" rule.

Claimant suffered a compensable injury on June 5, 1978 while he was driving an automobile from his home in Portland to the employer's job site on the upper Clackamas. At the time of his injury claimant was employed as a laborer subject to a labor agreement between the Association of General Contractors and various unions which basically provided that to avoid the inequity between living expenses of an employee providing for himself and his family in the major metropolitan areas and those of an employee working in the remote areas, all jobs or projects located more than 75 miles from the city hall in Portland should receive a basic rate of pay and an additional $1.50 an hour for all classifications. Additionally, the agreement states: "No travel time, transportation reimbursement, or subsistence is payable under this agreement except as provided in this article . . . ". The article referred to is Article XVI and it does not specifically provide for travel time, transportation reimbursement or subsistence payment under the facts of this case.

Claimant testified he lives 67 miles from the job site and that he drove daily in his own car to and from work. According to the aforesaid labor agreement, claimant received $1.50 an hour pay for work in a certain zone in addition to his basic pay of $8.37 an hour.

The labor relations manager for the Association of General Contractors testified that he assisted in preparing and negotiating the aforesaid agreement in 1975. He stated that transportation provisions contained in the agreement were deleted at the request of the union. The prior agreement had not provided for zone pay.

On the date of the accident there had been other employees who lived closer to the job site or had lived at the job site who were paid the same zone pay as claimant. The additional zone pay was included in the regular pay check.

The Referee found that the general rule in Oregon was that in the absence of special circumstances an employee injured while coming to or from his place of work was excluded from workers' compensation benefits. An exception to this rule is when an employee is paid a specific amount as compensation for time spent in coming or going from the place of employment.

The Referee found that the remoteness of the employer's job site required the claimant to travel over 134 miles day, took four hours and 40 minutes travel time and required claimant to use 13 gallons of gas for his round trip. Computed on an eight-hour day, his zone pay was $12; his base pay was $8.37 per hour.

The Referee concluded that the zone pay was not related to claimant's hourly wage as travel time nor was it necessarily related to the distance traveled because all employees received the same compensation regardless of the distance traveled. Although payment for travel time or expenses was not expressed in the written agreement it was not illogical to conclude that since claimant's job required him to travel over a hazardous road and spend more time, effort and money than the ordinary worker would have to in commuting daily to and from his place of employment, that the travel itself was an important part of his services to the employer. Even the labor contract indicated that the zone wage was partly based on the remoteness of the job site.

The Referee concluded that claimant's travel was necessarily included as part of his services to the employer and so contemplated by the employer who paid compensation for it. Therefore, claimant's injury arose out of and in the course of his employment and was compensable.

The Board, on de novo review, finds that the labor agreement expressly excluded paying for travel under the circumstances presented in this case. The zone pay was specifically a method of paying wages. Under the contract claimant was being paid $1.50 an hour in addition to his basic rate of pay. This additional $1.50 per hour was a special wage offered as an inducement to work in remote areas. If the job site was beyond 75 miles, everyone working on that particular job received an additional $1.50 an hour regardless of whether he lived at the job site or had to travel to and from the job site.

In Fenn v. Parker Construction Company, 6 Or App 412 (1971), which the Referee quoted in his order, the court held claimant was within the scope of his employment when he was injured while driving home; however, in that case, claimant was reimbursed under his employment contract for "travel time" at the rate of $.30 per mile one way. In the instant case, claimant was not being paid for travel time under his employment contract. The fact that claimant was being paid on a zone wage scale has nothing to do with travel reimbursement. A zone wage scale is simply a method of paying salary, which is computed by adding a certain amount of zone pay per hour depending upon the distance of the job site from the nearest metropolitan district to a stated base pay per hour. This zone pay is salary and is paid regardless of where the employee lives and how far he has to travel to his place of employment.

Claimant, therefore, was not within the course of his employment when he was injured on his way to work on June 5, 1978.

ORDER

The order of the Referee, dated January 11, 1979, is reversed.

The denial issued by the carrier, dated July 10, 1978, is affirmed.

WCB CASE NO. 78-8351 July 31, 1979

PETER A. TELLE, CLAIMANT
Stipulation & Order

This matter coming on regularly before the Worker's Compensation Board for review of an Opinion and Order of Referee Daughtry issued May 23, 1979, and the parties having resolved their differences, hereby stipulate and agree as follows:

(1) The claimant's full award pursuant to Referee Daughtry's Opinion and Order of May 23, 1979, shall be paid to the claimant in a lump sum.

(2) Claimant shall dismiss his Request for Board Review.

WCB CASE NO. 77-4693 August 2, 1979

CHERI LAMPLEY, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Roger R. Warren, Employer's Atty.
Stipulation

Come now the claimant, Cheri Lampley, personally and by her attorney, Evohl F. Malagon, and the employer, through its insurer, Employers Insurance of Wausau, and their attorney, Roger R. Warren, and hereby move the Board for an Order based upon the following recitals and stipulations of the parties:

Claimant sustained an industrial injury on October 31, 1972, while working for Roseburg Lumber Company, Roseburg, Oregon and made claim therefor. The claim was accepted and benefits paid, ultimately resulting in Determination Order dated May 30, 1973, whereby Claimant was awarded temporary total disability benefits to May 8, 1973, and no permanent partial disability. No appeal was filed from the Determination Order. On July 20, 1977, an Aggravation Application was filed on Claimant's behalf. A report from Claimant's treating physician was submitted on May 5, 1978, in support of the Aggravtion Application. Employers Insurance of Wausau did not accept or deny the claim for aggravation but argued at the hearing held on September 14, 1978, before Referee Lyle R. Wolff that Claimant's present problems were not the result of her industrial injury. Referee Wolff issued his Opinion and Order on the 4th day of January, 1979, remanding the claim to the insurer for acceptance and payment of benefits retroactive to April 13, 1978, and assessing penalties and attorney fees against the insurer. On or about the 18th day of January, 1979, the employer and insurer, through their attorney, filed a Request for Board Review.

The parties realize that a bona fide dispute exists as to the compensability of Claimant's claim for aggravation and the relationship of Claimant's present condition to her injury of October 31, 1972, and, therefore, the parties desire to compromise and settle the claim pursuant to ORS 656.289(4) and that an Order be entered as follows:

1. Roseburg Lumber Company and Employers Insurance of Wausau shall pay to Claimant and her attorney the sum of $7,500, said sum to include all benefits and attorney fees. Claimant realizes that the payment of said sum is not an admission of the existence or compensability of the aggravation claim, but is the settlement of a disputed claim.

2. Claimant's attorney shall receive the sum of $1,875, out of the $7,500, as and for a reasonable attorney fee.

3. In consideration of the promise to pay said sum, Claimant agrees that the aggravation claim shall remain in a denied status; that there is no acceptance of the claim, expressed or implied, by the insurer; and, that no other sum shall now or hereafter be paid or payable thereunder.

4. The appeal filed by the employer and insurer shall be dismissed.

IT IS SO STIPULATED:

WCB CASE NO. 79-218 August 6, 1979

WILLIAM GILL, CLAIMANT
Lyle C. Velure, Employer's Atty.
Stipulation

THE PARTIES STIPULATE AS FOLLOWS:

(1) That on or about September 30, 1976, claimant filed Report of Occupational Injury or Disease alleging that he injured his low back when letting down a cab on a truck. Said claim was accepted and closed by Determiantion Order dated August 29, 1978, awarding claimant 10 percent unscheduled disability from injury to his mid back. Claimant filed a request for hearing.

(2) That the plaintiff contends that he currently has symptomatology in his back which precludes him from being employable in any capacity.

(3) Employer contends that claimant suffered a compensable injury which made an underlying osteoarthritic degenerative condition of his spine symptomatic on a transient basis. That claimant's underlying osteoarthritic condition has not been permanently worsened or changed by said injury and that he has been fully compensated. That the contention of employer is supported on the medical reports previously submitted.

(4) That the parties stipulate that the employer and carrier have accepted the claim only as a transient production of symptomatology of an underlying condition and have denied any aggravation of the underlying condition. That claimant waives any defect in the form of denial.

(5) That the parties hereto realize that the contentions and positions involve a dispute and bona fide conflict and thus, a disputed claim, which, claimant realizes, if further pursued, might well involve the lack of benefits to himself and, therefore, the parties desire to compromise and settle the claim and all contentions therein involved pursuant to ORS 656.289(4) and that an order be entered as follows:

(a) The employer, through its carrier, shall pay to claimant in a lump sum the sum of $62,500 by way of a disputed claim in lieu of any further benefits.

(b) Claimant's Request for Hearing shall be dismissed with prejudice and the position of the employer set forth in paragraph (4) above shall be affirmed.

(c) Claimant's attorney shall be allowed the sum of $7,400.00 attorney fees, said sum to be paid from said settlement proceeds.

IT IS UNDERSTOOD AND AGREED that claimant has entered into this agreement on a disputed claim basis after due consultation with his attorney and that he desires to withdraw his Request for Hearing with prejudice and that the said Request for Hearing shall be

dismissed with prejudice and he shall thereafter be barred from asserting any further claim for compensation in that he agrees that he has been fully and adequately compensated for any transient symptomatology resulting from his underlying condition. That claimant agrees that if he does suffer continuing temporary or permanent disability it is not related to his industrial injury but is due to his underlying non-compensable degenerative condition.

IT IS FURTHER UNDERSTOOD AND AGREED that in the event this agreement and stipulation shall hereafter be set aside by any administrative agency or court that the sums paid herein shall be an offset against any compensation ordered.

I HAVE READ THE FOREGOING, UNDERSTAND IT, AND AGREE TO IT AS OF THIS 7th DAY OF May, 1979.

IT IS SO ORDERED.

WCB CASE NO. 78-4664 August 7, 1979

COLEEN BACKER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Keith D. Skelton, Defense Atty.
Request for Review by Employer
Cross-request by Claimant

Reviewed by Board Members Wilson and Phillips.

The employer requests and the claimant cross-requests review by the Board of the Referee's order which granted claimant 64° for unscheduled low back disability.

The employer contends that the award is excessive, that it is far greater than any income that she has ever had in her life and also is in complete disagreement with rest of the Referee's opinion. The claimant contends that she is entitled to a greater award and that her earning capacity should not be measured with respect to the income she may earn at any one time but rather by her ability to obtain and hold gainful employment in the labor market in the broad field of general industrial occupation.

The issues before the Referee were extent of claimant's permanent disability and whether or not she was entitled to be referred to an authorized program of vocational rehabilitation.

At the time of her injury claimant was 20 years old and was employed as a packager. She injured her low back while lifting. This injury was diagnosed as an acute low back strain with a possible herniated nucleus pulposus at L5-S1. X-rays were taken which showed claimant to have six lumbar vertebrae with an almost pseudoarthrosis of the transverse process of the 6th vertebra to the right.

Claimant has been seen by various physicians and has been given conservative treatment only. In July 1977 claimant was referred to the Callahan Center and after her claim was closed on June 22, 1978 with an award of 16° for 5% unscheduled low back disability claimant attempted to work as a clerk in a hardware store. She was unable to do this work; in fact, as a result of this attempt claimant was hospitalized. Her claim was reopened.

Dr. Throop took two EMG tests, the first was abnormal, the second was not. Dr. Azavedo at Callahan Center, agreed with the prior diagnosis of chronic lumbosacral strain, herniated disc at L5-S1 level, left. She rated claimant's physical impairment as moderate to severe. Claimant's treating physician, Dr. McGee, indicated claimant was "permanently disabled as regards her ability to return to her former job requiring working on an assembly line and also requiring lifting and bending." Claimant has also been diagnosed as having symptoms of arachnoiditis and Dr. McGee indicated that claimant's future restrictions should include no heavy lifting greater than 25 pounds, avoidance of bending and stress of a repetitive nature as applied to the lumbar spine.

Claimant's claim was closed again by a Determination Order, dated November 22, 1978, which granted her 16° for 5% unscheduled disability.

Claimant's work background includes employment with Arctic Circle, Kentucky Fried Chicken, Northrup's Sea King, Weyerhaeuser and part time for the Chamber of Commerce prior to being employed by the defendant/employer. All of her jobs were entry level sales positions with the exception of the part time work at the Chamber of Commerce and the tree planting for Weyerhaeuser. At the time of the hearing claimant was training for secretarial work.

The Referee found the claimant has a high school education and that her intelligence has been assessed as average. Her aptitudes appear to be excellent in several areas and she is able to read at above average ability and has above average understanding.

Claimant contends that she is entitled to vocational rehabilitation. The Referee found it difficult to ascertain whether or not the refusal to refer claimant to vocational rehabilitation was arbitrary because the basis for the decision was not known.

Claimant, on her own, enrolled at Merritt-Davis Business College and plans to become an executive secretary. The Referee found it reasonable to assume that she intended to obtain employment as an executive secretary which would be considered a sedentary occupation and that she apparently anticipates being able to perform the duties required. He concluded that if claimant was able to sit long enough to function as an executive secretary he was unable to perceive why she would not be able to sit for prolonged periods typing or doing other clerical duties. He found claimant not to be vocationally handicapped. She had marketable skills in a sedentary occupation. The fact that vocational rehabilitation would enable her to achieve a more satisfactory salary level was irrelevant. Leaton v. SAIF, 27 Or App 669.

Although claimant was not vocationally handicapped as a result of her compensable injury the Referee concluded that she was entitled to an award greater than 16°.

The Board, on de novo review, concurs in the conclusions reached by the Referee. The medical evidence indicates that claimant's injury was superimposed upon a low back which contained 6 lumbar vertebrae, L-6 having a large right transverse process which nearly pseudoarticulates with the sacrum. She has recurrent acute low back pain and left leg pain which probably is related to a herniated intervertebral disc with sciatica.

OAR 438-22-220 states:

> "Earning capacity shall be measured with regard to the worker's loss of the ability to obtain and hold gainful employment in the labor market as a whole, considering the broad field of general industrial occupations, and not with regard to the worker's job at any one time."

The employer contends that as a result of the training claimant is receiving from Merritt-Davis Business College she will, in the future, earn more than she has previously been able to earn. This is not the true test of loss of potential wage earning capacity. Given the broad range of industrial occupations, claimant now has been limited to sedentary occupations as a result of her industrial injury superimposed upon a pre-existing condition. Her impairment has been rated in the moderate to severe category by independent examiners. When this impairment is considered together with claimant's age, education and work background, the Board, as did the Referee, finds that claimant's loss of potential wage earning capacity is in excess of 5%.

The Board concludes that claimant is entitled to an award of 64° which represents 20% of the maximum for unscheduled disability.

ORDER

The order of the Referee, dated February 26, 1979, is affirmed.

Inasmuch as the employer initiated the request for review and failed to prevail, claimant's attorney is awarded an attorney's fee of $250, payable by the employer, Smoke-Craft, Inc., and its carrier, Liberty Mutual Insurance Company.

SAIF CLAIM NO. KB 149515 August 7, 1979

JOHN D. CROY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back on September 29, 1965 while working for Percy E. Jellum, Contractor, Inc. His claim was first closed on July 31, 1969 and his aggravation rights have expired. Claimant has undergone several surgeries and has not worked more than one or two days since the injury. In December 1969 he underwent open heart surgery which has greatly contributed to his overall disability.

By a Board's Own Motion Order, dated August 11, 1978, claimant's claim was reopened for further treatment.

On March 19, 1979 the Orthopaedic Consultants found claimant's condition was not stationary but indicated surgery was not necessary. They felt that after a period of time spent with the Pain Clinic and Vocational Rehabilitation claimant could possibly do a light job of some sort.

Claimant, on March 26, 1979, was evaluated at the Northwest Pain Center; they thought it unlikely he would ever be employed again due to the fact that he has been out of work for so many years and has absolutely no financial incentive to go to work. They recommended no further treatment and indicated in April, 1979 that they wouldn't need to see him for another four months.

On June 29, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted time loss benefits only. They feel he has previously been compensated by the three awards which total 75% of the maximum for unscheduled disability and claimant's condition has not changed since the last closure. They recommended compensation for temporary total disability should begin June 19, 1978, the date Dr. Cherry started aggressive treatment, and run until April 13, 1979, the date claimant was terminated from the Pain Center.

The Board concurs in this recommendation.

ORDER

The claimant is hereby granted compensation for temporary total disability from June 19, 1978 through April 13, 1979, less time worked.

SAIF CLAIM NO. HC 409956 August 7, 1979

WILLIAM G. FRICKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable back injury on November 29, 1972. The original diagnosis was acute bilateral sacroiliac strain. Claimant's claim was first closed on March 15, 1973 with compensation for time loss only.

Claimant was admitted to the hospital on November 28, 1978 for further treatment and, based on the medical reports of Dr. Hazel and Dr. Cook, the Board reopened claimant's claim as of that date. Claimant returned to work on January 2, 1979 and the Fund terminated time loss on that date. Dr. Hazel's report, dated July 10, 1979, indicated that as far as he knew claimant's condition was medically stationary and he did not have any specific residual as of February 1979 when he last saw claimant.

The Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for time loss from November 28, 1978 through January 1, 1979, less time worked.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 28, 1978 through January 1, 1979, inclusively, less time worked.

SAIF CLAIM NO. ED 176386 August 7, 1979

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

On April 1, 1979 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury suffered on March 25, 1969. Claimant's aggravation rights have expired. Attached to her request for own motion relief were numerous medical reports from 1969 through 1978.

On May 14, 1979 the Fund requested an extension of time to have claimant examined by the Orthopaedic Consultants. Their report was forwarded by the Fund to the Board on July 26, with the statement that it would oppose reopening of claimant's claim. The Orthopaedic Consultants found that claimant's impairment due to her industrial injury had not changed since the claim was closed. They recommended no medical treatment.

The Board, after thoroughly considering the evidence before it, concludes that claimant has failed to prove her condition is worse than it was at the last closure. Therefore, claimant's request for own motion relief for an injury sustained on March 25, 1969, should be denied.

IT IS SO ORDERED.

CLAIM NO. 1248A August 7, 1979

JACK B. HUTCHINS, CLAIMANT
Order pursuant to ORS 656.206(5)

Claimant suffered a compensable injury on October 20, 1971. His claim was accepted and closed by a Determination Order, dated January 23, 1973, whereby claimant was found to be permanently and totally disabled as of December 30, 1972. The employer appealed the Determination Order and, after a hearing thereon, the Referee entered his order on November 13, 1973 which affirmed the Determination Order.

The employer, a self-insurer, has, pursuant to ORS 656.206(5), had claimant re-examined periodically to determine whether the claimant continues to be permanently incapacitated from regularly performing work at a gainful and suitable occupation. On November 8, 1978 the employer filed its request pursuant to the aforesaid statute. It was advised that it would be necessary to provide a current physical and psychological examination and authorize all related testings if necessary before a re-evaluation could be made of claimant's condition.

Subsequently, the employer submitted examination reports from the Orthopaedic Consultants dated January 8, 1978 and February 4, 1979 together with a psychological assessment made by Dr. Painter, a clinical psychologist, to the Evaluation Division of the Workers' Compensation Department. They recommended that claimant's award for permanent total disability be reduced on the basis that claimant was physically able to work, he was medically capable of working, but has chosen not to return to work. They recommended an award of 25% of the maximum for unscheduled disability in the neck and left shoulder.

The Board, having considered carefully the reports from the physicians at the Orthopaedic Consultants and the psychological evaluation made by Dr. Painter, finds no evidence that claimant's condition is different at the present time than it was at the time he was found to be permanently and totally disabled. Therefore, the recommendation made by the Evaluation Division is not accepted.

ORDER

Claimant shall continue to be considered as permanently and totally disabled as of December 30, 1972.

WCB CASE NO. 78-5199 August 7, 1979

JUDY M. McGEE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant
Cross-request by Employer

Reviewed by Board Member Wilson and McCallister.

Claimant requested and the employer and its carrier cross-requested review by the Board of the Referee's order which awarded claimant 96° for 30% unscheduled head and neck disability. Claimant contends that the award is grossly inadequate; the employer contends the award is excessive.

The issues before the Referee were claimant's entitlement to additional temporary total disability compensation beyond that awarded by the Determination Order and extent of permanent disability. The only issue before the Board on review is the extent of permanent disability.

Claimant, at the time of the hearing, was 33 years old, married, with no children from her present marriage. She has a two-year degree in civil engineering from Umpqua Community College and has some typing and shorthand skills. She has also worked as a waitress, cook and done some temporary upholstery work.

On May 17, 1977 a suspended butcher block fell on her head while she was working at Fred Meyer, Inc., the defendant in this matter. She completed her shift and returned home; thereafter, she felt stiff and sore over her entire head, neck and shoulder area.

After some unsuccessful chiropractic treatments claimant was seen by Dr. VanOlst, an orthopedic physician, who referred her to Dr. Throop, a neurologist, because of headaches which persisted despite medication and physical therapy. Claimant had had no prior injuries to her head, neck or shoulders nor had she had any prior problems with headaches nor nausea.

On October 21, 1977 Dr. Throop reported that he could find no neurological deficit which would preclude her from returning to work. Claimant returned to see Dr. Van Olst, who appears to be claimant's primary treating physician. He suggested a referral to the Callahan Center but claimant declined.

The medical reports from Dr. VanOlst indicate that he believed claimant's headaches were connected to the industrial accident and that they would prevent claimant from moderate or heavy work requiring prolonged walking, squatting and recovering, climbing and descending stairs and ladders and lifting and carrying weights over 20 pounds. He thought she would have neck pain and headaches with extended use of her arms at or above the shoulder level and also that rapid changes of head and neck positions would cause difficulty. He felt claimant's ability to concentrate or work under stress would affect the headaches. He found no objective orthopedic findings but stated that claimant had a musculoligamentous problem which would not show on an x-ray. He felt that the nausea from which claimant suffered was related to her headaches and that it contributed to claimant's limitations which he found to be moderate.

The Referee concluded, after considering claimant's age, education, training, experience and potential for retraining together with the nature of the injury and her reluctance to attend Callahan Center, that she had suffered some permanent loss of wage earning capacity which would be adequately compensated for by an award of 96° which is 30% of the maximum.

The Referee concluded that claimant had failed to prove that she was entitled to any additional compensation for temporary total disability. The medical evidence offered after the entry of the Determination Order of July 26, 1978 whereby claimant was awarded compensation for temporary total disability from May 18, 1977 through July 23, 1977 and from August 19 through April 27, 1978 was not sufficient to prove that claimant was not medically stationary on April 27, 1978.

The Board, on de novo review, finds that the opinion expressed by Dr. Van Olst that claimant's headaches were connected to her industrial injury and would preclude claimant from doing moderate or heavy work stands uncontradicted. However, the Referee correctly took into consideration

claimant's refusal to attend the Callahan Center in evaluating claimant's overall loss of wage earning capacity. Claimant's refusal rendered such evaluation difficult particularly since claimant appears to be trainable and has management potential. Dr. VanOlst stated that claimant could not do moderate or heavy physical activities; this did not exclude all activities.

The Board agrees that the assessment by the Referee of claimant's loss of potential wage earning capacity under the circumstances of this case was correct.

ORDER

The order of the Referee, dated January 17, 1979, is affirmed.

WCB CASE NO. 78-4155 August 7, 1979

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

Reviewed by Board Members Wilson and McCallister.

The Fund seeks Board review of the Referee's order which set aside its denial of claimant's claim and remanded said claim to it for payment of compensation as provided by law until the claim was closed pursuant to ORS 656.268.

The issues are whether the claim was compensable and, if so, was the claim timely filed.

Claimant is a 30-year-old meter reader who commenced working for the employer on December 13, 1976. She saw Dr. Fields, a podiatrist, on March 9, 1977. Dr. Fields found claimant had ingrown nails on her big toes and also a tumor on the little toe of the right foot. On April 1, 1977 the tumor was removed and palliative treatment was continued for the ingrown nails.

On July 18, 1977 surgery was performed for the permanent removal of both the ingrown nail borders and matrix, bilaterally. Dr. Fields continued to see claimant to debride the scar tissue and discharged her on October 27, 1977.

Claimant continued to have problems and was seen by Dr. Hogan, also a podiatrist, at the suggestion of the employer. He found underlapping hammertoe on the fifth digit of the right foot and believed that a joint resection would resolve the problem. He also recommended excision of an additional part of the nail from both big toes. The surgery was performed on January 12, 1978.

On February 22, 1978 claimant filed a claim against the employer, stating that her job required a great amount of walking which had aggravated her condition and caused repeated problems, visits to her doctor and loss of time from work.

On April 7, 1978 Dr. Hogan advised the carrier that he felt prolonged walking would aggravate claimant's condition but he could not say that claimant had no injury on the job because at the time of this report he was unable to recall any such discussion with claimant.

On April 10, 1978 Dr. Fields reported that claimant's condition was not caused by the job but it did aggravate it. He repeated this opinion two weeks later. On May 26, 1978 the Fund filed its denial, stating it was unable to accept responsibility for claimant's injury diagnosed as gout and ingrown toenails, that medical information indicated it was a pre-existing condition and, furthermore, claimant failed to file her claim as required by ORS 656.807.

On July 10, 1978 Dr. Fields, for the third time, advised the Fund that he had told claimant on August 8, 1977 that her job was aggravating her condition.

On September 28, 1978 the Fund asked Dr. Fields if claimant's employment caused any permanent change in her pre-existing foot condition or merely exacerbated that condition on a temporary basis. Dr. Fields replied with a handwritten note at the bottom of that letter that claimant's condition was merely aggravated by her employment and he didn't think it caused any permanent change or disability to her feet.

The Referee found that when claimant took the job as a meter reader, she was required to wear boots because of the large amount of walking required; some days she walked four to five miles. Claimant felt that the boots were the main cause of her problem but she had to wear them because it was necessary for her to walk through water and over rough terrain in order to get to many of the meters. After claimant complained of her foot problems she was given other work which did not require as much walking. After the last surgery was performed by Dr. Hogan claimant ceased reading meters and has been given another job with the employer which requires no walking. Claimant says she presently is not having any difficulty. Claimant stated that the tumors on her little toe were caused entirely by her walking and did not exist prior to her employment.

The Referee found no evidence that a doctor had informed claimant that she had an occupational disease. ORS 656.807 provides, in part, that all occupational disease claims shall be void unless a claim is filed within five years after the last exposure in employment subject to the Workers' Compensation Law and within 180 days from the date claimant becomes disabled or is informed by a physician that he or she is suffering from an occupational disease, whichever is the later. Dr. Fields, according to the Referee, did not indicate to claimant that there was a probability that her foot condition was being aggravated by her work until the Spring of 1978 and the claim was filed in February 1978. He concluded the claim was timely filed.

The Referee found that claimant's pre-existing condition was permanently aggravated by her employment notwithstanding Dr. Fields' report that although claimant's condition was aggravated by her employment he did not think it caused any permanent change or disability. The Referee found the evidence was contrary to Dr. Fields' opinion and indicated that claimant had a pre-existing condition with her feet which did not require an operation until claimant, as a result of her job, had to wear heavy boots and do considerable walking. After that her condition worsened and surgery was required. He concluded that this undoubtedly involved a permanent increase in disability to claimant. He concluded that the claim should be held compensable. He referred it to the Fund for acceptance as an occupational disease.

The Board, on de novo review, finds that Dr. Fields, who was claimant's primary treating physician, was unequivocal in his statement to the Fund that he had told claimant on August 8, 1977 that her job was aggravating her condition. Claimant had 180 days from the date she became disabled or from the date that she was informed by Dr. Fields that she was suffering from an occupational disease in which to file a claim. Claimant did not file her claim until February 22, 1978.

The only medical evidence in the record, with the exception of some technical reports from a pathologist and a radiologist, consists of reports from Dr. Fields and Dr. Hogan. The Referee chose to ignore Dr. Field's opinion that claimant's employment did not cause any permanent change or disability. He stated this opinion first on April 24, 1978 in a report to the Fund; he stated it again in a letter addressed to one of the attorney's for the Fund dated July 10, 1978, and for the third time he repeated it in response to a letter directed to him by the attorney for the Fund dated September 28, 1978. There is no medical evidence in the record to contradict this opinion. The only construction that can properly be given to Dr. Fields' opinion is that claimant has suffered a temporary exacerbation. There is no medical evidence in the record that indicates that claimant's pre-existing condition was permanently worsened by her occupation. Therefore, the ruling of the Court of Appeals in Weller v. Union Carbide Corporation, 35 Or App 355, (1978), controls. The denial was proper.

ORDER

The order of the Referee, dated January 26, 1979, is reversed.

The denial of the Fund, dated May 26, 1978, is hereby affirmed.

SAIF CLAIM NO. BC 409644 August 7, 1979

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

On January 23, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on November 22, 1972 while employed by Bedrock Crushing Company whose insurance carrier was the State Accident Insurance Fund. The claim was accepted and closed. Claimant's aggravation rights have expired.

Subsequently, claimant's attorney forwarded a medical report of Dr. Paluska, dated November 8, 1978, which indicated claimant was discomfort in his knee. He indicated he could not determine the reason for this pain without further diagnostic studies.

Correspondence between the Board and claimant's attorney continued for some time until the Fund responded on May 31, 1979 stating its position that it would oppose own motion consideration at this time based on the information before it.

The Board has held claimant's request in abeyance for some time waiting for additional medical evidence to support claimant's contentions. Because none were forthcoming, the Board, based on what it has before it, concludes that claimant's request for own motion relief should be denied at this time.

ORDER

Claimant's request for own motion relief for an injury sustained on November 22, 1972 is hereby denied.

WCB CASE NO. 78-6147 August 7, 1979

HENRY SEABERRY, CLAIMANT
Marion B. Embick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks review by the Board of the Referee's order which affirmed the Fourth Determination Order, dated February 10, 1978, and also awarded claimant compensation for temporary total disability from March 4, 1977 through October 13, 1977.

The issue is extent of disability and entitlement to additional compensation for temporary total disability.

Claimant was injured on March 24, 1971 while lifting a heavy generator onto the back of a pickup truck. The employer was a building contractor. Claimant's injury was initially diagnosed as acute lumbosacral sprain by Dr. Eckhardt who continued to treat claimant through July 1975.

Claimant has had only conservative treatment in the 7-1/2 years since his injury.

The claim was first closed on March 22, 1972 with an award equal to 48° for 15% unscheduled disability. Claimant requested a hearing and, pursuant to a stipulation prior to the hearing, the claim was reopened on June 20, 1972 and closed again on March 21, 1973 with an additional award of 16° for unscheduled disability. Claimant again appealed and, after a hearing, Referee Fink granted claimant an additional 96° by his Opinion and Order dated December 6, 1973. This gave claimant a total of 160° for 50% of the maximum for unscheduled disability.

Dr. Eckhardt recommended that the claim be reopened and it was, with compensation for temporary total disability commencing July 1, 1975. The claim was again closed by a Third Determination Order dated June 2, 1976 which granted no additional award for permanent partial disability.

On December 2, 1976 the claim was again reopened when claimant was hospitalized for bed rest and physical therapy. Time loss benefits were paid through March 4, 1977 on which date claimant was imprisoned on a probation violation charge. The last claim closure was made on February 10, 1978 by the Fourth Determination Order which awarded no additional compensation for permanent partial disability.

The Fund has conceded that the March 4, 1977 date upon which compensation for temporary total disability was terminated was incorrect and that claimant was not declared medically stationary until September 13 when he was examined by Dr. Becker. However, the Referee found that Dr. Becker's later report, on October 28, 1977, was the first report which indicated claimant's condition was medically stationary. In that report Dr. Becker stated:

> "It is my feeling that his condition is medically stationary, and that it has been so for the past year. If the case has not been closed, it should be closed".

Based upon claimant's testimony and a review of the medical records from the date of the injury to the present time, the Referee found no indication that claimant's condition was any different than it was shortly after the injury. Claimant's complaints are primarily subjective, however, Dr. Becker found some objective findings in the low back area.

The Referee found that claimant had been retrained to work as a barber soon after his injury and that he was now certified in this profession. Claimant alleges that he is unable to barber more than a few hours each day. Referee Fink had noted the same situation at the time of his hearing in 1973 and it was on the basis of this restricted activity that he had increased the award.

The Referee concluded that the burden of proof rested with the claimant and that there had been no showing that his condition warranted an increased award for permanent partial disability.

With respect to the temporary total disability, the Referee concluded the claimant was entitled to such compensation from March 4, 1977 until Dr. Becker's report of October 28, 1977.

The Board, on de novo review, agrees that claimant has been adequately compensated for his loss of wage earning capacity by the awards which he has received totalling 160° which represents 50% of the maximum allowable by statute for unscheduled disability.

The Board notes that the Referee makes a finding that claimant is entitled to compensation for temporary total disability from March 4, 1977 until Dr. Becker's statement of October 28, 1977 which stated claimant was medically stationary, yet he ordered compensation for temporary total disability paid only through October 13, 1977. Apparently, this is a typographical error because there is nothing in the record to indicate a cessation of payments for temporary total disability on October 13, 1977. Nevertheless, it must be corrected by this order.

ORDER

The Referee's order, dated January 25, 1979, is modified.

Claimant is granted compensation for temporary total disability from March 4, 1977 through October 28, 1977. This award for compensation for temporary total disability is in lieu of that granted claimant by the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

SAIF CLAIM NO. TC 308799 August 7, 1979

ARTHUR B. STEVENS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on June 7, 1971. The claim was accepted and closed by a stipulation, dated August 16, 1972, whereby claimant received compensation equal to 32° for 10% unscheduled disability. Claimant's aggravation rights have expired.

Claimant requested that his claim be reopened for surgery recommended by Dr. McIntosh. On November 29, 1977 claimant was admitted to the hospital for back surgery performed by Dr. James who indicated his condition was related to his 1971 injury. On March 23, 1979 the Board issued its Own Motion Order reopening claimant's claim as of November 29, 1977.

Claimant saw Dr. James several times after the surgery and he indicated claimant was progressing well. His closing examination of April 27, 1979 found claimant's condition to be medically stationary and he stated claimant could go back to some sort of work with limitations. He believed claimant's age was a factor in preventing him from doing heavier type work.

On June 20, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional compensation for temporary total disability from November 29, 1977 through April 27, 1979 and additional compensation for permanent disability equal to 80° for 25% unscheduled disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 29, 1977 through April 27, 1979, less time worked, and compensation equal to 80° for 25% unscheduled disability. These awards are in addition to all awards claimant has previously been granted.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of March 23, 1979 for claimant's award of temporary total disability.

Claimant's attorney is awarded an additional attorney's fee equal to 25% of the increased compensation granted by this order for permanent partial disability, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-5816 August 7, 1979

EUGENE TURNER, CLAIMANT
McMenamin, Joseph, Herrell & Paulson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which found claimant to be medically and vocationally stationary. It also approved the previous Determination Orders dated May 28, 1974, September 8, 1976 and July 26, 1978, each granting claimant compensation for temporary total disability only.

The issues are: (1) is claimant medically and vocationally stationary and (2) extent of permanent partial disability.

Claimant, at the time of the hearing, was 47 years old and has a ninth grade education. He completed a mechanics course in the Army where he obtained his GED and also attended a body and fender school at Mt. Hood Community College. For the past 19 years claimant has worked for the employer loading and unloading trucks. On March 15, 1974 claimant suffered an injury to his low back for which he was seen by Dr. Hill, a chiropractor, who released claimant to return to work on March 28 and again on April 12, 1974. The injury was accepted as a non-disabling injury and it was Dr. Hill's opinion that there would be no permanent disability.

The claim was closed on May 28, 1974 by a Determination Order which allowed claimant time loss benefits from March 21 through April 14, 1974.

In July 1974 the claim was reopened and claimant was paid compensation for temporary total disability from July 27, 1974 through July 23, 1976.

Claimant was examined by Dr. Berg, an orthopedic physician, who could find no reason for claimant's completely stiff right leg. All he could find was a definite hysterical-type right leg limp. He felt claimant's condition was stationary and that it could be improved by claimant returning to work as soon as possible.

Claimant was referred to Callahan Center for a work potential evaluation. No specific orthopedic treatment was indicated, however, work involving lifting was not recommended; claimant should seek a sedentary type of occupation. Claimant's impairment was rated at mild to mildly moderate and he was found to have a moderately severe psychopathology, largely attributable to his injury. The prognosis for restoration and rehabilitation was good assuming claimant received psychotherapy. Claimant refused to undergo psychotherapy. Claimant's program was terminated for lack of cooperation on his part.

Dr. Fleming, a clinical psychologist, doubted that claimant really wanted to return to full time regular work.

Dr. Berg again examined claimant and found that he could work if so motivated but felt he was too well situated from a financial standpoint to attempt to return to work. He found no reason from an orthopedic standpoint for the disability in claimant's right leg and believed it to be a psychiatric problem. The nerve conduction velocity study was normal and claimant refused to allow the EMG to be performed.

Dr. Quan, a psychiatrist who examined claimant in July 1976, said the injury might have aggravated the pre-existing anxiety but it would not preclude claimant from resuming his usual occupation. Earlier Dr. Berg had found it was difficult to connect pre-existing anxiety tension state to the industrial injury.

On September 8, 1976 the claim was again closed by a Determination Order which gave claimant additional time loss benefits and stated that claimant was medically stationary as of September 23, 1974.

In November 1976 Dr. Hickman had requested the Fund to reopen the claim for psychological reasons, stating that he hoped to assist claimant in finding a job.

Claimant was seen by Dr. Grewe late in 1976 who thought claimant was disabled except for extremely light work, however, Dr. Percy felt claimant should be able to return to gainful employment on a limited basis when so motivated.

On May 5, 1977 claimant was denied further vocational assistance. In August 1977 he was examined by the physicians at the Orthopaedic Consultants who found claimant not stationary and unemployable primarily because of psychological impairment which prevented surgical intervention. Further psychiatric treatment was recommended.

Dr. Colbach, a psychiatrist, on August 10, 1977, found him to be psychiatrically stationary. He stated that claimant somehow expected to have someone effect a magic cure for him and that he was functioning marginally with no hope of improvement. Dr. Colbach was unable to see how anybody could assist claimant based upon his history of resisting all efforts to do so.

In October 1977 Dr. Fleming decided to discontinue his attempts to assist claimant on a vocational objective until claimant and Dr. Grewe had agreed upon leg surgery. Claimant refused not only the surgery but the diagnostic procedures proposed. Dr. Fleming felt claimant was medically stationary.

Pursuant to a stipulation approved on December 2, 1977 the Fund reopened the claim as of March 10, 1977, based on Dr. Grewe's previous report dated December 14, 1976, and also paid penalties and attorney's fees.

In January 1978 claimant was again examined by the Orthopaedic Consultants who felt that claimant's back and psychiatric conditions were stationary and that claimant was unemployable because of severe psychological impairment. Claimant's physical impairments were mild although he could not return to his former occupation, with or without limitations. He had to be trained for some other occupation. Claimant's lumbar spine and functional loss problem were rated as moderately severe but it was agreed that the permanent functional impairment rating was essentially due to claimant's conversion reaction. The loss of function due to the industrial injury was rated as mild.

In March 1978 Dr. Grewe reported that he could not understand claimant's inability to bend the right knee; he felt that it must be purely on a functional basis. He recommended claim closure and on July 26, 1978 a corrected Determination Order granted claimant additional time loss benefits.

The Referee concluded that claimant could not be forced to undergo the diagnostic studies which were recommended by the orthopedic physicians and the neurologists; however, his permanent partial disability, if any, which resulted from his March 15, 1974 accident could not be reasonably measured without knowledge of the results of such studies. He further concluded that the speculative effects of the accident's aggravation of claimant's pre-existing emotional problems could not be measured. The medical consensus was that claimant was unmotivated and has made his decision to not return to work. The Referee was more convinced by these medical reports than by the reports from the Psychology Center. He stated that claimant had failed to meet his burden of proving that he was not medically stationary or not vocationally stationary; claimant also had failed to prove that he had not received adequate compensation from the three previous Determination Orders.

The Board, on de novo review, agrees with the conclusion reached by the Referee that claimant is both medically and vocationally stationary. However, based upon the reports from the Orthopaedic Consultants the Board finds that claimant has some permanent partial disability which is attributable to his March 15, 1974 industrial injury.

The Orthopaedic Consultants stated that claimant could not return to his same occupation, with or without limitations. For the past 19 years claimant has worked for the employer; now, because of his industrial injury, he is precluded from returning to that work. It is apparent that claimant is not receptive to retraining as indicated by his stay at the Callahan Center. Claimant's impairment is rated at mild to mildly moderate; his psychopathology is moderately severe and largely attributable to the injury; however, attempts at retraining claimant were defeated primarily because of claimant's lack of cooperation. Dr. Colbach stated in his report of August 10, 1977 that claimant was psychiatrically stationary and he didn't see claimant making much improvement emotionally or physically. For a period of three years all efforts to help claimant improve his emotional level have been defeated by claimant.

The Board finds that although claimant has been less than cooperative with the doctors who have attempted to assist him, nevertheless, the evidence indicates that he cannot return to the types of employment in which he has the greatest experience. Claimant's condition from a psychological standpoint is such that retraining will be very difficult, if at all possible.

The Board concludes that as a result of the industrial injury of March 15, 1974 claimant is precluded from returning to a segment of the labor market which was open to him prior to his industrial injury and therefore he has suffered a loss of wage earning capacity equal to 25% of the maximum allowable by law.

The Board agrees that claimant is medically and vocationally stationary at this time.

ORDER

The order of the Referee, dated December 27, 1978, is modified.

Claimant is awarded 80° of a maximum of 320° for 25% unscheduled low back disability. This award is in addition to the previous awards which are set forth in the Referee's order which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-4770 August 9, 1979

BARBARA EDWARDS, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Keith D. Skelton, Defense Atty.
Order Of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the employer, and said request now having been withdrawn,

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

SAIF CLAIM NO. C 355513 August 9, 1979

STEVEN D. KASER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable back injury on February 19, 1972 which resulted in the removing of a disc at the L4-5 interspace which was accepted, closed and claimant's aggravation rights have expired.

In 1974 claimant had had a protruded disc at the L3-4 interspace.

In 1979 claimant submitted medical reports to the Fund indicating a myelogram and laminectomy had been done in May 1979 and requested that the Fund reopen his claim for an aggravation of his 1974 industrial injury. The Fund denied this request on June 21, 1979, contending that claimant's present condition was a result of the 1972 injury. Claimant has since requested own motion relief relating to the February 1972 injury and the Fund does not oppose this request.

The Board, after considering the evidence before it, especially Dr. William Smith's report of June 1, 1979 which directly relates claimant's condition to the 1972 injury, concludes claimant's claim should be reopened as of May 1, 1979, the date of the myelogram, and until closed pursuant to the provisions of ORS 656.278.

ORDER

Claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation, as provided by law, commencing May 1, 1979 and until closed pursuant to ORS 656.278.

WCB CASE NO. 78-6245 August 9, 1979

LAUREY J. KNOWLAND, CLAIMANT
William Rutherford, Claimant's Atty.
Thomas J. Mortland, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks review by the Board of the Referee's order which set aside the partial denial issued by Travelers Insurance Company and remanded the matter to it to be accepted and for the payment of compensation, as provided by law, until closed pursuant to ORS 656.268.

The issue is whether there is a causal relationship between claimant's upper back and neck condition which required a laminectomy and fusion on May 17, 1978 and his industrial injury of September 3, 1975.

Claimant had sustained a compensable injury to his low back on February 7, 1974 while working for the defendant-employer, whose workers' compensation coverage at that time was furnished by Argonaut Insurance Company. This claim was closed on April 5, 1974 by a Determination Order which awarded claimant compensation for time loss only. Claimant continued to receive intermittent treatment for the symptoms resulting from this injury until June 2, 1975.

On September 3, 1975, while employed as a millwright for the same defendant-employer, claimant was injured when a motor housing exploded. A large piece of the motor struck claimant in the left shoulder and left knee. The impact forced claimant's back into an I-beam where he struck the back of his head, the left shoulder and upper back. He was taken to the hospital immediately and had persistent pain in his back between the shoulder blades and in his left side and hips. Claimant missed a week from work. At the time of this injury, the defendant-employer's carrier was Travelers Insurance Company. Claimant filed a claim for aggravation of a 1974 injury against Argonaut, defendant-employer's carrier in 1974, which was denied on November 19, 1975 and a claim for a new injury against Travelers which was denied on December 8, 1975. Claimant requested a hearing and on May 14, 1976 a Referee's order directed both carriers to compensate claimant equally for medical care and treatment.

The Referee's order was reversed by a Board's Order on Review entered on January 12, 1977 which placed the sole responsibility upon Travelers and directed it to pay compensation to claimant from September 3, 1975 until the claim was closed pursuant to ORS 656.268.

As a result of the September 3, 1975 injury claimant has received medical treatment from Dr. Fax and Dr. Cohen, both orthopedists, and also from Dr. Nash, a neurosurgeon. The latter admitted claimant to the hospital to perform myelograms and surgery. Dr. Nash stated in a letter to the claimant's attorney dated November 22, 1978 that it was, ". . . my considered medical opinion that the surgery which was carried out May 17, 1978 was by medical history and neurological and other parameters of clinical findings the direct result of the injury of September, 1975".

The reports from Dr. Cohen and Dr. Fax and also the report from Dr. Howard, a chiropractic physician, initially referred to chronic upper back strain. On November 9, 1976 Dr. Lloyd diagnosed trauma to the back, neck and left shoulder, and found limited movements of the left shoulder, neck and back due to pain and siffness. On March 18, 1978 a myelogram indicated a defect at C-7, T-1 interspace and on May 17, 1978 Dr. Nash, with the consent of Travelers Insurance Company, performed a hemilaminectomy at C7-D1.

On July 13, 1978 Travelers Insurance Company denied responsibility for claimant's "cervical (neck) condition", stating that it would continue to accept claimant's low back condition but the other condition did not arise out of and in the course of his employment relative to his September 3, 1975 industrial injury.

On July 27, 1978 claimant's claim was closed by a Determination Order which awarded claimant 32° for 10% unscheduled low back disability. The order stated that claimant was found to be medically stationary on November 4, 1976; it also stated that it was not making any determination upon the conditions denied by the carrier on July 13, 1978.

Dr. Fax, on July 7, 1978, subsequent to the surgery but prior to the denial by the carrier, had reported that at no time had claimant exhibited typical radicular type pain as might be expected from a large disc which was apparently found when Dr. Nash performed the myelogram. Dr. Fax found nothing in his records to indicate claimant ever complained of neck pain, therefore, he concluded, based upon his records, that he had no evidence of a causal relationship between claimant's current neck problems and the prior upper back and lower back problems.

Dr. Cohen reported on September 12, 1978 that he had seen claimant twice; once on September 29, 1975 which was less than a month after his injury and again on December 2, 1975. At both times claimant's complaints of pain were in his lower back at the pelvic area. At no time did claimant complain to him of pain in his neck or upper extremity nor pain in the upper back, nor did he give Dr. Cohen any history of an injury to his neck or back.

Claimant testifies he couldn't turn his head without pain and he had headaches; since the surgery performed by Dr. Nash, claimant has had no trouble with regard to turning his neck and he has not had any headaches. The Referee found that claimant was a credible witness and he believed his testimony that claimant had had neck and upper back problems prior to seeing Dr. Nash.

The Referee concluded that the medical evidence, taken as a whole, and in conjunction with the testimony of claimant, clearly indicated that claimant suffered problems diagnosed by Dr. Nash and that such problems were directly related to claimant's September 3, 1975 industrial injury. He therefore remanded claimant's "cervical (neck) condition" to the employer and its carrier.

The Board, on de novo review, finds that claimant had suffered massive injuries on September 3, 1975 and had had severe medical problems from that date and until the surgery which was performed by Dr. Nash on May 17, 1978. Both Dr. Fax and Dr. Howard found that claimant had pain in his upper back. Claimant testified that the area of greatest pain was between the shoulder blades. He also complained of headaches. Most of claimant's problems have been resolved as a result of the surgery performed by Dr. Nash.

The Board is persuaded by the opinion expressed by Dr. Nash that there was a causal relationship between the claimant's problems in the lower cervical and upper dorsal back (C6-7 and C7-T1) and the industrial injury of September 3, 1975. The Board notes that while Dr. Fax treated claimant for this low back condition commencing in February 1976 his earlier reports indicated, as did Dr. Cohen's, that claimant had problems in his upper back and these opinions would not be inconsistent with that expressed by Dr. Nash.

ORDER

The order of the Referee, dated January 31, 1979, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $300, payable by the employer and and his carrier.

CLAIM NO. 05X014304 August 9, 1979

MARGIE McCASLAND, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Own Motion Order

On July 18, 1979, claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained on May 3, 1971. The claim was first closed on November 10, 1971 and claimant's aggravation rights have expired.

In support of claimant's petition was an attached medical report by Dr. Abbott which indicated that claimant's condition has deteriorated since December 1977 and at the present time she is unable to work due to this condition. She has had to discontinue her vocational rehabilitation program due to discomfort in her back. He stated that she had been hospitalized in late February 1979 for about three weeks and that she continues to receive medical care at the present time.

On July 24, 1979 the Board asked the carrier to respond within 20 days, stating its position with regard to claimant's request.

On August 2, 1979 Argonaut Insurance Company informed the Board that it opposed reopening claimant's claim.

The Board, after thoroughly considering the medical evidence before it, concludes that claimant's claim should be reopened as of the date she entered the hospital in February 1979, based on the report of Dr. Abbott.

ORDER

Claimant's claim for an injury sustained on May 3, 1971 is hereby remanded to the carrier for acceptance and payment of compensation, as provided by law, commencing on the date claimant entered the hospital in February 1979 and until closure pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 77-3131 August 9, 1979

EDWARD R. NEWBERRY, CLAIMANT
Ford & Cowling, Claimant's Attys.
Luvaas, Cobb, Richards & Fraser,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks review of the Referee's order which directed it to accept claimant's claim for a bilateral hernia condition, including medical services incurred therewith, and also awarded claimant 96° for 30% unscheduled back disability. The order stated that the Determination Order, dated July 5, 1977, was to be considered as the first Determination Order with regard to the claimant's hernia condition. The order allowed claimant's attorney an attorney's fee payable out of the compensation increase of $750 for claimant's unscheduled back disability and also an attorney's fee payable by the employer and its carrier, pursuant to ORS 656.386.

Issues were compensability of claimant's claim for a disabling hernia condition; the extent of claimant's unscheduled back disability and the award of a reasonable attorney's fee for claimant's attorney should claimant prevail on the denied claim.

On August 29, 1975 claimant, then a 47-year-old mechanic, injured his low back while lifting a garage door. The injury was diagnosed as a low back strain. The claim was closed on July 5, 1977 by a Determination Order granting claimant time loss benefits and 48° for 15% unscheduled low back disability.

On April 6, 1977 claimant was examined by Dr. Augter. Claimant was complaining of low back pain with radiating pain down the left leg and numbness in the left foreleg. He also complained for the first time of tenderness in the epigastrum and in the left inguinal area. Claimant claims that while lifting a door he experienced immediate back pain and felt a pulling sensation in his stomach area; he also experienced swelling. At that time the pain and swelling in the stomach area was not considered serious but later he felt his condition was worse. Dr. Augter diagnosed a small direct inguinal hernia, left sided, with an enlarged inguinal ring on the right with a small direct inguinal hernia. On April 11, 1977 surgical repair of the right inguinal hernia was performed with satisfactory results.

Claimant contends that his bilateral hernia condition, including the medical treatment incurred in connection therewith, was related to his job accident of August 29, 1975. The carrier denied the claim for the hernia on April 29, 1977.

The Referee found the only medical evidence relating to claimant's bilateral hernia condition and the causal relationship of it to the job activities was presented by Dr. Augter. He reported on June 1, 1978 that the origin of claimant's bilateral hernia was traumatic. He also reported that he felt claimant's condition would have been attributable to the August 29, 1975 door lifting incident as it was described by claimant in relation to his job activities. The doctor relied on claimant's report of accident history and claimant's credibility in reaching his opinion.

The Referee concluded that claimant's claim for his bilateral hernia condition was compensable. He found it was undisputed that the accidental injury of August 29, 1975 resulted in claimant's disabling back condition and the fact that claimant did not become aware of his bilateral hernia problem until a later date did not prevent him from holding the claim compensable. The Referee felt that claimant was more concerned with his back problem and probably thought that the pain in his epigastrum and left inguinal area was merely a part of his back problem. It is not reasonable to believe that claimant could have medically diagnosed his problem and he felt that the key to the whole matter was claimant's credibility. Claimant told Dr. Augter about the August 29, 1975 incident and Dr. Augter's opinion was that a causal relationship between that incident and the bilateral hernia condition existed.

Claimant's claim for his unscheduled back disability was closed by the Determination Order of July 5, 1977 and the claimant timely filed a request for hearing on the adequacy thereof. The Referee, using hindsight, found that the Determination Order should have applied to not only claimant's disabling back condition but his disabling bilateral hernia condition inasmuch as the latter condition is also in the unscheduled area and was attributable to the August 29, 1975 industrial accident.

The Referee found that claimant's job as an automotive mechanic required repetitive bending, stooping and heavy lifting. After his injury claimant returned to regular work as a service manager, a relatively light job. Claimant is now 50 years old and has no apparent formal education. He has been employed as an automotive mechanic since he was 13 years old.

The Referee concluded that claimant has residual back impairment which places substantial limitations on his work activities. He must avoid heavy lifting, repetitive bending and stooping and twisting or turning movements. These restrictions will seriously and adversely affect claimant's ability to continue as a line automotive mechanic even though at the present time he is doing such work in a supervisory capacity. Based upon claimant's limited education, his restricted work background and his age, the Referee found that claimant was entitled to an award equal to 96° which represents 30% of the maximum for unscheduled disability.

The Referee found that the record failed to demonstrate that claimant has any residual resulting from his hernia conditions, however, claimant's attorney is entitled to be paid a reasonable attorney's fee because he prevailed on the denied claim for claimant's bilateral hernia condition.

The Board, on de novo review, finds no medical evidence which relates claimant's bilateral hernia condition to his original back injury. Dr. Augter relied solely upon the history related to him by claimant of the August 29, 1975 door lifting incident. Dr. Augter did not state that the hernia was caused by claimant lifting the door. He stated that he "can only take the patient's word".

More than 18 months had elapsed between the date claimant indicates his hernia occurred and any mention of the hernia in the medical records. It is improbable that three treating physicians would fail not only to mention claimant's stomach pains but also fail to diagnose and treat what claimant indicates he told the doctor in Grants Pass was a "swelling in front" and to which Dr. Augter referred as a "traumatic hernia".

Claimant did not produce any witnesses to testify in his behalf although he claimed to have informed three doctors and one fellow-workman of this condition. The evidence indicates that the person who was supposed to know about the condition, the employer, learned about it from the insurance carrier after claimant had had the surgery.

The Board does not agree with the Referee that claimant was a credible witness.

The Board does agree with the Referee's assessment of claimant's unscheduled back disability.

Inasmuch as the Board has found that the claim for a bilateral hernia condition was not compensable, the denial by the employer and its carrier of that condition must be approved and, therefore, the award of $750 attorney's fee granted claimant's attorney for prevailing on a rejected claim must be set aside.

ORDER

The order of the Referee, dated January 18, 1979, is affirmed only on the award of 96° of a maximum of 320° for 30% unscheduled low back disability and the approval of claimant's agreement with Ford & Cowling of an attorney's fee equal to 25% of said increased compensation.

In all other respects, the Referee's order is reversed.

The denial issued by the employer dated April 29, 1977 is hereby affirmed.

WCB CASE NO. 78-9351 August 9, 1979

VIRGINIA SMETS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

A request for review was received by the Board on July 6, 1979 from claimant seeking review of the Referee's order entered in the above entitled matter.

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

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

WCB CASE NO. 77-6272 August 10, 1979

ARLIE L. KILGORE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests Board review of the Referee's order which granted claimant an award of compensation for permanent total disability with the payments to commence as of April 25, 1977.

The sole issue is extent of permanent disability.

Claimant had suffered a compensable injury to his back on March 13, 1972 while lifting wood at work for Oregon-American Studs. He attempted to return to work on March 20 but was unable and apparently has not returned to work since that date.

On December 14, 1972 claimant was interviewed by the Vocational Rehabilitation Division. He told the counselor that he had completed the fourth grade in Oklahoma, quitting to find employment. He said he was not interested in obtaining a GED because he felt he was too old (claimant at that time was 47 years old). Claimant was working as a offbearer at the time of his injury and he listed his major occupation as that of a logger and sawmill laborer. He told the counselor he was interested in finding employment as a saw sharpener.

At the time claimant's claim was closed on February 9, 1973 he was in the process of working a six months on-the-job training program, however, after the claim closure, he began complaining of increased pain.

The claim was closed actually on February 7, 1973 but corrected on February 9, 1973 and granted claimant compensation for temporary total disability from March 13, 1972 to January 18, 1973, less time worked, and 80° for 25% unscheduled low back disability.

Claimant requested a hearing on the Determination Order, as corrected. After a hearing the Referee, on July 3, 1973, affirmed the award of 80° for the unscheduled disability but granted claimant an additional award of 42.04° for combined bineural hearing loss of a maximum of 192°. This award was increased to a bineural hearing loss of 60.48° of a maximum of 192° pursuant to the findings of the Medical Board of Review. These findings were filed pursuant to an order of the Board dated February 22, 1974 and became final as a matter of law.

Claimant sought Board review of that portion of the Referee's order affirming the award of 80° for the unscheduled low back disability. The Board, on February 22, 1974, affirmed the Referee's award. The Board's order was not appealed and became final by operation of law.

In 1974 claimant moved to Oklahoma where he was given medical treatment by Dr. Branscum, an orthopedic surgeon. Claimant, at that time, was complaining of back pain and bilateral leg pain, worse on the right. He gave a medical history dating back to 1972. In a report to the Fund, dated July 8, 1975, Dr. Branscum recommended that a myelogram be performed and, in all probability, a laminectomy with removal of the posterior bone mass and bilateral posterior lateral fusion.

Claimant filed an aggravation claim on January 16, 1976 and his attorney was advised by Dr. Branscum on December 4, 1976 that the myelogram had revealed a first degree spondylolisthesis L6 on the sacrum and degenerative disc disease. The spondylolisthesis was repaired by a surgical fusion and the disc space was explored.

On February 9, 1976 the Fund denied claimant's claim for aggravation; however, on April 8, 1976 Dr. Parcher, medical director for the Fund, advised the Fund's counsel that he had reviewed claimant's file and was of the opinion that claimant's surgery in Oklahoma was related to his original injury, therefore, the claim should be accepted.

On April 30, 1976 a Settlement Stipulation was approved whereby claimant's request for hearing on the propriety of the Fund's denial of his aggravation claim was compromised and settled by the Fund's withdrawal of its denial and its acceptance of claimant's claim. The Fund agreed to pay claimant compensation for temporary total disability, commencing as of July 8, 1975 and until the claim was closed pursuant to ORS 656.268.

The fusion was not successful and required a repair of the nonunion in May 1976. Following this surgery, Dr. Branscum suggested that claimant not return to heavy work. In April 1977 Dr. Dandridge examined claimant and noted progressive improvement since the surgery. He felt there was 25% permanent physical disability based upon the claimant's congenital deformity (during his earlier medical treatment, it was discovered that claimant had a sixth transitional vertebra of the lumbar spine) and superimposed injury and surgery.

The claim was closed on May 25, 1977 by a Determination Order which awarded claimant compensation only for temporary total disability.

Following the claim closure Dr. Branscum reported that the rating by Dr. Dandridge was, " . . . a soft rating for this man's disability, but I think it's probably within the range of reasonable ability". Dr. Branscum's opinion was that claimant had 50% permanent partial disability of his body as a whole.

In July 1978 Dr. Couch, who was associated with Dr. Branscum, found claimant to be considerably improved symptomatically as a result of the last surgery but stated that the fusion was apparently not solid and suggested additional surgery. Claimant stated he was not interested at that time in any more surgery.

After the entry of the Determination Order on May 25, 1977 the claimant requested a hearing and as a result of that hearing the Referee found claimant to be permanently and totally disabled.

Claimant testified that he has leg pain constantly, that he cannot bend and his back bothers him. He is unable to lift nor can he sit for prolonged periods of time. In fact, any activity causes him pain. He testified that this incapacitating pain destroys any opportunity to do any of his previous jobs.

The Referee found that claimant's age, educational deficiencies, work limitations and substantial physical limitations and deficiencies due to the incapacitating pain, prohibited any effective vocational rehabilitation of claimant. He did not believe that prudent employers would want to hire injured workers and the Referee did not feel that claimant could even do light type work.

In the opinion of the Referee claimant had made reasonable efforts to find work but he stated that it was doubtful that claimant could do light work based upon the claimant's testimony and the history reported by Dr. Branscum and Couch and also Dr. McKillop.

The Referee concluded that claimant's condition had worsened since the date of the last award or arrangement of compensation to the point where claimant's incapacitating pain made it utterly impossible for him to do any regular and suitable work on a regular basis. He quoted from Dr. McKillop's report of August 14, 1973 which, he felt, made it quite clear that claimant's limited education made returning to any work force highly unlikely and Dr. McKillop's report of November 28, 1973 in which he stated that light work was not a possibility.

The Referee found that the claimant had last received a payment for permanent partial disability in February 1975 and that the last compensation for time loss was paid in May 1977. He stated that apparently the date set forth in the Second Determination Order reflected an implied "medically stationary" date as set forth in Dr. Dandridge's letter of April 29, 1977. He directed the claimant be paid compensation for permanent total disability commencing on the terminal date of the compensation for temporary total disability contained in the Second Determination Order, April 25, 1977.

The Board, on de novo review, does not find claimant to be permanently and totally disabled. The Referee's relies to a certain extent on the reports from Dr. McKillop. In 1972 Dr. McKillop stated that claimant had a severe disability because there was no work available of a light nature in the Grand Ronde area. He reaffirmed this opinion in August 1973, stating that he saw little hope for getting claimant back to work because there was simply was no light work in the Grand Ronde area. The Board does not interpret these statements to mean that Dr. McKillop was stating claimant was totally disabled; he was simply saying there was no light work in a particular area. This is probably very true, however, it is not relevant because soon thereafter claimant moved to Oklahoma.

After claimant had moved to Oklahoma he received medical treatment from Dr. Branscum, Dr. Dandridge and Dr. Couch, none of whom suggested that claimant could not return to light type work. Following the surgery in May 1976 Dr. Branscum stated that the claimant should not return to heavy work. Dr. Dandridge examined claimant in April 1977 and expressed his opinion there was about 25% permanent physical disability based upon claimant's congenital deformity and superimposed injury and surgery. Dr. Branscum would have had it a bit higher but said it was probably within the range of reasonable ability. Dr. Couch found improvement in claimant's condition but when he suggested additional surgery because the fusion apparently was not solid claimant refused.

The evidence indicates that claimant has not worked since the date of his accident; the Referee found that claimant had been "unable to work since the date of his accident". The Referee has placed more limitations upon claimant's work activities than any of the doctors who have treated him. Likewise, he has made a finding that claimant has made reasonable efforts to find work and that he was unable to do light work and could not be retrained. There is no evidence in the record to support any of these findings. They are only assumptions and inferences which are contrary to the weight of the evidence.

In addition to claimant's failure to prove by medical evidence or lay testimony that he is permanently and totally disabled, claimant has very effectively removed himself from the proximity of the only agency, the Field Services Division of the Workers' Compensation Department, which possibly could provide services which would enable a determination of claimant's employability or trainability. Also, by moving from Oregon to Oklahoma, claimant has made it very difficult for the Fund to properly process the claim and although there is nothing to indicate claimant does not honestly believe that he is permanently and totally disability, he does have, at the very least, an obligation to provide the system with this opportunity to help him and to cooperate by doing his full share in attempting to rehabilitate himself.

Notwithstanding all of the above, the Board realizes that claimant has suffered a substantial loss of wage earning capacity as a result of his industrial injury of February 7, 1973 and he has not been adequately compensated for such loss by the award of 80° which represents 25% of the maximum for unscheduled disability. Therefore, the Board grants claimant an additional 176° for 55% of the maximum allowable by statute. This award gives claimant a total of 256° for 80% of the maximum.

ORDER

The order of the Referee, dated December 21, 1978, is modified.

Claimant is awarded, in addition to all prior awards for temporary total disability and permanent partial disability, 176° of a maximum of 320° for 55% unscheduled low back disability. This additional award for permanent partial disability is in lieu of the award for permanent total disability granted by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-6939 August 10, 1979

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

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which granted him 96° for 30% unscheduled right hip disability in addition to the award of 64° granted claimant by the Determination Order dated July 5, 1978.

The sole issue is extent of permanent disability, including permanent total disability.

Claimant is 63 years old. Approximately 30 years prior to the hearing he received his B.S. degree in Business Administration from the University of Oregon. For a short period of time claimant worked for another company selling beauty and grooming aids to barbers and beauty shop owners and also worked as a service station salesman. However, for 25 years prior to his injury on October 27, 1977 claimant was part owner of the business of the defendant-employer which is engaged in wholesale distribution of products to barbers and beauty shops.

On October 27, 1977 claimant fell down the basement stairs while at work and broke his right hip. It was surgically repaired by Dr. John Hardiman on October 28, 1977. Dr. Hardiman continued to treat claimant until June 6, 1978 when he felt that claimant was fairly well stabilized although he was still using a Canadian crutch. Dr. Hardiman noted that the right leg was somewhat shorter than the left and there was some persisting atrophy in the quadiceps and hamstring muscles.

Claimant told Dr. Hardiman he doubted that he could return to his previous employment because it required climbing ladders, using a hand truck up and down a ramp and carrying orders that packaged weigh from 30 to 100 pounds. He thinks he could do the paperwork part of his job but that it is a very small portion of the job. He told Dr. Hardiman that he felt he was a candidate for disability retirement on this basis. Dr. Hardiman felt that this was a reasonable assumption. He had no treatment to offer claimant at that time other than to encourage him to continue to develop as much range of motion and stength as he could in his limb through exercise.

Subsequently, claimant sold his interest in the business and retired.

The Referee felt that claimant's complaints of being unable to stand straight with both feet flat on the floor and the inability to lift or carry heavy items or do any prolonged sitting or walking were sincere and, in fact, claimant was permanently and totally disabled from returning to his old job unless he could come up with some completely different technique of running that business. Nevertheless, claimant failed to carry his burden of proving permanent total disability because he failed to establish that he is willing to seek regular gainful employment, that he has made any reasonable effort to obtain such employment. To the contrary, claimant has voluntarily retired.

The Referee found that claimant had an excellent education and his experience in running his own business together with his better than average intelligence should make many types of employment available to him. There is no evidence that claimant was forced to retire although it might be difficult, even distasteful, for claimant to have to assume the role of an employee after so many years of being an employer. However, the evidence does not show that claimant is so physically disabled that he can no longer find employment on a regular basis which would be suitable and gainful.

Claimant had been awarded 64° which represented 20% of the maximum. The Referee found that because there had been a narrowing of the broad field of general industrial occupation because of claimant's physical impairment and advanced age that his loss of earning capacity should be increased to 30% of the maximum.

The Board, on de novo review, finds that claimant is entitled to 50% of the maximum for his loss of wage earning capacity. The Board reaches this conclusion based on Dr. Hardiman's rating of impairment together with claimant's advanced age and the fact that he can no longer engage in the occupation in which he participated for 25 years.

In reaching this evaluation of claimant's loss of wage earning capacity, the Board has considered the fact that only 10%15% of claimant's time had been spent in sedentary activities which ranged from writing out orders to completing the accounting books. The balance of claimant's time was involved in physical activities from which he is now precluded by his industrial injury.

ORDER

The order of the Referee, dated January 11, 1979, is modified.

Claimant is awarded 64° of a maximum of 320° for 20% unscheduled right hip disability. This award is in addition to all previous awards of compensation for permanent partial disability received by claimant as a result of his industrial injury of October 27, 1977.

The award of attorney's fees for claimant as provided by the Referee's order is affirmed.

Claimant's attorney is also awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 77-81 August 13, 1979
WCB CASE NO. 78-8911

CHRIS W. BARKER, CLAIMANT
Gary M. Galton, Claimant's Atty.
Charles R. Holloway, Employer's Atty.
Stipulation And Order

THE PARTIES STIPULATE AS FOLLOWS:

(1) That on or about November 4, 1976, Claimant filed a Form 801 alleging an industrial injury or Occupational disease in the form of a cardiovascular conditon resulting from, caused or aggravated by his industrial exposures as a Claims Supervisor while in the employ of Argonaut Insurance Company.

(2) That the claim was originally deferred by Argonaut's industrial insurance carrier, Travelers Insurance Company, then formally denied in a letter under date of December 29, 1976.

(3) That on or about January 5, 1977, and within sixty (60) days from the date of the Denial, Claimant requested a Hearing contesting the Denial, and alleging his entitlement to medical expenses, penalties and attorneys' fees. Claimant relied upon ORS 656.262 (2), (4) and (8), 656.382(1) and 656.386(1).

(4) This matter came on regularly for Hearing on March 9, 1978, and September 19, 1978, in Portland, Oregon, before Referee Joseph D. St. Martin. In his Opinion and Order published on October 10, 1978, Referee St. Martin made the following finding:

> I am of the opinion that the November 4, 1976, episode of angina is compensable, having arisen out of and during the course of employment and that the claim should be remanded for acceptance and the payment of benefits as by law provided until the claim is ready for closure. The facts of the case may be like Riutta v. Mayflower Farms, 19 Or App 278, handed down October 28, 1974, but I express no opinion as to permanency. (Opinion and Order, p. 3).

Referee St. Martin also made an award of penalties and attorney's fees.

(5) On or about October 31, 1978, the Employer, Argonaut Insurance Company, through its industrial carrier, Travelers Insurance Company, Requested review by the Workers' Compensation Board of the Opinion and Order of Referee St. Martin. The Employer alleged that its grounds for review were the compensability of this claim, together with the award of penalties and attorneys' fees. On November 6, 1978, Claimant filed a Cross-Request for Review. The case is presently pending before the Workers' Compensation Board.

(6) On or about November 13, 1978, and April 25, 1979, Claimant filed Requests for Hearing alleging his entitlement to further compensation, medical expenses, penalties and attorneys' fees. These Requests for Hearing were denominated as WCB Case No. 78-8911 and have yet to be determined by a Referee of the Workers' Compensation Board.

(7) It is Claimant's contention that his disabling angina condition occurring on November 4, 1976, is compensable, and that he is entitled to penalties, attorneys' fees, medical expenses and all other benefits as provided by law. Conversely, it is the position of the Employer, Argonaut Insurance Company and its Insurer, Travelers Insurance Company, that Claimant's cardiovascular condition is not compensable, having pre-existed his employment exposures and resulting in no disabling or permanent effects. The Employer further contends that Claimant is not entitled to an award of penalties, attorneys' fees, medical expenses or permanent disability arising out of the episode of November 4, 1976.

(8) That it appears to the parties that a bona fide dispute exists as to the compensability of this claim and the resultant benefits flowing therefrom and that it should be settled pursuant to the provisions of ORS 656.289(4) by a lump-sum payment of $15,000 to Claimant by Travelers Insurance Company on behalf of the Employer, Argonaut Insurance Company. That it is expressly agreed by all parties that this claim will remain in a denied status. That the parties fully understand and agree that this compromise is in complete and final settlement of all contentions raised in the Carrier's Request for Review and the Claimant's Cross-Request for Review and Requests for Hearing, including the issues of compensability, payment of medical expenses, penalties, attorneys' fees and permanent disability. Claimant further understands and agrees that by making this settlement he waives any and all aggravation rights and continuing medical care and treatment that could inure to him by virtue of ORS 656.273 and ORS 656.245.

(9) That Claimant's Counsel, GALTON, POPICK & SCOTT, have been instrumental in obtaining this settlement for Claimant, so they shall be allowed a reasonable attorneys' fee in the sum of $2,700, this amount to be paid directly from the aforesaid settlement proceeds to Claimant's Counsel by Travelers Insurance Company, and not in addition thereto.

(10) The Carrier's Request for Review and Claimant's Cross-Request for Review and Requests for Hearing shall be dismissed.

WCB CASE NO. 78-6333 August 13, 1979
WCB CASE NO. 78-6334

FRANCES A. SMITH, CLAIMANT
Kirkpatrick & Howe, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the Second Determination Order dated May 12, 1978 (as corrected on July 25, 1978) and the Determination Order of May 12, 1978.

The issue is the extent of permanent partial disability involved in two claims, each closed separately although on the same date.

WCB Case No. 78-6333 relates to an injury to her left arm. Claimant, a 55-year-old custodial helper, sustained the injury on May 15, 1975 when she was bumped into and shoved against a brick wall by a group of students. She was seen by Dr. Edgerton who diagnosed severe tendinitis of the left hand. She was also seen by Dr. Schuler who made nerve conduction studies which were normal. However, Dr. Schuler found atrophy of the muscle in her arm and forearm. The diagnosis was adhesive bursitis of the left shoulder. He felt that her condition was medically stationary as of December 1975 but recommended that claimant have a psychological evaluation and also an examination by the physicians at Orthopaedic Consultants. Claimant refused to submit to either the evaluation or the examination and her claim was closed by a Determination Order dated May 17, 1976 which awarded claimant compensation only for temporary total disability.

Claimant requested a hearing but prior to the hearing a stipulation was approved on September 24, 1976 whereby claimant was awarded 28.8° for 15% loss of her left arm and claimant withdrew her request for hearing. The claim was subsequently reopened and closed by a Second Determination Order dated May 12, 1978, corrected on July 25, 1978, whereby claimant was given compensation for additional temporary total disability from August 12, 1977, per stipulation dated November 9, 1977, through June 8, 1978 and an additional 19.2° for 10% loss her her left arm.

WCB Case No. 78-6334 relates to an injury claimant suffered on September 24, 1976 when she was sweeping the girls' locker room, moved a chair and slipped and fell on her leg. Diagnosis was stasis ulcer and on November 12, 1976 claimant underwent vein stripping surgery. This claim also was closed on May 12, 1978 with an award of compensation for temporary total disability and 7.5° for 5% loss of the left leg.

On June 18, 1974 claimant had sustained an injury to her low back which was accepted and the claim was closed with an award of 24° for unscheduled low back disability. Claimant contends that her pre-existing low back disability upon which the consequence of her May 15, 1975 and September 24, 1976 have been superimposed to make her permanently and totally disabled. The Referee indicated in his order that the extent of disability resulting from the 1974 back injury was not otherwise an issue.

After the closure of claimant's first claim for an industrial injury she was seen by Dr. Manley who in turn referred her to Dr. Franks; he also referred her to Dr. Couperus. In addition claimant has been examined by Dr. Bennett, Dr. Shlim and Dr. Parvaresh.

The Referee found that claimant had not returned to work until September 24, 1976 and that on that date she suffered the second injury which ultimately caused a stasis ulcer. The ulcer was treated by stripping a portion of the vein but claimant's symptoms continued so nerve conduction studies were performed. They apparently were within the normal limits.

The Referee found that claimant had not worked since November 1976 and there was no evidence that she had attempted to seek regular gainful employment. Therefore, he found claimant was not permanently and totally disabled under the provisions of ORS 656.206(3).

He found that her symptoms and reactions thereto have been bizarre and grossly disproportionate to the objective medical findings. He felt that she had received an abundance of medical treatment and tests but that neither her complaints nor her psychoneurosis had improved. He concluded that the Second Determination Order of May 12, 1978 which related to claimant's industrial injury of May 15, 1975 and the Determination Order dated May 12, 1978 which related to her industrial injury of September 24, 1976 should be affirmed inasmuch as the awards granted thereby were commensurate with the objective medical findings.

The majority of the Board, on de novo review, finds that claimant is permanently and totally disabled. Dr. Edgerton was of the opinion that this was an unusual case because of the progressive disability claimant had acquired over the past months and years. Claimant has actually gone down hill with progressive inability to withstand and cope with daily pressures. Her left leg bothered her with a very sensitive paraesthesias up and down the calf and medial aspect of her left leg; in fact, it was so sensitive it was difficult for her to pull her hose up on that leg. He felt that the fibrositis which had been diagnosed by the orthopedists and the surgeons who had seen her in consultation was indeed a problem. The injuries claimant sustained in the past have left obvious scar tissue forming into this fibrositis syndrome, therefore, limiting function of the various joint areas and making it extremely sore and painful in some of the other extremity areas. He found no hope that claimant could ever hold gainful employment, not only because of her physical handicaps but because emotionally she was not able to cope well enough for sustained work activity.

On October 18, 1978 Dr. Edgerton advised claimant's attorney that "We have a lady here that is really totally disabled. She might be put back to work for a week and then declare too much pain and not be able to get around. I thing [sic] psychologically and emotionally and physically the patient will probably never be of any value in any gainful employment from here on".

Dr. Manley, an orthopedic surgeon, had referred claimant to Dr. Bennett, a rheumatologist for the University of Oregon Medical Center. Dr. Bennett felt that claimant did have a fibrositis of the right shoulder which was chronic, ongoing problem secondary to the injury she suffered in 1975. Dr. Manley said she should do no work which would aggravate this which means that claimant would have to be on total disability for an undeterminate length of time, possibly for the rest of her working career because the problem will be aggravated by minimal work situations.

On October 30, 1978 Dr. Manley stated it was his opinion that as a result of the industrial injury claimant was permanently incapacitated and unable to work in any gainful occupation.

Dr. Parvaresh felt that claimant possibly could be helped with proper psychiatric care, preferably as a in-patient which would indirectly help her physical condition and eventually recover, but without it she would be unable to do anything.

The majority of the Board concludes that the provisions of ORS 656.206(3) notwithstanding, in this case claimant's physical and psychological condition are such that her motivation to return to work is immaterial. Even if claimant attempted to return to the labor market, there is nothing she would be able to do in her present condition and the consensus of the medical opinion appears to be that claimant will remain in this condition for the rest of her life.

The majority of the Board concludes that claimant is permanently and totally disabled and should be considered so as of the date of this order.

ORDER

The order of the Referee, dated December 27, 1978, is reversed.

Claimant is found to be permanently and totally disabled and entitled to receive compensation therefor from the date of this order forward.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation granted claimant by this award, payable out of said compensation as paid, not to exceed $3,000.

Board Member McCallister dissents as follows:

I do not agree with the opinion of the majority. I would not award permanent total disability but would modify the award of permanent disability granted by the Determination Order and affirmed by the Referee.

ORS 656.206(3) requires the worker seeking permanent total disability establish he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment. The evidence in this case shows the claimant has neither sought nor made any effort to obtain regular and gainful employment.

I find no evidence in the medical record which would establish that claimant's condition is so serious that she is precluded from engaging in any work, or that she cannot be trained for any work that is at once regular and gainful and within her physical limitations.

The claimant has an obligation to diminish the disabling effects of her injury(ies). In this case the evidence indicates she is not of the "temperament" to do so and tends to indicate she has "retired" from the labor market. Her "temperament" which is a part of the psychoneurosis manifestation has played a significant part in her ability to cope with what is shown by the evidence to be a serious physical problem described as "fibrositis" which produces a chronic pain syndrome. The evidence shows the pain syndrome is confined to the claimant's left arm, left leg and left shoulder area. The evidence further indicates that so long as she does not engage in activities which require constant use of the parts of her body affected by the fibrositis her pain is kept within a reasonable tolerance level. Notwithstanding these problems the medical evidence does not support a conclusion that motivation is overcome by the magnitude of the consequences of her injuries. The medical findings of a left-sided pain complex, her age, past experience, training, trainability, etc. do not excuse her from participation in the "rehabilitation" obligation contemplated by the statute.

Responsibility for vocational rehabilitation is not solely that of the Department. It is a multiple responsibility of the carrier, regulatory agency, physicins, the injured worker and anyone else who has been drawn into the worker's compensation system. Considering this claimant's age and the severity of the injury residuals the very least obligation the claimant must meet is an indication of a willingness to inquire about and apply for the rehabilitation assistance available. In this case the claimant has failed to take even this small step; in fact, she has assumed the demeanor and life style of a totally disabled person retired from the labor market.

I believe the evidence supports a greater award of permanent disability than granted by the Determination Order affirmed by the Referee. The medical evidence and lay testimony supports a finding of permanent residuals in the left shoulder. The shoulder is an unscheduled area and residuals there are a consequence of the May 15, 1975 accident. The evidence further supports a greater award of scheduled disability to the left arm. The residual pain is disabling and markedly limits the claimant's use of that member.

I conclude the unscheduled left shoulder disability to be 25% of the maximum allowed by statute. I further conclude that an award of 50% scheduled disability for the residual left arm disability reflects the loss of use of that member.

These awards are in lieu of the award granted in the Determination Order. In addition I would remand this claim to the Field Services Division for vocational assistance to the claimant with primary emphasis on job placement and guidance.

I find the Referee's characterization of this claimant's efforts to cope with her legitimate problems inappropriate. His comment regarding the "longsuffering daughter and son-in-law" is injudicious and inappropriate. Certainly such gratuitous comments are not consistent with the high level of professionalism the parties, as well as the public, have a right to expect.

SAIF CLAIM NO. DC 340487 August 15, 1979

ARTHUR G. BUCK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable low back injury on October 15, 1971 in a lifting incident. He subsequently underwent a L4-5 discectomy and by the May 31, 1972 Determination Order was granted compensation for 10% unscheduled low back disability. Claimant's aggravation rights have expired.

By a Board's Own Motion Order, dated December 11, 1978, claimant's claim was reopened with time loss commencing on September 29, 1978. In October 1978 claimant underwent a lumbar myelogram together with a laminotomy L4-5, L5-S1 left with L5-S1 discectomy. His condition gradually improved and soon thereafter he was able to return to part time work. Dr. Struckman, on July 11, 1979, indicated claimant was medically stationary at that time with no functional disability; however, claimant had some disability of a chronic, moderately aching pain.

On July 19, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted time loss benefits from September 29, 1978 through July 11, 1979, less time worked, and an additional award of compensation for 5% unscheduled disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 29, 1978 through July 11, 1979, less time worked, and compensation equal to 16° for 5% unscheduled low back disability. These awards are in addition to all previous awards claimant has been granted.

WCB CASE NO. 78-2467-1F August 15, 1979

LYNN W. BUCK, CLAIMANT
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the Fund's denial dated November 17, 1978 on the basis that it was barred because of late filing.

The issue is compensability of claimant's claim for benefits from the Inmate Injury Fund. The Fund contends that the claim was barred by the provisions of ORS 655.520(3). Claimant contends he suffered an industrial injury or an aggravation of a pre-existing injury.

Claimant, at the time of the hearing, was 28 years old. He served in the U.S. Army in the late 1960's where he was first wounded in the mouth, stomach, arm and left leg by shrapnel from a hand grenade. Later, in 1969, he injured his low back when he was involved in an armoured personnel carrier accident. Following his recovery claimant was advised not to lift any heavy weights.

After his discharge from the service claimant took a course in welding and worked for a period of time in 1971 as a ship repair welder. In 1974 he dislocated his right knee.

On February 17, 1975 claimant was incarcerated at the Oregon State Penitentiary to serve a 20-year sentence. He is scheduled to be released on January 9, 1988.

At the hearing claimant testified that he had worn a back brace since his injury in the army but that he was not allowed to wear the brace when he entered the prison because of the metal stays in the brace. When he was first imprisoned claimant worked in the furniture factory which required no heavy lifting, however, he later was assigned to the metal shop as a welder in October 1975.

Certain chart notes made at the prison infirmary indicate that between July 26, 1976 and September 22, 1977 claimant complained almost monthly of back problems. Claimant testified that he had injured his back in June 1976 when he and another inmate were lifting a 400-pound roll of wire. However, there was no evidence that such incident was reported to the prison authorities when it happened. No witnesses were called to substantiate claimant's testimony nor was there any evidence that claimant filed a claim for the alleged incident.

While in the prison, claimant was examined a number of times by Dr. Becker, who reported on October 5, 1976 that claimant should do no heavy lifting for at least six months. On December 7, 1976 Dr. Becker reported that claimant continued to have low back problems.

Subsequently, claimant was transferred from the metal shop to the laundry. Claimant testified that he had to lift baskets weighing from 50 pounds to 200 pounds. Dr. Becker diagnosed chronic lumbosacral strain symptoms with no current herniated intervetebral disc. He prescribed a lumbosacral corset and claimant was placed on a "medical idle" status. In July 1977 Dr. Becker recommended that claimant be vocationally oriented towards selling work that would not stress his low back. He never expressed an opinion on whether claimant's back problems were caused, or aggravated, by his work, nor on the permanency of claimant's back condition.

Claimant signed his claim for benefits on October 21, 1977, alleging an accident occurred on or about March 18, 1977 when he strained his low back lifting heavy baskets of laundry. Although the claim lists another inmate as a witness to the accident, neither this person nor any other person was called to substantiate claimant's claim. The doctors at the penitentiary did not complete the physician's report section of the claim form because the infirmary had no record that claimant was seen by anyone at that time. By letter, dated November 8, 1977, the claim was sent by the penitentiary safety supervisor to the Fund. The letter of transmittal explained the lack of a physician's report and stated that evidently the first Form 20-IF was lost, therefore, they were again submitting a claim for claimant and it was no fault of claimant for this late filing. The letter also added that, as with the first filing, there was still no supervisor report because the injury was not reported.

The Fund denied the claim on February 17, 1978, based on the prison's position that there was no record of either an injury or medical treatment on or about March 8, 1977.

The Referee found that payments from the Inmate Injury Fund are covered by the provisions of ORS 655.505 to 655.550. Benefits are paid, with some exception, in the same manner as provided for injured workers under ORS 656. However, 655.520(3) provides that a claim must be filed within 90 days after the injury or it is barred. The Fund is given the discretion to waive this 90-day filing requirement if good and sufficient reason is shown why the claim could not be timely filed.

The Referee found that the claim was signed by claimant on October 21, 1977 and although the transmittal letter was dated November 8, 1977 it appeared that the documents were not forwarded to the Fund until February 1978. The October date, however, was over seven months after the alleged incident of March 8, 1977, therefore, the claim was filed long after the expiration of the statutory period. The transmittal letter did indicate that a claim had been made and had been lost through no fault of claimant. However, the Referee found no evidence as to when the earlier claim was made and could not infer that it was timely made. He found that had the transmittal letter from the prison and the subsequent delays in getting the documents to the Fund suggested that the claimant had good cause for late filing only the Fund could waive the 90-day requirement. It chose not to do so.

The Referee concluded that the claim was barred for late filing and that he had no jurisdiction to decide the issue of compensability on its merits. However, he stated that had he had such authority, he would have had to decide adversely to claimant because there had been a failure of proof by claimant that he had sustained a compensable injury and even if he viewed the claim as a claim for an occupational disease the results would not differ.

Furthermore, apparently, only injuries appear to be within the intent of the Inmate Injury Fund statutes; there is no reference to disease. Going one step further the Referee stated that even if occupational diseases were covered claimant would not prevail because he failed to prove that his work at the penitentiary originally caused or materially and permanently worsened his spinal condition, citing Weller v. Union Carbide, 35 Or App 355.

The Board, on de novo review, affirms the Referee's conclusion that claimant's claim is barred under the provisions of ORS 655.520(3) and, therefore, agrees that the Referee had no jurisdiction to decide the issue of compensability on its merits.

ORDER

The order of the Referee, dated March 12, 1979, is affirmed.

Larry D. Crouch, Claimant
Spence, O'Neal & Banta, Claimant's Attys.
Roger R. Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Referee's order which granted claimant an additional 112°, making a total of 160° for 50% unscheduled low back disability and 22.5° for 15% loss function of the right leg.

The issue is extent of permanent partial disability, both scheduled and unscheduled.

Claimant suffered a compensable injury on March 10, 1975 when he pushed on a load of plywood core, slipped and felt a "pop" in his back.

Claimant's claim was first closed by a Determination Order, dated September 8, 1975, which awarded him compensation for time loss only. On December 17, 1975 and again on July 17, 1976 claimant had low back surgery. The claim was closed on July 14, 1976 by a Second Determination Order which granted claimant 48° for 15% unscheduled low back disability. The claim was again reopened and closed on December 16, 1976 by a Third Determination Order which granted claimant no additional permanent partial disability. On May 17, 1977 claimant had additional back surgery, including a spinal fusion at L5-S1, and on October 11, 1978 the claim was closed for the last time by the Fourth Determination Order which granted claimant no additional compensation for permanent partial disability.

The Referee found that during the period of time between 1975 and 1978 claimant had recurring low back pain which radiated into his legs. Claimant had tried to return to his regular job at the mill, he also tried other less physical jobs at the mill, but each time he returned and attempted to work, his symptoms worsened.

Dr. Thompson, an orthopedic surgeon, stated in February 1978 that claimant was medically stationary and recommended claim closure with a moderate permanent partial disability award. He did not think claimant should return to his regular job but felt that he could continue to attempt the lighter type work to which he had returned in January 1978. Notwithstanding, claimant ceased working on March 1, 1978 because he had developed, in his opinion, incapacitating low back and right leg symptoms.

Dr. Campagna, a neurosurgeon, on March 9, 1978, found claimant's back motion was limited to 25% of normal and in less than three months found that such limitations were limited to 50% of normal. Claimant contended he had right leg pain which was "unbearable". Dr. Campagna diagnosed a residual neuropathy S1, right, and scheduled claimant for hospitalization with conservative treatment. However, claimant did not appear and Dr. Campagna did not contact claimant for several months. On September 18, 1978 he reported that claimant was medically stationary although he had not seen him since June.

The claimant is married and has four children; he completed the 10th grade but dropped out of school the following year to be married and commence working. The Referee speculated that claimant had the intelligence and knowledge to obtain a GED if he chose to do so, however, claimant has not, as yet, obtained one. Claimant has at least 11 years of experience in plywood mills, working principally as a member of plywood lay-up crews. He has also worked as a cook and for a short period of time he managed a restaurant.

The Referee found that in addition to claimant's unscheduled low back disability, the medical reports substantiated a scheduled disability to his right leg which Dr. Campagna termed "residual neuropathy". The Orthopaedic Consultants, who had examined claimant at the request of the carrier on February 27, 1979 designated it as "radiculopathy". The Referee found that it was referred pain from the lumbar injury and was disabling because claimant was unable to stand for prolonged periods of time.

Stating that separate awards could be given for both scheduled and unscheduled disabilities arising from the same injury, whether the separate parts of the body have suffered direct trauma or not or are disabled through referred pain, the Referee concluded that claimant had lost 15% function of his right leg as a consequence of the compensable back injury.

With respect to claimant's unscheduled low back disability, the Referee concluded that claimant's loss of earning capacity was substantially greater than that indicated by the award for permanent partial disability granted by the Second Determination Order of July 14, 1976.

Claimant had significant loss of function in his low back which was confirmed by the physicians at Orthopaedic Consultants who classified loss of function as moderate; he was unable to return to any of the plywood jobs in which he had experience and which constituted 80% of his work background.

The Referee doubted that claimant could engage in any physical work or any work which required prolonged standing or sitting. Claimant's education was limited and claimant's employer, the operator of a large mill, was unable to find a suitable job for him despite claimant's obvious motivation to remain with the employer. Claimant is comparatively young, intelligent and adaptable to non-physical labor, nevertheless, his job opportunities have been diminished by his industrial injury. At the present time claimant is gainfully employed at a suitable occupation, however, his earnings have been significantly reduced. Claimant earned $18,000 in 1974 as compared to $14,400 at the present time.

Based upon the foregoing, the Referee concluded that claimant was entitled to an award equal to 50% of the maximum for his unscheduled disability and he therefore increased the prior award by 112°.

The Board, on de novo review, finds no medical evidence in the record of any impairment to claimant's right leg. The pain which claimant has in his right leg is referred pain but there is no evidence that such pain is disabling. There is no basis for a separate award under these circumstances.

With respect to claimant's unscheduled disability, the Board finds that the medical evidence does not support an award equal to 50% of the maximum. Claimant cannot return to his former occupations but no one has told him that he could not do light type work; in fact, Dr. Thompson felt that he should continue to work the duties which he attempted in January but despite Dr. Thompson's opinion claimant quit two months later.

The Board concludes that claimant will be adequately compensated for his loss of wage earning capacity resulting from the industrial injury on March 10, 1975 by an award equal to 30% of the maximum. Claimant has already received an award equal to 15%, therefore, the Board increases that award by 15%. This gives claimant a total of 96° for 30% of the maximum for unscheduled disability.

ORDER

The order of the Referee, dated March 26, 1979, is modified.

Claimant is awarded 48° of a maximum of 320° for 15% unscheduled low back disability. This award is in addition to any prior awards for permanent partial disability which claimant may have received for his industrial injury of March 10, 1975 but it is in lieu of the additional award of 112° for 35% unscheduled low back disability and the 22.5° for 15% loss function of the right leg granted by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-3017 August 15, 1979

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

Reviewed by Board Members Wilson and McCallister.

The employer seeks Board review of the Referee's order which granted claimant compensation for permanent total disability, payable from the date of the termination of temporary total disability. Credit was allowed for payments made on the award granted by the prior Determination Order.

The sole issue is extent of permanent disability. The employer contends that claimant has failed to meet his burden of proving that he is incapable of sustaining regular, gainful employment and, therefore, is not entitled to an award for permanent total disability.

Claimant, at the time of his injury, was a 51-year-old deaf mute. On October 24, 1975 he slipped, fell and hit his lower back on the bumper of a truck and then fell backwards on a cement floor.

Initially, the claim was denied and claimant requested a hearing. As a result of the hearing an order was issued on November 10, 1977 finding the claim compensable and remanding it to the carrier. The claim was closed by a Determination Order dated April 14, 1978 whereby claimant was awarded compensation for temporary total disability and temporary partial disability and 64° for 20% unscheduled low back disability.

Claimant's family physician referred him to Dr. Goodwin, an orthopedic surgeon, who performed a laminectomy with excision of an extruded disc at L4-5, exploration of the disc space at L3-4 and at L5-S1 and decompression of the nerve root on June 11, 1976.

On January 5, 1978 claimant was examined at the Orthopaedic Consultants who diagnosed a chronic lumbar strain, status post-operative laminectomy with residuals, degenerative disc disease, osteoarthritis in the lumbar spine and exogenous obesity. They recommended a job change, stating that if modified suitable employment could not be provided, claimant would probably need vocational assistance. They suggested that an effort be made to find suitable modified work with claimant's present employer in view of his long record of service with it. Claimant has the physical capacity for light work as defined in the Dictionary of Occupational Titles. They rated the total loss of function or impairment in the lumbar spine as of the time of the examination as mildly moderate and due to the injury.

Dr. Goodwin, who may be considered as claimant's treating physician, concurred generally with these findings in a report dated March 7, 1978. In this concurring report Dr. Goodwin indicated that on claimant's last visit to his office on October 11, 1976 it had appeared that claimant was doing very well and no further treatment was indicated. Claimant had been advised he could do most of the activities in which he desired to engage but that he could not do any heavy lifting or repetitive bending. He had been given permission to return to light work without heavy lifting or repetitive bending as of November 1, 1976 but indicated to the doctor that he was retiring and going to go on Social Security because of his deafness.

Claimant had developed heart problems approximately 10 years ago and presently takes medication for hypertension. In March 1976 an angiogram revealed minor aortic valve disease. Claimant occasionally takes nitroglycerin pills for his chest pain. He had meningitis at the age of three which left him a deaf mute. He also has had bilateral breast biopsy for cysts and he sustained a dog bite on the nose a few years ago which required plastic surgery.

On May 26, 1978 claimant's family physician, Dr. Horenstein, found claimant to be medically stationary as of February 28, 1978. At that time claimant had considerable amount of pain in the low back along the paralumbar muscles. She later saw claimant in April and again in May. On those two occasions claimant did not have such complaints nor did he have any spasms. She started claimant on a Williams exercise program and suggested that he attempt such light activities as mowing his lawn and doing light work around the house.

Claimant had been in contact with the Division of Vocational Rehabilitation and on December 23, 1977 the Workers' Compensation Department Field Services Division referred him for vocational rehabilitation. In a monthly report dated April 3, 1978 it was noted: "VRD case closure likely due to poor feasibility as a result of medical instability". On June 2, 1978 the rehabilitation counselor stated that Dr. Horenstein felt that claimant was too disabled to handle a job. On June 20, the counselor advised claimant that his case was being closed as of that date because there was no further service the agency could provide him.

On June 5, 1978 David Rollins, a clinical psychologist, talked with claimant and reported on July 20, 1978 that claimant had a severe occupational handicap when the physical residual handicap of his industrial injury is considered together with his deafness, limited communication skills and lack of occupational skills. He thought claimant was not a good candidate for retraining with his limited education, his age and his communications difficulty. The only possible work potential would fall within the sheltered workshop facilities. Dr. Rollins was unable to demonstrate the existence of gainful and suitable work activities even there.

The Referee found claimant has a sixth grade education, that after finishing school he worked as a janitor in a department store until 1948 when he moved from North Dakota to Portland, Oregon where he worked one day in a furniture factory and from that date until 1975 claimant worked as a janitor for the defendant-employer. This janitorial work involved sanding floors with an electric sander which weighed 460 pounds, cleaning flour bins with a brush and vacuum, cleaning floors and cleaning equipment. With all of the limitations placed upon claimant's work activities there is no way that claimant could return to his former job.

Permanent total disability is defined as a loss, including pre-existing disability, which permanently incapacitates a worker from regularly performing any work at a gainful and suitable employment. ORS 656.206(1)(a). The Referee found that claimant no longer had the ability to sell his services in a competitive labor market. His pre-existing conditions which include deafness, inability to communicate verbally, limited educational background and very limited work background, left claimant with very little to offer. When he suffered his back injury which necessitated the surgery, that injury, in the opinion of the Referee, took from claimant what little he had had to offer in the general labor market.

and precluded him from returning to the work which he had done for 28 years and in which his entire past training had been. Attempts to rehabilitate claimant were unsuccessful because of his severe handicap and he has been advised that he cannot be rehabilitated even though it is admitted that he has a severe vocational handicap.

The Referee concluded that claimant's long steady work record did not suggest a person who lacked motivation to return to work; Dr. Rollins expressed his opinion that claimant was anxious and willing to return to work in any capacity in which he could effectively function. Unfortunately, there is no such employment available to claimant.

The Referee concluded that claimant was permanently and totally disabled.

The Board, on de novo review, finds claimant has many severe pre-existing disabilities; however, the evidence indicates that claimant is physically capable of performing employment involving sedentary or light duty. Both his family doctor and Dr. Goodwin agreed on this. Dr. Goodwin indicated he had released claimant to return to light work as of November 1, 1976, placing only a restriction on his work activities of no lifting or repetitive bending. At that time, claimant informed Dr. Goodwin that he intended to retire under Social Security because of his deafness. The evidence indicates that although claimant has not returned to work, his activities at home indicate he has a tolerance for activities consistent with light employment. He is able to work in the yard, take care of the garden, maintain his car and truck and to cut wood with a power saw.

It is not questioned that employment possibilities for claimant are very limited, however, they are not, by any means, completely foreclosed. Dr. Rollins listed a number of jobs which he felt claimant would be capable of doing. The evidence indicates that claimant has not attempted by any means available to him as a deaf-mute to communicate with his employer about returning to work nor has he looked for work in a furniture factory, nor searched for janitorial type employment. The only thing that claimant has done is pursue vocational rehabilitation and it is apparent from the opinions expressed by the doctors that claimant does not need to be vocationally rehabilitated to perform certain types of jobs.

The Board finds that although claimant had suffered a severe loss of wage earning capacity as a result of his industrial injury, he is not permanently and totally disabled. The burden is upon claimant to prove that he is no longer able to engage on a regular basis in a suitable gainful employment and that proof includes evidence that he has sought out such type of employment. In this case claimant has not sought further employment; in fact, he has retired. He voluntarily left his job to receive Social Security benefits.

The Board concludes that although claimant is not permanently and totally disabled he is entitled to a substantial award and that he was not adequately compensated by the award of 64° for 20% unscheduled low back disability granted by the Determination Order. Therefore, the Board increases that award to 240° which represents 75% of the maximum allowable for unscheduled disability.

ORDER

The order of the Referee, dated January 4, 1979, is modified.

Claimant is awarded 240° of a maximum of 320° for 75% unscheduled low back disability. This award is in lieu of the award of compensation for permanent total disability granted by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 76-6215 August 15, 1979

THOMAS E. GALE, CLAIMANT
Charles Paulson, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the defendant's denial of claimant's claim for compensation for an injury sustained on or about March 1, 1974.

The sole issue before the Board is whether claimant suffered a compensable injury on or about May 1, 1974. The claim was initially accepted and compensation was paid. The claim was closed by a Determination Order dated November 12, 1976; however, on August 8, 1977 the defendant denied claimant's claim from the beginning.

The Referee found that claimant was not a credible witness and he did not believe the injury could have occurred as described by the claimant. He did find believable evidence that claimant was unloading sacks of cement on a windy day and thereafter complained of back pain; this activity may have taken place either on February 28 or March 1, 1974. The Referee felt this evidence apparently supported claimant's contention.

The Referee concluded that although there was evidence that claimant had lost some time from work prior to his resignation on April 4, 1974 the probability that it was necessitated by his back injury was not as strong as the probability that it was occasioned by his abdominal complaints. He stated that although claimant may have had some back pain while working on or about March 1, 1974 that would not constitute a compensable industrial injury unless it resulted in claimant losing time from work or incurring medical expenses and there was no persuasive evidence in this case that claimant's back complaints were related to any event on March 1, 1974.

The medical evidence consists basically of reports from Dr. MacHaffie and Dr. Petrosky. Both doctors based their opinions on history related to them by claimant and because the Referee found claimant not to be credible he concluded that the opinions expressed by each doctor could not be accorded weight. He affirmed the denial.

The Board, on de novo review, concurs in the conclusion reached by the Referee. This concurrence is based solely upon claimant's failure to meet his burden of proving that he had suffered a compensable injury.

The Board fails to understand why this case, which involved a simple question of compensability, should have taken so long to hear and also why such an abundance of evidence, wholely irrelevant and immaterial to this case was allowed into the record by the Referee. The Board also finds that the Referee acted injudiciously in resorting to the type of personal comment contained in his Opinion and Order.

ORDER

The order of the Referee, dated September 20, 1978, is affirmed.

STEVEN E. HUTCHESON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on June 7, 1965. His claim file apparently has been misplaced but the Board has assumed that his claim has been closed and his aggravation rights have expired.

On July 6, 1978 claimant requested that his claim be reopened, based on medical reports by Dr. Coletti and a hospital report which indicated he was hospitalized on September 30, 1976 for a lumbar myelogram. The Board, by its August 23, 1978 order, reopened claimant's claim.

Claimant returned to work on October 25, 1976. On January 8, 1979 he was seen by Dr. Coletti regarding his back condition. The doctor recommended claimant return to work as soon as his symptoms abated. He did not see Dr. Coletti again until May 30, 1979 at which time the doctor found him to be completely asymptomatic. He noted only that claimant occasionally had low back pain with excessive activity and sometimes had left leg radiation. He was considered to be medically stationary without any significant residuals.

On June 7, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended claimant be granted additional time loss benefits from September 30, 1976 through October 25, 1976 and from January 8, 1979 through May 30, 1979, less time worked.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 30, 1976 through October 25, 1976 and from January 8, 1979 through May 30, 1979, less time worked.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of August 23, 1978.

WCB CASE NO. 78-4344 August 15, 1979

MELVIS JOHNSON, CLAIMANT
Robert J. Thorbeck, Claimant's Atty.
Dean M. Phillips, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson, Phillips and McCallister.

The employer seeks Board review of the Referee's order which directed it to accept claimant's claim and provide claimant with compensation, as provided by law, until the claim is closed; to pay claimant an additional compensation, equal to 25% of any compensation for temporary total disability due from June 28 until July 31, 1978, not to exceed $200, and to pay claimant's attorney $900 as a reasonable attorney's fee for reversing the denial and an additional $50 for his services in securing additional compensation for temporary total disability, making a total attorney's fee of $950.

The majority of the Board, after de novo review, agrees with all of the findings and conclusions reached by the Referee; however, it feels that the award of attorney's fees is excessive and that claimant's attorney is entitled to a total attorney's fee award of $750. In all other respects, the majority of the Board affirms and adopts as its own the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The order of the Referee, dated February 28, 1979, is affirmed except for the award of attorney fees which is reduced from $950 to $750.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the carrier.

Board Members McCallister dissents as follows:

I would reverse the Referee and approve the denial.

The medical evidence in this case clearly establishes the gonorrheal bacterial infection and the dissemination of the bacterial infection throughout the body system is not related to the claimant's employment. The dissemination of the infection and the occurrence of septic arthritis is described by Dr. May as a common (ordinary) sequalae or consequential result of a gonorrheal bacterial infection. He testified it was not a usual consequence but nonetheless a common consequence. An inference can be drawn that the pustule on the thumb was also a common finding in such cases.

The argument then, is not whether the infection pre-existed nor whether the systemic dissemination would occur but where in the body the infection would "settle". The fact it settled, in part, in the claimant's right ankle and caused the septic arthritis was, according to Dr. May, not unusual but a common and therefore ordinary result of gonorrheal infection.

The infection having settled in the claimant's right ankle caused septic arthritis. The septic arthritis ran its natural course.

ORS 656.802(1)(a) defines an occupational disease as "Any disease or infection which arises out of and in the scope of the employment, and to which an employee is not orginarily subjected or exposed other than during a period of regular actual employment therein."

The medical evidence herein, when taken in total, supports a finding that the gonorrheal bacterial infection set up a sequence of events, the consequences of which cannot be distinguished from that which the claimant would ordinarily be subjected or exposed in the course of day to day activity.

Dr. May, at page 23 of his deposition, states in part: " . . . but at the same time we were able to bring him in, put him at bed rest, start him on antibiotics, drain that ankle multiple times like we did. He was able to get full recovery of that ankle and, as far as I am concerned, he has got a good ankle." The Court of Appeals in the Weller v. Union Carbide and Stupfel v. Edward Hines Lumber Company cases has provided direction and definition in cases such as this one. Temporary worsening of pre-existing conditions are not compensable. In this case the medical evidence supports a finding of temporary worsening and when the medical evidence is viewed in a totality of sequencial consequences supports a finding that the condition for which compensation is claimed was pre-existing.

I find the septic arthritis is not compensable and would reinstate the employer/carrier's denial.

CLAIM NO. C604-13353REG August 15, 1979

ARNOLD REYNOLDS, CLAIMANT
Own Motion Order

On June 1, 1979 claimant requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained to his right shoulder on February 16, 1972. Claimant's aggravation rights have expired. On June 5 the Board advised the claimant it would need current medical evidence to indicate whether claimant's condition had worsened since the last closure of the claim and whether the worsening was attributable to his 1972 injury.

Dr. Berselli sent a report to the Board, dated July 7, 1979 which indicated he had seen claimant on March 1, 1979 for complaints of increased pain in his shoulder. An arthrogram was negative. Claimant was referred to Dr. Langston who diagnosed residuals of a previous operative procedure and functional overlay. Based upon this, Dr. Berselli felt surgery was not indicated at that time.

On July 16, 1979 the Board forwarded a copy of Dr. Berselli's letter to the carrier and asked it to inform the Board of its position within 20 days. On July 17 Dr. Berselli advised the Board that claimant's disability commenced on April 1, 1979 and he was not to work until further notice. He felt claimant was a good candidate for vocational rehabilitation.

On July 30, 1979 the carrier indicated it would oppose reopening unless, at some later date, claimant became enrolled in a program of vocational rehabilitation.

The Board, after thoroughly considering the medical evidence before it, concludes that claimant's claim should be reopened as of April 1, 1979, based on the evidence that his condition has worsened since the last arrangement or award of compensation and this worsening is attributable to claimant's 1972 industrial injury.

ORDER

Claimant's claim is hereby remanded to the carrier for acceptance and payment of compensation, as provided by law, commencing on April 1, 1979, and until the claim is closed pursuant to ORS 656.278.

SAIF CLAIM NO. YC 431525 August-15, 1979

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

Claimant sustained a compensable injury to his right thumb on April 4, 1973. Surgery was recommended at that time but not carried out and the claim was first closed on February 8, 1974 with an award equal to 40% loss of the thumb. His claim was reopened and the recommended surgery was performed in September 1975. The claim was again closed on July 14, 1976 with no additional permanent disability award. When the internal fixation wire was removed claimant's claim was again reopened and closed in 1977 with no further award.

By a Board's Own Motion Order claimant's claim was reopened as of March 20, 1979, the date claimant underwent surgery performed by Dr. Ellison. Dr. Ellison indicated that claimant's condition at that time was related to his 1973 industrial injury and that the prognosis was good. He felt claimant would be able to return to work on April 15, 1979. In a phone conversation with the carrier, Dr. Ellison indicated claimant's physical impairment was not increased as a result of the recent treatment.

On May 24, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for time loss only from March 20, 1979 through April 14, 1979, less time worked.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 20, 1979 through April 14, 1979, less time worked.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $750.

DONALD L. SCOVILLE, CLAIMANT
Fred Allen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which directed it to pay claimant compensation for "temporary total disability and medical expenses only arising from his industrial injury from July 21, 1978 until he returns to work or is released by his doctor to return to work."

The issue is compensability.

Claimant, a 37-year-old cook, worked for the employer as a dinner cook. His regular shift was from 4 p.m. until midnight. He did not work Wednesdays and Thursdays of each week.

Claimant filed a report for an industrial injury on August 12, 1978, stating that his back had been "popping in and out for about two or three weeks, on 7/21 my back totally went out". On August 31, 1978 the Fund denied the claim.

Approximately seven years before this alleged incident claimant had suffered an industrial injury to his upper back for which he received an award equal to 10% of the maximum for unscheduled disability. The Referee found that from that time until July 1978 claimant was able to work although during that period he also suffered low back problems, i.e., his low back would "pop out" but would soon return to normal.

Claimant testified that on July 21 he was working in the kitchen for the defendant-employer and at about 6 p.m. he stooped over to pick up a lettuce core and upon straightening suffered low back pain. He said one of the other employees in the kitchen helped him straighten up and he reported the incident to the office manager who said she would work his shift until he was able to get someone to replace him. Shortly thereafter claimant went home but returned to work the following day. He said that his back continued to hurt him after working several hours and he quit. After talking to his employer and recommending another cook, he left upon her arrival. This was on a Friday. The following Monday he saw Dr. Mang, a chiropractor, who has been treating him since. Claimant said he felt much better now, that he has been off work since July and has only recently been released for part time work.

The Referee found that on July 19 claimant had worked on his car and while bending forward under the dash his back "slipped out" and later "popped back" as it usually did. Claimant told an employee on that date that he hurt his back and that employee so testified at the hearing. Claimant testified he also had pain in his back on the 20th while working on his car but when he returned to work on July 21, his back was not bothering him and he worked fine until he stooped to pick up the lettuce core.

The Referee, relying upon the Court's in Riutta v. Mayflower Farms, Inc., 19 Or App 278 (1974), found that claimant's work activity had produced a temporary aggravation of claimant's back condition which originated approximately seven years earlier but continued to give claimant problems intermittently. The Referee concluded that although claimant had sustained no permanent partial disability, nevertheless, the employer was responsible for time loss and medical expenses. He distinguished the ruling in Riutta from the Court's holding in Weller v. Union Carbide, 35 Or App 355, and Stupfel v. Edward Hines Lumber Company, 35 Or App 457, stating that in the latter two cases the Court was considering whether or not there was a material and permanent worsening of claimant's condition to justify an award of permanent disability and did not intend to find as not compensable payment of time loss and medical expenses in situations such as existed in the case before him.

The Board, on de novo review, finds no evidence that claimant's present condition is any worse than it has ever been. If claimant did exacerbate his back condition, it was as a result of working on his car during his days off from work. The evidence clearly indicates that for the past seven years claimant's back has been "popping in and out" with some frequency and yet claimant has continued to be able to work under those conditions. There is no evidence that since the incident of July 21, 1978 these episodes became any more severe or caused claimant any more disabling pain or lasted for any greater length of time.

The Board concludes that there is no evidence to justify a finding that claimant's condition was materially and permanently worsened by bending over to pick up the lettuce core on July 21, 1978. The symptoms which claimant experienced at work on July 21 were symptoms of his prior back condition which had been aggravated by claimant working on his car earlier in the week. These symptoms are not compensable, therefore, the denial by the Fund on August 31, 1978 should be upheld.

ORDER

The order of the Referee, dated February 20, 1979, is reversed.

The denial by the State Accident Insurance Fund, dated August 31, 1978 and relating to claimant's claim for an alleged industrial injury on July 21, 1978, is approved.

SAIF CLAIM NO. DC 169055 August 15, 1979

JOSEPH SMALL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left arm on January 2, 1969. After the initial treatment, surgical removal of the olecranon bursa was done. Later diagnoses were epicondylitis and ulnar palsy. The claim was first closed on June 4, 1970 with compensation for 15% loss of the left arm. Subsequent awards granted claimant a total of 96° for 50% loss of the left arm.

Claimant is presently complaining of weakness, pain and sensory loss throughout the entire left upper extremity. He wears a plastic brace on his arm most of the time. In both the letter reports from Dr. Dericks and Dr. Adams there was no evidence of any significant treatment and no indication that claimant's condition had worsened since the last award or arrangement of compensation.

The Evaluation Division of the Workers' Compensation Department recommended that the claim for aggravation be denied.

The Board, after thorough consideration of the medical evidence before it, agrees and it concludes that claimant's request for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-7784 · August 15, 1979

GERTRUDE M. WOOD, CLAIMANT
Rask & Hefferin, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant
Cross-request by Employer

Reviewed by Board Members Phillips and McCallister.

Claimant requests review and the employer cross-requests review by the Board of the Referee's order which approved the Determination Order dated September 27, 1978 whereby claimant was awarded 32° for 10% unscheduled low back disability. The claimant contends she is entitled to a greater award. The employer contends that the Referee erred in refusing to admit exhibits tendered by it under cover of its letter dated February 8, 1978.

Claimant, a saleslady 52 years old at the time of the hearing, bruised her left knee and sprained her left wrist on March 1, 1976 when she tripped over a display shelf and fell to the ground. Claimant had been employed in the employer's Portland retail store for five-and-a-half years. She was seen at the emergency room at the Portland Adventist Hospital where it was indicated she would be off two or three days. Claimant returned to work after a lapse of four days and the wrist and knee pain resolved but she became aware of pain in her lower back.

Claimant continued to work until September 15, 1976. On September 8 she had visited her family doctor, Dr. Irvine, seeking relief for her intermittent back pain.

On March 29, 1977 Dr. Irvine reported that he had seen claimant several times since September 8 and that she continued to complain of pain in her low back and in the left buttocks, thigh and leg. He thought, because she appeared to be improving, that she might be able to return to work on October 18, 1976, however, on October 15, 1976 he found she could not work because she could not stand long enough.

In November Dr. Irvine made arrangements for claimant to have a back evaluation at the Callahan Center where she was advised to return in one month and not to return to work. The last time Dr. Irvine examined claimant was on March 1, 1977. At that time she told him that she had been examined by Dr. Case, an orthopedist, the prior week at the request of her employer.

It was Dr. Irvine's impression that claimant had a chronic low back strain and degenerative disc disease at L5-S1 with nerve root irritation on the left. He felt claimant had a permanent partial disability associated with her injury of March 1, 1976 and that she had made very little progress on conservative medical management. He felt that neurosurgical intervention might be necessary in the future. He referred her for job retraining and stated she could not do any type of work which required lifting, stooping, prolonged standing or sitting.

On March 29, 1977 Dr. Irvine advised the employer that he had reviewed the orthopedic consultation report of Dr. Case, dated February 21, 1977, and was in substantial agreement with his report. However, he did have some reservations, e.g., he questioned Dr. Case's conclusion that the obliteration of the lumbosacral disc space was present at the time claimant fell on March 1, 1976. Although such problem may have developed over a period of time there is no documentation of it and even if it had been pre-existing it certainly was aggravated by her injury on March 1, 1976. Dr. Irvine also disagreed with Dr. Case's belief that claimant lacked desire to return to work. Dr. Irvine has known and treated claimant longer than Dr. Case and he felt she was being perfectly honest and realistic in recognizing that with her present discomfort she would be unable to return to her former job. He fully concurred in claimant's assessment of her ability to return to her former employment.

On August 22, 1978 Dr. Wells, an orthopedic physician, did a closing evaluation of claimant's condition. It was his impression that she had a degenerative disc disease associated with degenerative arthrosis of the lumbosacral junction, degenerative disc disease in the lumbar region. He felt the claimant would have to avoid activities which required bending, stooping, pushing, pulling and so forth. She would also have to avoid heavy lifting but as long as she remained within such restrictions she would be able to carry on some sort of remunerative activity. He concluded by saying claimant was medically stationary but not vocationally stationary.

On September 27, 1978 the claim was closed by a Determination Order which awarded claimant compensation for temporary total disability from September 15, 1976, the date claimant ceased working, and until August 22, 1978, the date Dr. Wells found her condition to be medically stationary. The claimant was also awarded 32° for 10% unscheduled low back disability. The claimant appealed this Determination Order.

The employer failed to notify its defense counsel of the hearing and, therefore, was not represented before the Referee on January 24, 1979. However, there was substantial correspondence between the employer's counsel and the Referee subsequent to the hearing and also statements made by the Referee at the hearing which indicate that the hearing was to be held open to allow the employer's counsel to present such evidence as it desired and presumably to allow both counsel closing arguments if so desired.

The employer's counsel was furnished a copy of the transcript and did write a letter of transmittal to the Referee, dated February 8, 1979, which submitted 11 exhibits all of which were objected to by claimant. The Referee refused to receive these exhibits in evidence, and without any further explanation, apparent on the record, he closed the hearing on March 1, 1979 without allowing closing arguments.

The Referee found that, "Under the facts and evidence allowed by claimant this award seems at least fair". He affirmed the Determination Order.

The Board, on de novo review, agrees with the Referee's conclusion that the award granted by the Determination Order was adequate compensation for claimant's industrial injury.

The actions of the Referee in refusing to accept the employer's exhibits and summarily closing the case apparently misled both parties or, at least, the employer. The employer's attorney had stated that he had additional evidence to introduce.

It was not until January 29, 1979, five days after the hearing, that the defense counsel received the complete file from the employer which enabled it to file a response and to proffer an indexed group of documents generated through the course of claims management. At that time the defense counsel stated he would not officially offer the documents until he had received the transcript of the proceedings and had some idea of what documents had already been offered by claimant's attorney. The Board finds that the employer's action in failing to advise its counsel of the hearing in a timely matter so that he might appear in the employer's behalf and present their case was inexcuseable. Nevertheless, the Board assumes that the absence of defense counsel from the hearing was not the basis for the Referee's refusal to accept the exhibits offered in behalf of the employer's case. The Board suggests that when a Referee clearly indicates that the hearing will be held open and does not set any definite date for its closure, that he will not close the hearing without written notice to both parties with adequate time for each to respond thereto.

The Board finds the Referee should have admitted the evidence submitted by the employer. The evidence is material to disposition of the case and the employer was led to believe that the record would be held open for proper introduction of its evidence. The evidence is admitted into the record.

ORDER

The order of the Referee, dated March 8, 1979, is affirmed.

WCB CASE NO. 78-8365 August 17, 1979

JACK F. CERVETTO, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Cliamant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SIAF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which set aside its denial dated September 22, 1978 and remanded the matter to the Fund with instructions to accept claimant's claim for the May and December 1978 episodes of treatment.

The issue is compensability of the claim for aggravation.

The facts are correctly set forth in the Referee's Opinion and Order, a copy of which is attached and, by this reference, is made a part of this order.

The only medical evidence in the record is the testimony of Dr. Won who causally connected the May and December 1978 episodes to the industrial injury of August 1977.

The Referee concluded that claimant had met his burden of proving that he was entitled to benefits on the basis of aggravation, however, claimant has not sustained any time loss from the date of the industrial injury in August 1977 to date, therefore, it must be considered as a non-disabling claim.

The Referee declined to award penalties but because claimant prevailed on a rejected claim he was entitled to have his attorney paid a reasonable fee by the Fund. He awarded a fee of $550.

The Board, on de novo review, agrees with the conclusions reached by the Referee in his order.

ORDER

The order of the Referee, dated March 20, 1979, is affirmed.

WCB CASE NO. 78-7892 August 17, 1979

MARY JOAN CROFT, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
SAIF, Legal Services, Defense Atty.
Order On Motion To Dismiss

On June 29, 1979 the Referee entered his Opinion and Order in the above entitled matter. On July 30, 1979 the Fund requested review of the Referee's order.

The 30th day after the date of the issuance of the Referee's order was July 29, 1979, which was a Sunday, therefore, the request received on the following Monday, July 30, was timely and the claimant's motion to dismiss said request should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-4769 August 17, 1979

KALLIE M. DUGGAN, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which approved the Fund's denial, dated September 10, 1976, of claimant's claim for aggravation and found that claimant was entitled to no award for permanent partial disability. The order further allowed the Fund to set off compensation already paid against any future awards for permanent partial disability.

Claimant, on December 26, 1973, suffered a compensable injury to her right shoulder while lifting a roll of brass. Dr. Edmundson diagnosed a strained right chest; x-rays taken were negative. However, claimant was hospitalized from December 29, 1973 to January 4, 1974. After receiving medical treatment for her physical condition and also being evaluated from a psychological standpoint, claimant's claim was closed by a Determination Order dated July 5, 1974 which granted claimant approximately six months compensation for temporary total disability and 16° for 5% unscheduled right shoulder disability.

Claimant appealed the adequacy of the Determination Order and a hearing was held before Referee McLeod who, by an order dated August 28, 1975, set aside the Determination Order in its entirety and directed payments for temporary total disability be resumed as of June 18, 1974. The Fund requested review and on June 28, 1976, after de novo review, the Board issued its Order on Review reversing the Referee and reinstating the disputed Determination Order. This order was affirmed by the circuit court for Hood River County and also by the Oregon Court of Appeals.

Claimant continued to receive treatment from various doctors. The medical bills involved together with entitlement to compensation for temporary total disability were the issues before the Referee on November 27, 1978. Additionally, claimant requested a hearing on the propriety of the Fund's denial on September 10, 1976 of her claim for aggravation.

The Referee found that the Fund had proven that it had paid all of the medical bills and there was no issue relating to medical treatment or penalties and attorney's fees for delay or resistance of payment. He found that the problem was a "mix-up" between Dr. Cherry and the Fund regarding the possibility of a consultation by Dr. Cherry with another doctor of his choosing.

On the Fund's denial of claimant's claim for aggravation, the Referee found that it was, ". . . apparently based on Dr. Cherry's letter of June 23, 1976 which does not appear in the exhibits. A letter from Dr. Cherry does appear dated July 23, 1976".

He found that the preponderance of the evidence was that all of claimant's problems were psycho-physiological or psychosomatic and that her emotional problems preceeded her industrial injury. The report from the Orthopaedic Consultants had stated that there was no objective evidence of orthopedic or neurological deficit and therefore no disability rating was indicated. The Referee found that this report from the Orthopaedic Consultants was based upon an examination dated August 25, 1976 and mailed August 30, prior to claimant's request for hearing. The Board did not have the benefit of this report when it affirmed the Determination Order dated June 28, 1976 and the Referee found it reasonable to conclude that had it had this medical evidence it would not have reinstated the Determination Order.

Claimant also contended that the Fund terminated payment of compensation for temporary total disability on August 17, 1976 although it did not deny the claim for aggravation until September 10, 1976. The Referee expressed his opinion that claimant had used this minor vehicle, i.e., the industrial injury of December 26, 1973, to gain medical examinations and treatments at the expense of the Fund and long periods of payment of compensation for temporary total disability, which he considered as a windfall, to now complain about 24 days of compensation for temporary total disability.

He found the complaint was de minimis and that claimant had failed to explain why relief on this issue was not requested at either the circuit court or Court of Appeals level. He set aside the Determination Order and approved the denial of claimant's claim for aggravation.

The Board, on de novo review, finds that the Fund's denial of September 10, 1976 relating to claimant's claim for aggravation was properly approved by the Referee. However, the issue of the Determination Order dated July 5, 1974 is res judicata and the Referee had no jurisdiction to set aside an award which has been approved by the Court of Appeals.

Claimant filed a claim for aggravation on July 23, 1976. The carrier paid temporary total disability from July 6 to August 17, 1976 and then ceased payments, but the claim was not denied by the Fund until September 10, 1976. This constitutes, in the Board's opinion, unreasonable delay in the payment of compensation. Therefore, claimant is entitled to "interim compensation" for the period between August 17, 1976 and September 10, 1976 and to an additional award of compensation equal to 15% of the amount due claimant between the aforesaid dates and the Fund should pay claimant's attorney a reasonable attorney's fee.

ORDER

The order of the Referee, dated December 5, 1978, is affirmed only insofar as it approves the State Accident Insurance Fund's denial of September 10, 1976.

Claimant is awarded "interim compensation" from August 17, 1976 to September 10, 1976 and additional compensation equal to 15% of that sum as a penalty for unreasonable delay by the Fund in accepting or denying claimant's claim of aggravation.

Claimant's attorney is awarded as a reasonable attorney's fee the sum of $250 payable by the State Accident Insurance Fund pursuant to the provisions of ORS 656.262(8) and 656.382.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum equal to 25% of the additional compensation for temporary total disability awarded claimant by this order, payable out of said additional compensation as paid, not to exceed $750.

WCB CASE NO. 78-4135 August 17, 1979

GLENETTE K. ELLER, CLAIMANT
Robertson, Hilts & Huycke, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks review by the Board of the Referee's order which directed it to pay claimant 48° for 15% unscheduled upper back and head disability.

The issue is extent of permanent partial disability.

On March 11, 1977 claimant suffered a compensable injury which consisted of a strain of her upper back, while employed by Harry and David. On June 7, 1977 Dr. Weinman, an orthopedic physician, who had been treating claimant upon referral from her family doctor, stated that it was his impression that this was a reactivation of an old chronic cervical strain with localized mild fasciitis in the upper shoulders, bilaterally. He felt claimant could work as of August 2 but she should not do any lifting above her shoulders. Claimant worked for two days but was unable to continue because of severe neck pain and headaches.

Dr. Maukonen, a neurologist, examined claimant on September 30, 1977. Claimant was given conservative care but obtained no relief therefrom and was referred to Dr. Fried, a psychiatrist, who agreed that claimant was a good candidate for the "eclectic" approach which included relaxation therapy, biofeedback and limited use of medication. Claimant completed this course and on March 20, 1978 Dr. Fried stated there was no gross psychopathology.

Dr. Maukonen examined claimant on March 22, 1978 and reported on April 3, 1978 that he had no plans for any further follow-up for claimant and had left her in the hands of Dr. Fried who apparently, in the opinion of Dr. Maukonen, had reached an impasse in attempting to treat her or get her back to work.

Based upon this report, the claim was closed by a Determination Order dated April 20, 1978 which gave claimant compensation for temporary total disability from March 14, 1977 through March 30, 1978, less time worked.

Subsequently, Dr. Weinman indicated in his report of August 3, 1978 that claimant had recovered with no permanent residuals.

On September 22, 1978 claimant was referred to the Orthopaedic Consultants who stated that because of claimant's functional overlay and her poor response to pain they did not believe she would be a good candidate to return to her former job. They felt that her current symptoms were not injury related. They found the total loss of function of the neck and upper back as a result of the injury was nil.

Dr. Maukonen did not agree with either the report of the Orthopaedic Consultants or that of Dr. Weinman but did agree with Dr Fried's opinion that claimant's problems were chronic and stable. He felt she would be left with a mild to moderate pain which would require treatment and that it was related to her March 1977 injury.

The Referee concluded that the weight of the medical evidence established that claimant's upper back and head symptoms were injury-related and were permanent. He accordingly awarded her 48° for 15% of the maximum for the unscheduled disability.

The Board, on de novo review, gives more weight to the opinions expressed by Dr. Weinman and the three physicians at the Orthopaedic Consultants than it does to the opinions of Dr. Maukonen and Dr. Fried. Claimant had been involved in a car accident in 1973 and at that time she was treated by Dr. Weinman. In June 1977 he became her treating physician and, based upon his previous experience with claimant, he made his diagnosis of June 7, 1977. Dr. Weinman continued to treat claimant through March 7, 1978; on that date he found that she was stable insofar as her upper back and shoulder problems were concerned.

Dr. Maukonen, who did not see claimant until September 30, 1977, six months after the alleged injury, did not have much success in treating claimant and Dr. Fried, the psychiatrist who treated claimant with an "eclectic" approach, was unable to discover any evidence of gross psychopathology. The physicians at the Orthopaedic Consultants found no permanent residuals from the episode of March 11, 1977.

The Board concludes that claimant has no permanent disability as a result of the injury of March 11, 1977.

ORDER

The order of the Referee, dated November 8, 1978, is reversed.

The Determination Order, dated April 20, 1978, is reinstated.

SAIF CLAIM NO. WC 452508 August 17, 1979

RONALD M. FITCH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on July 13, 1973 while employed as a faller for Murphy Company. He apparently recovered and his claim was closed on October 24, 1973 with no award for permanent partial disability. Claimant suffered a subsequent back injury on September 17,1973 which was processed as a separate claim. After a laminectomy the claim was closed on April 1, 1974 with an award of compensation equal to 5% unscheduled low back disability.

An incident in 1975 was determined to be an aggravation of claimant's July 1973 injury and another laminectomy was performed. This claim was closed on January 5, 1977 with an additional 10% award; this award was appealed and claimant was granted an additional 15% for a total award as a result of his June 13, 1973 injury of 80° for 25% unscheduled low back disability.

Claimant again aggravated this condition in January 1979 and surgery for disc removal was performed. His recovery was excellent and Dr. Serbu found no major problems on his final examination. Claimant returned to sales work on March 8, 1979.

The Evaluation Division of the Workers' Compensation Department recommended that claimant be compensated only for time loss benefits from January 22, 1979 through March 7, 1979.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 22, 1979 through March 7, 1979, less time worked.

WCB CASE NO. 77-5854 August 17, 1979

ROBERT GRAY, CLAIMANT
Nicholas Zafiratos, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks Board review of the Referee's order which granted claimant an additional 48° for 15% unscheduled psychological disability.

The issue is extent of disability. Claimant contends he is permanently and totally disabled under the provisions of ORS 656.206(1)(a). The Fund contends that the Referee's award of compensation was adequate.

Claimant is a 56-year-old electrician who has an eighth grade education. He has had over 20 years' experience as an electrician and a few years' experience in construction work. On October 4, 1974, while he was lifting a coil of wire, claimant sprained his back. The claim was accepted and claimant received conservative treatment for nearly three years by an Astoria physician. He also was treated by orthopedic and neurologic specialists practicing in Portland. It has been necessary to hospitalize claimant on various occasions for traction.

Claimant has had several prior back injuries. One in 1964 required a laminectomy and fusion L5 to S1. He also has degenerative osteoarthritis in the upper lumbar area and he had two heart attacks after the industrial injury for which he received treatment from Dr. Henningsgaard.

Following his 1974 injury claimant worked at a modified job as an electrician for the defendant-employer until July 1976. He has not worked since that time. Claimant has not received any medical treatment for approximately a year-and-a-half although he still takes medication consisting of Valium and Darvon.

A Determination Order, dated April 5, 1977, awarded claimant 160° for 50% unscheduled mid and low back disability.

The evidence indicates that claimant has had various other industrial injuries to his back which have required a variety of surgical repair. No doctor has stated that claimant cannot return to work although claimant is definitely limited in the type of work that he can do. He cannot engage in any employment that involves much bending or lifting.

The Referee found that claimant was not motivated to return to work nor has he looked for work for nearly a year prior to the hearing. Part of claimant's reluctance to seek employment at the present time is related to his recent heart attacks which he suffered after his industrial injury. The defendant-employer had offered claimant lighter work but claimant did not think that he could do such work. According to a psychiatrist who examined claimant subsequent to the issuance of the Determination Order claimant sees himself as a "disabled person". This psychiatrist, Dr. Frank Russell, believes claimant is chronically depressed and he does not think treatment will materially alleviate such depression. It was his opinion that the depression was connected to claimant's industrial injury and his current inability to work.

Claimant's wife testified that claimant was unable to sleep at night, that he wobbled when he walked and was unable to sit for any length of time and that his lower back and right hip constantly hurt him. He walks occasionally to try to get some relief from his pain but is unable to walk more than about a quarter of a block before he "completely gives out", according to claimant's wife. Claimant has difficulty climbing up and down stairs; he has difficulty lifting things and he has to make very frequent stops when he takes a long trip in his car. Claimant does work at the Elks Lodge as a secretary, however, he only takes minutes at the meeting and his wife does all the typing, filing and so forth. Claimant is not paid for being secretary for the Lodge, however, his wife is paid for her work.

The Referee concluded that claimant was not permanently precluded as a result of his October 4, 1974 industrial injury from regularly performing any work at a gainful and suitable occupation but felt he was entitled to an award for the psychological disability he had sustained as a result of his industrial injury. Therefore, the Referee directed the claimant be paid an additional 48° for unscheduled psychological disability. The Referee did not alter the previous award of 160° for unscheduled mid and low back disability.

The Board, on de novo review, finds that claimant, who has worked as an electrician for many years, was at the time of the injury sitting at about desk height doing some electrical repair work and when he started to jump onto the floor he experienced an electric shock-like pain in his low back, which radiated into his thighs. Claimant was examined by the physicians at the Orthopaedic Consultants who rated his disability as moderately severe. They also found marked functional overlay, stating that there was considerable interference during the examination and this was classified as severe. Dr. Russell stated that he agreed with the diagnoses of the physicians at Orthopaedic Consultants but would add a diagnosis of depressive reaction, moderately severe, chronic.

The Board concludes that although claimant is not permanently and totally disabled, he has suffered a severe disabling injury as a result of his October 4, 1974 injury and it has affected him both from a physiological and psychological standpoint. Therefore, the Board concludes that to adequately compensate claimant for his loss of wage earning capacity resulting from this industrial injury he should be awarded a total of 256° which represents 80% of the maximum allowable for an unscheduled disability. Claimant has already been awarded 50% of the maximum for his back disability and 15% of the maximum for his psychological problems, giving him a total of 65% of the maximum. The Board, therefore, awards claimant an additional 15% of the maximum for his unscheduled disability.

ORDER

The order of the Referee, dated February 14, 1979, is modified.

Claimant is awarded 48° of a maximum of 320° for 15% unscheduled disability, including mid and low back and psychological problems. This award is in addition to all previous awards of compensation granted claimant for his October 4, 1974 industrial injury.

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

Claimant's attorney is awarded as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted claimant by this order, payable out of said increased compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-5409 August 17, 1979

BILL MAVIS, CLAIMANT
Marvin S. Nepom, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests Board review of the Referee's order which directed it to accept claimant's claim and pay compensation, as provided by law, until the claim is closed pursuant to the provisions of ORS 656.268. The order also directed the Fund to pay claimant additional compensation equal to 25% of all of the compensation for time loss hereafter paid to claimant as a penalty for unreasonable and arbitrary resistance to the payment of compensation. The claimant's attorney was awarded $750 as a reasonable attorney's fee.

The issue before the Referee was compensability of claimant's claim, however, the only issues before the Board are the assessment of penalties and the overpayment of time loss benefits to claimant.

Claimant was a 24-year-old carpenter who alleged he suffered a compensable injury to his low back on January 31, 1978 while working in the bathroom of the house which the defendant-employer was remodeling.

On June 6, 1978 the Fund denied the claim, stating that there was insufficient evidence to support a claim for a compensable industrial injury.

The Referee, based upon the testimony of claimant and his wife and other lay testimony, concluded that claimant had been hired as a carpenter on behalf of the employer by the employer's carpenter foreman on or about January 5, 1978. A couple of days prior to January 31, 1978 claimant and the carpenter foreman went to a private home to lay out the remodeling work which claimant was to do. On January 31

claimant went to the job site by himself and while he was in the bathroom pulling on some molding it came loose unexpectedly and caused claimant to fall backwards into the bathtub injuring his low back. Claimant drove to the employer's office, immediately reported the injury to a fellow-employee and the defendant-employer subsequently was advised of the injury by the carpenter foreman.

Claimant was first seen by a chiropractor and later made an appointment, on the advice of the carpenter foreman, to see the company doctor, Dr. James C. Dinneen, an orthopedic physician. Dr. Dinneen, after examining claimant on February 7, 1978, diagnosed a contusion-sprain of the lumbar spine and indicated that the condition requiring treatment was the result of the incident of January 31, 1978 and prevented claimant's return to regular employment.

Approximately two to three weeks before the injury claimant had advised the defendant-employer that he intended to leave Portland for personal reasons. He moved to Lebanon about February 17 and received medical treatment from Dr. Simpson, a chiropractor. He returned to work on May 1, 1978.

The Referee found that the employer was, at all relevant times, in a non-complying status because his accountant had failed to keep coverage with the Fund in force. The Referee also found that the employer had offered to continue to employ claimant at a desk job and he would receive the same rate of pay he was getting while working as a carpenter. Claimant refused this offer because it was necessary for him to leave town; this was a personal problem and not relevant to the issues herein nor did it involve anything of a derogatory nature.

The Referee found that the employer had made several payments to claimant following the injury which totalled approximately $300-$400. These payments were intended as a substitute for workers' compensation benefits.

The Referee found that claimant's claim was compensable, that his injury had arisen out of and in the course of his employment. The payments made to claimant following the injury were made primarily to avoid trouble because of the defendant-employer's non-complying status and the offer of the desk job to the claimant was made for the same reason. The Referee stated this was the only circumstance explaining the Fund's denial of the claim, but he concluded that claimant had sustained the burden of proving that he had sustained a compensable injury. All of the facts surrounding claimant's claim were known by the Fund or could easily have been discovered by it before the issuance of its letter of denial. For that reason the Referee concluded that the denial was arbitrary and unreasonable to the extent that it justified an award of penalties and attorney's fees.

The Fund, on December 19, 1978, stated that even if claimant had sustained a compensable injury, the time loss from work was greater than the injury necessitated and it argued that it was entitled to have this issue litigated at the hearing. The Referee rejected this contention because of a longstanding practice of the Hearings Division of the Workers' Compensation Board.

The Board, on de novo review, agrees with the Referee's conclusion that the claimant's claim was compensable, although this issue was not before the Board on review. It also agrees with the Referee's refusal to allow litigation on the issue of time loss.

However, with respect to the penalties assessed by the Referee, the Board feels that 25% of all of the compensation for temporary total disability hereafter paid to claimant is too broad. Penalties may only be assessed against ". . . amounts then due. . . ." The evidence indicates that claimant is entitled to compensation in the nature of a penalty from the date of his injury, January 31, 1978, to the date the first payment for time loss was made on February 27, 1978 and also from March 6, 1978 when the payment of time loss benefits was stopped, to May 1, 1978 when claimant returned to work.

The Board assumes, inasmuch as the only issues appealed were penalties and overpayment of time loss benefits, that both parties are satisfied with the balance of the Referee's order.

ORDER

The order of the Referee, dated January 12, 1979, is modified.

The State Accident Insurance Fund is ordered to pay to claimant as a penalty for unreasonable and arbitrary resistance to the payment of compensation, additional compensation equal to 25% of the temporary total disability compensation due claimant from January 31, 1978 to February 27, 1978 and from March 6, 1978 to May 1, 1978.

That portion of the Referee's order which directed the Fund to accept claimant's claim and pay compensation, as provided by law, and to pay claimant's attorney a reasonable attorney's fee in the sum of $750 is affirmed.

WCB CASE NO. 77-7631 August 17, 1979
WCB CASE NO. 78-464

ELMER R. PEER, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the order of the Referee which affirmed the denial of claimant's claim against Employee Benefits Insurance; reversed the Fund's denial of claimant's claim for aggravation and remanded the claim to it for acceptance and payment of compensation commencing November 1, 1977 and ordered the Fund to pay claimant's attorney a fee of $850.

Claimant was employed by Cape Arago Lumber Company pulling on the green chain and on May 15, 1976 sustained a compensable injury to his right foot when he twisted his ankle. The Fund was the workers' compensation carrier. The diagnosis of claimant's injury was complete rupture of the lateral collateral ligaments. On May 16 claimant underwent surgery by Dr. Adams to repair the rupture. Claimant was released to light duty work on July 12 and to his regular job on July 19, 1976.

A Determination Order did not grant any permanent partial disability as claimant failed to keep appointments with Dr. Bert and claimant had moved without leaving a forwarding address so the Determination Order gave him time loss only. Claimant did not appeal this Determination Order.

Claimant did return to this employer for a short time but could not tolerate pulling on the greenchain and terminated. He then became a laborer for Peterson Seafood where his foreman was his brother-in-law. EBI was the carrier for this employer.

Claimant contends that on May 5, 1977 he was helping his foreman lift a box of fish weighing 150 pounds and his ankle gave way and he fell to his knees. Claimant did continue working and did not seek medical attention until October.

Dr. Bert's chart notes indicate that claimant was clinically unstable to inversion stress of his ankle. Dr. Bert recommended a Watson-Jones ligament repair surgery. This surgery was performed on December 9, 1977.

On December 1, 1977 the Fund denied claimant's claim of aggravation.

On December 15, 1977 Dr. Bert opined that claimant's injury of May 5, 1977 was an aggravation of his first industrial injury.

On December 29, 1977 EBI denied claimant's claim for a new injury.

By February 1978 Dr. Bert found claimant's condition to be medically stationary with minimal impairment and he recommended retraining.

Claimant's brother-in-law/foreman was deposed and he testified he knew of claimant's problems with his ankle and that the ankle swelled upon him from his injury at the mill. The injury claimant alleges on May 5, 1977 occurred when claimant jumped over a pallet and his foot caught on the edge and claimant tripped and fell. He further testified he asked claimant if he wanted to fill out an injury report and claimant said no, "it was not big deal".

The Referee found that claimant's May 5, 1977 incident was an aggravation from his original industrial injury and remanded the claim to the Fund for acceptance and the payment of compensation commencing on November 1, 1977. He affirmed the denial of EBI.

The Board, on de novo review, affirms the conclusions reached by the Referee.

ORDER

The order of the Referee, dated February 8, 1979, is hereby affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee at Board level the sum of $250, payable by the State Accident Insurance Fund.

WCB CASE NO. 78-380 August 17, 1979

ROBERT RAVETTO, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
Chandler, Walberg & Whitty, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the denial by the employer of claimant's claim for a new injury occurring on May 16, 1978.

The issue is whether claimant, while he was stamping wood on a skinner saw on May 16, 1978, sustained an aggravation of a compensable injury which he had suffered to his right knee on May 4, 1976 or whether he had suffered a new injury to his low back.

The 1976 injury had been accepted and claimant had been awarded 22.5° for 15% loss of the right leg by a Determination Order dated January 11, 1978.

When claimant filed his claim on May 22, 1978 the employer accepted it as an aggravation of the 1976 injury but denied, de facto, claimant's claim for a new injury to his back.

Claimant contends that if he prevails on the de facto denial of the new injury then that injury must be remanded to the employer to be accepted and for the payment of compensation as provided by law until closed pursuant to ORS 656.268. If the May 16, 1978 incident is found to be an aggravation of the 1976 injury, claimant contends that at the present time he is not medically stationary and therefore the determination of the extent of disability of that injury, which was to his right knee, cannot be determined.

On May 16, 1978 claimant noticed pain in his thigh as well as in his right knee. He saw Dr. Anthony J. Smith several days later and related this history to him. On May 19, 1978 he developed low back pain together with right knee

pain. The following day he reported to Dr. Smith an episode of the instability of his knee causing him to stagger, resulting in claimant pulling a muscle in his low back. This, in turn, caused the back pain of which he had previously been complaining to become quite severe and kept him from working.

Eventually, claimant had surgery for a protruding disc at the L4-5 level which verified the existence of a back injury. It was Dr. Smith's opinion that the back injury occurred because of the right knee condition primarily through the events which occurred on a Saturday when claimant was not working and was caused by the knee buckling under claimant's weight. There was no report of any traumatic event having occurred on either May 16 or May 19 which would indicate a new injury, according to the Referee. Claimant was performing his regular work and developed the low back pain as a result of his right knee condition.

The Referee found that the closure by the Third Determination Order dated July 26, 1978 was erroneous. At that time claimant was not medically stationary and, in fact, he had not had the surgery. The Referee was unable to determine why the Determination Order was designated as "Third" when there was no record of a Second Determination Order. He found the case was voluntarily reopened again by the employer subsequent to the Third Determination Order and remained in an open status as a re-opened aggravation claim, therefore, he could not make a determination on the extent of disability at the present time. With respect to the claim for a new injury, he affirmed the employer's denial.

The Board, on de novo review, finds that claimant sustained a new injury to his back on May 16, 1978 and that the de facto denial on the part of the employer of this claim was improper and the claim should be remanded to the employer for acceptance and for the payment of compensation, as provided by law, commencing on May 16, 1978 until the claim is closed pursuant to ORS 656.268.

The Board also finds that the Third Determination Order dated July 26, 1978 was not erroneous. Its purpose was to grant claimant additional compensation for temporary total disability and it related strictly to the May 4, 1976 leg injury. The surgery to which the Referee referred in his Opinion and Order was for a back problem, i.e., excision of a protruding disc at the L4-5 level. Insofar as claimant's leg was concerned he was medically stationary at the time of the Third Determination Order on July 26, 1978. That fact that it was entitled "Third" rather than "Second" is not material; the record reveals only two Determination Orders had been issued with regard to the May 4, 1976 injury.

The Referee had found no report of a traumatic event having occurred on either May 16 or May 19 which would indicate a new injury: The Board finds that even though the condition of the right knee might have contributed to a certain extent to the back problem, nevertheless, there is sufficient evidence that the work activity on May 16, 1978 was a material contributing cause of the injury. There is no necessity for it to have been the sole cause.

Having found that the Determination Order of July 26, 1978 was proper closure, the Board concludes that claimant has a right to have the adequacy of the award made by that Determination Order determined. Therefore, that issue should be remanded to the Referee to make such a determination.

Because of its actions, the employer is also assessed a penalty in the sum of 25% of the compensation due claimant from May 16, 1978, the date of the injury to claimant's back, and until November 3, 1978, the date the attorney for the employer informed claimant's attorney that the employer was treating the alleged accident on May 16, 1978 as a re-injury rather than a new injury. This notification is treated by the Board as a de facto denial of claimant's claim for a new injury. Furthermore, claimant's attorney is entitled to a reasonable attorney's fee for the employer's failure to timely accept or deny the claim for the new injury of May 16, 1978.

ORDER

The order of the Referee, dated March 6, 1979, is reversed.

The employer's de facto denial of claimant's claim for a new injury on May 16, 1978 is improper and the claim for said industrial injury is hereby remanded to the employer, a self-insurer, to be accepted and for the payment of compensation, as provided by law, commencing on May 16, 1978 and until that claim is closed pursuant to ORS 656.268.

The employer is directed to pay claimant additional compensation equal to 25% of the compensation due claimant from May 16, 1978 through November 3, 1978, the date of the de facto denial, for its unreasonable delay in accepting or denying claimant's claim for the May 16, 1978 injury.

Claimant's attorney is awarded as a reasonable attorney's fee for his services both before the Referee and at Board review in prevailing on a rejected claim the sum of $1,200, payable by the employer.

The issues raised by claimant concerning the adequacy of the award made by the Third Determination Order dated July 26, 1978 which related to claimant's industrial injury to his right leg sustained on May 4, 1976 is hereby remanded to Referee Raymond Danner for determination.

WCB CASE NO. 76-3081 August 17, 1979

JEANNINE M. SANDERS, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly & Barnett, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

The claimant seeks review by the Board of the Referee's order which affirmed the Determination Order, dated September 16, 1975, and denied claimant's request for additional compensation for permanent partial disability and additional benefits on the basis of aggravation.

Initially, this claim was an appeal from a Determination Order which had awarded claimant 37.5° for 25% loss of her right leg. The issues at the first hearing were extent of disability and premature closure of the claim, however, at the hearing claimant presented for the first time two additional issues. One was a claim for aggravation of a back condition, the other was a claim for aggravation involving headaches. The Referee found it impossible to proceed under these circumstances and accordingly ordered that the proceedings be abated until the attorneys or both parties notified the Referee that they were ready to proceed on all issues and, specifically, directed claimant to make claims for aggravation upon the Fund for the aforesaid two conditions and allowed the Fund the statutory 60 days within which to accept or deny these claims. This order was entered on May 10, 1978. On November 28, 1978 the Referee was advised that the issues were to be:

"1. Extent of compensable consequences of accepted claim.
2. Need for current TTD, medical care and treatment.
3. Aggravation.
4. De facto denial of aggravation and consequences claims.
5. Penalties and fees including same for unreasonable resistance and delay and failure to pay medical care costs.
6. In the alternative, extent and character of disability."

On December 11, 1978 the hearing was held.

Claimant is a 38-year-old motel maid who sustained a compensable injury on May 11, 1972 when she slipped while climbing some stairs at work. The injuries were diagnosed as contusions and abrasions of her right knee. Dr. Zimmerman diagnosed acute synovitis of the right knee due to trauma.

Claimant had injured her right knee approximately a year before when she was involved in an automobile accident.

Initially, claimant's claim for the industrial injury was closed by a Determination Order, dated November 14, 1972, which granted claimant compensation only for temporary total disability.

On April 10, 1974 Dr. Cohen surgically removed a fragment of the right patella. Later claimant was treated by Dr. Crosson of Denver, Colorado who, in March 1975, performed a right patellectomy. Claimant's claim was closed by a Determination Order, dated December 16, 1975, whereby claimant was granted 37.5° for 25% loss of her right leg.

Claimant testified that on several occasions she fell because her right knee buckled under her, and this would injure her low back and her head resulting in persistent low back pain and headaches. The last fall, which was February 1977, occurred on a stairway. Claimant testified her back first commenced hurting in 1977 when her leg buckled while she was getting out of a car although none of the reports mentioned such an incident.

Claimant was seen by Dr. Sajid, a clinical and diagnostic neurologist, to whom she related a history of falling down the stairs and being unconscious for a few minutes thereafter.

Claimant contends that the situation regarding her back is precipitated, in part, by her unusual gait. Dr. Clayton reported that claimant walked with a limp and tended to hyperextend her knee. Dr. Cohen, who had performed surgery on claimant, reported claimant limped considerably and walked "well over her right hip". However, Dr. Sajid's report of April 5, 1978 stated that claimant's gait was normal.

Claimant was also seen by Dr. Reilly, a neurosurgeon practicing in Denver, Colorado. He treated claimant initially for headaches in November 1975 and the following month he treated her for low back pain. Dr. Reilly concluded that her head pains were muscular contraction headaches or tension headaches and a myelogram performed in January 1976 demonstrated a small, non-operative degenerative disc disease at T11-12. Dr. Reilly expressed no opinion concerning claimant's knee symptomatology but did say that an abnormal gait could cause chronic back strain but would not produce disc herniation.

The Referee found that claimant was not credible, that the preponderance of the medical evidence indicated that claimant was medically stationary at the time her claim was closed and that her condition had not worsened since that closure. He relied specifically on Dr. Cohen's report dated June 5, 1978 which stated in part,

"Concerning the patient's knee, I believe she has a disability due to the absence of the patella and weakness of the quadriceps equal to 25% loss function of the knee.

" . . . I do not believe any aggravation has occurred in the lower back or the knee, as far as I can determine, in the last year, since claim closure."

The Board, on de novo review, finds that pursuant to the Interim Order entered by Referee George Rode on May 10, 1978 claimant, by and through her attorney, made a claim for aggravation upon the Fund and, in writing, specified what medical reports, logs and medical bills were in the Fund's possession that supported the claims. This Interim Order specifically allowed the Fund 60 days within which to either accept or deny the aforesaid claims. The first claim was filed on May 11, 1978 but no response was made by the Fund. Demand again was made upon it on September 28, 1978, requesting that compensation for temporary total disability be paid along with penalties because of unreasonable delay in responding to the claim for aggravation.

Between May 11 and September 28 claimant requested the Fund to pay various medical bills. More requests were made in October and November of 1978. Finally on November 28, 1978 claimant's attorney wrote to Referee Rode and set forth the issues previously been described in this order. At that time the only exhibits which were to be offered in behalf of claimant's claims which had not been submitted to the Fund were Dr. Reilly's report of November 30, 1978 and Dr. Clayton's report of August 25, 1978. At no time prior to the hearing before the Referee did the Fund respond in any way to any of the foregoing claims, demands or reports.

The Board agrees with the Referee's conclusions that the claimant was medically stationary at the time of her claim closure on December 16, 1975 and that claimant had failed to prove that there had been any worsening of her condition since that closure; however, despite the directives contained in the Interim Order the Fund did nothing. In the Board's opinion, this constitutes a de facto denial and entitles claimant to receive "interim compensation" from May 10, 1978, the date of the Interim Order, to December 11, 1978, the date of the hearing before Referee Fink. Claimant is also entitled to additional compensation as a penalty for the Fund's failure to accept or deny the claims for aggravation within 60 days after they had knowledge thereof.

The Board also finds that the Fund, pursuant to the provisions of ORS 656.245, is responsible for the payment of all medical bills incurred by claimant which related to her industrial injury. The evidence indicates that the Fund has failed to pay these bills although they have been submitted to it by claimant. Therefore, the Fund shall pay such medical bills and in addition thereto shall pay a penalty equal to 15% out of the medical bills which relate to claimant's industrial injury that remain unpaid by it. Because of the Fund's unreasonable actions, it shall pay to claimant's attorney a sum of $750 pursuant to ORS 656.262(8) and 656.382.

The Board notes that the Referee states in his opinion that "reviewing the evidence in this case is similar to wending one's way through a maze". It is inexcuseable for any attorney to offer exhibits which are not legible and are not in proper chronological order and it is the obligation of the Referee to refuse to accept any exhibit which is not legible. The Referee also should make certain that there are no duplications of exhibits in the record. Some of the exhibits offered and accepted in this case are so illegible that their value is no greater than a blank sheet of paper.

ORDER

The order of the Referee, dated January 12, 1979, is modified.

The Determination Order dated December 16, 1975 is affirmed and the de facto denial by the Fund of claimant's claims of aggravation also is affirmed.

Claimant is awarded "interim compensation" from May 10, 1978 to December 11, 1978 and additional compensation equal to 15% of the aforesaid "interim compensation", as a penalty for the Fund's unreasonable delay in denying her claims for aggravation.

The Fund is directed, pursuant to ORS 656.245, to pay all medical bills which relate to claimant's industrial injury and which have been presented to it and, as a penalty for its unreasonable delay in paying said bills, to pay an additional amount equal to 15% of the total amount of said medical bills.

Claimant's attorney, pursuant to the provisions of ORS 656.262(8) and 656.382, is awarded a reasonable attorney's fee of $750 payable by the State Accident Insurance Fund.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $300 payable by the State Accident Insurance Fund.

WCB CASE NO. 78-6069 August 17, 1979

FLORENCE SLATER, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which approved the denial by the Fund of claimant's claim for medical services pursuant to ORS 656.245.

The sole issue is compensability of a claim for medical care and treatment furnished under ORS 656.245. Penalties and attorney's fees are also requested based upon alleged unreasonable resistance to the payment of said medical services which, at the time of the claim, were considered to be compensation.

Claimant was a 56-year-old waitress working in a restaurant who injured her neck, back and right hip on September 10, 1975 when she slipped and fell. The claim was accepted and closed by a Determination Order, dated April 15, 1977, which awarded claimant 16° for 5% unscheduled disability and also compensation for time loss from the date of the injury through January 19, 1976, less time worked.

Claimant was treated by Dr. John W. Whitmire, a chiropractor. The treatments commenced a few days after her injury and have continued throughout the claim processing. In December 1975 Dr. Mayhall, an orthopedic surgeon, agreed that the chiropractic therapy might be of benefit to claimant. In August 1976, after he had seen claimant, he stated claimant would reach a stationary point, but might require intermittent treatment in the future for flare-ups of degenerative arthritic symptoms. He said that whether or not claimant had chiropractic treatment was claimant's decision to make.

Dr. Whitmire, on March 3, 1977, reported that claimant was medically stationary but that she should continue with six more months of care to avoid increased pain and problems. After this report was received the claim was closed as aforesaid.

Dr. Whitmire continued to treat claimant. On July 18, 1978 the Fund denied responsibility for chiropractic treatments after June 8, 1978. It contended that claimant's continued problems were due to her pre-existing degenerative arthritis and misalignment of her vertebrae and were not due to her industrial injury.

After the claim was denied claimant continued her treatment with Dr. Whitmire until August 24, 1978 when she ceased seeing because she stated she was no longer able to afford to pay for the treatment herself.

Claimant testified that every time she went to the chiropractor she obtained temporary relief and felt that she needed to continue to have additional treatments every two to three weeks. Claimant was working at the time of the hearing although she had not seen Dr. Whitmire since August.

On September 18, 1978 Dr. Mayhall examined claimant at the request of the Fund. X-rays of claimant's neck revealed degenerative changes of mild to moderate nature at C6-7. Dr. Mayhall stated that claimant may have suffered a lumbosacral strain; that she claims to have had no problems with her back prior to her fall, however, it is known that she has some mild degenerative changes which were probably present prior to that fall.

It was Dr. Mayhall's impression that claimant may have suffered a lumbar strain and that she may have "off and on" pain for this but it did not appear to be giving her serious consequences at the time of his examination. The neurological status remained normal and the range of motion remained good and her ability to work has remained although claimant claimed that this was due only to the chiropractic therapies which she receives. Claimant described these therapies as not being manipulations, but consisting of the use of some type of machine which clicks on her back.

Dr. Mayhall also found that claimant had greater trochanteric bursitis and he suggested that some anti-inflammatory medications might relieve these problems. On January 16, 1979 Dr. Mayhall stated that it was his opinion that the therapy she had received had not been administered in a logical manner. He stated that claimant has had an inflammatory reaction. She has not taken any anti-inflammatory medication and also if she has had a lumbosacral strain, then the muscle strengthening, anti-inflammatory medications and the heat should have been administered. It was his impression that, as of February 18, both of claimant's conditions were stationary and required no further therapy. He recommended that claimant seeks orthopedic medical care if in the future her conditions would "flare up".

The Referee found that ORS 656.245 was broad enough to include palliative treatment, including chiropractic treatment after a determination of permanent disability. He concluded, however, that claimant had the burden of proving that the nature of the injury or the process of the recovery required the treatment received. He was persuaded, particularly by Dr. Mayhall's opinions, that the burden had not been met by claimant and he therefore approved the denial of her claim for medical care and treatment.

The majority of the Board, on de novo review, agrees with the conclusion reached by the Referee. It would note in addition that OAR 436-69-320 which states that performance of medical services which are or may be unnecessary are prohibited and that the Medical Director, when advised by an insurer of such alleged conduct, may consult with the appropriate peer review committee and may, in accordance with 436-69-510, recommend to the Director nonpayment or recovery of payments already made for services found unnecessary is permissive in nature.

In the instant case, the Fund has not contended that the medical services were unnecessary, nor has it requested the Medical Director to consult with the appropriate peer review committee to determine whether or not the treatment afforded claimant by Dr. Whitmire was proper. The Administrative Rule taken by itself does not supplant the authority of the Board to deal with the propriety of treatment or the carrier's refusal to provide it whether proper or improper.

In this case, the Board, based upon the evidence before it, concludes that the chiropractic treatment which had been afforded claimant by Dr. Whitmire may have been of some help to her, however, claimant has failed to sustain her burden of proving that after June 8, 1978 such treatments were necessary and were directly related to her industrial injury. The medical evidence, basically Dr. Mayhall's opinions, refute claimant's contention that they were.

The majority of the Board concludes that the Fund's denial of claimant's claim for medical services was proper.

ORDER

The order of the Referee, dated April 3, 1979, is approved.

Board Member Phillips dissents as follows:

This reviewer respectfully dissents from the majority opinion of the Board.

At the time the Fund stopped making payment of the medical bills and at the time the Fund issued the denial it had no medical reports to support its action. The medical reports the Fund relies upon to support its denial were issued after the denial and at the request of the Fund and were contrary to the latest medical report of the same doctor.

It is this reviewer's opinion that a carrier must have a medical report supporting its action when denying continued treatment of an accepted claim. The procedure outlined in OAR 69-320 was designed specifically for that purpose.

I would reverse the Referee and disapprove the denial of July 18, 1978 and would assess penalties and attorney's fees for unreasonable resistance to the payment of medical bills.

WCB CASE NO. 78-7514 August 17, 1979

ALBERT STUART, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Gearin, Landis & Aebi, Employer's Attys.
Don G. Swink, Defense Atty.
Order

On July 19, 1979 the Board entered its Order on Review in the above entitled matter which affirmed and adopted as its own the Opinion and Order of the Referee dated February 13, 1979 which had directed the carrier, St. Paul Insurance, to accept claimant's claim and provide payments or compensation, as provided by law.

On August 1, 1979 claimant's attorney filed a motion with the Board for an order authorizing payment of attorney's fees in connection with the representation of claimant in the above entitled matter.

ORS 656.382(2) provides that if the request for review is initiated by the carrier and the Board finds that the carrier should not prevail, the carrier shall be required to pay claimant's attorney's fee. In this case the claimant's attorney filed no brief and the Board concludes that, therefore, he is not entitled to be awarded an attorney's fee for his representation of claimant at the Board review level. Bentley v. SAIF, 38 Or App 473,481.

WCB CASE NO. 78-7579 August 17, 1979

CLIFFORD WILLIAMS, CLAIMANT
D. Keith Swanson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the order of the Referee which awarded claimant compensation for permanent total disability effective the date of his order, February 16, 1979.

Claimant has been a plumber most of his adult working life but does not have his journeyman's license. On March 27, 1972 claimant was so employed for R & M Plumbing and was pulling on a pipe and injured his low back.

The initial diagnosis by Dr. White was acute lumbar strain and functional overlay. Claimant was hospitalized for traction and his condition improved. Claimant had continued complaints of back pain with his legs giving way.

On July 7, 1972 claimant underwent a myelogram which revealed degenerative disc disease at L5-S1 but Dr. White was reluctant to operate due to claimant's obesity.

On October 30, 1972 claimant was hospitalized and underwent a laminectomy. By December 19, 1972 Dr. White had released claimant to his regular occupation but the doctor was skeptical about claimant's motivation to return to work. The doctor felt claimant should avoid lifting and his condition was medically stationary.

On January 9, 1973 Dr. Mason examined claimant at the Disability Prevention Center. The diagnosis was residual muscle tightness in the low back and legs with some abdominal weakness but no emotional overlay. A psychological evaluation revealed claimant had a 6th grade education and his I.Q. was dull-normal. They considered claimant functionally illiterate.

The impairment of claimant's low back condition was rated as mild.

Claimant did return to work in early 1973.

A Determination Order of February 28, 1973 granted claimant 48° for 15% unscheduled disability.

Claimant quit his employment in December 1976, he testified, due to back pain. Claimant has not worked since.

On October 31, 1977 Dr. Crothers examined claimant and opined that his current back problems were related to degenerative disc disease and not to the industrial injury. This degenerative disc disease was rated as moderately severe.

On December 12, 1977 claimant was seen by the Orthopaedic Consultants who found severe functional overlay and drug dependency. Claimant's condition was not stationary and he needed to be weaned from drugs. The physicians felt that claimant's back condition was related to the 1972 injury and he was in need of further medical care. They stated claimant's psychological problems interfered but were not related to the injury.

Claimant requested a hearing on a claim for aggravation; a hearing was held and by an Opinion and Order of March 23, 1978, Referee Seifert remanded the claim to the carrier for acceptance.

On May 30, 1978 claimant was enrolled at the Callahan Center. The final diagnosis was chronic strain of the lumbar muscles and ligaments superimposed on severe degenerative disc disease, cardiovascular disease, obesity and moderate severe psychopathology. The prognosis was poor for return to gainful employment. Claimant's condition was medically stationary but not vocationally. They felt claimant had the capacity for sedentary work only with limitations of no lifting over 10 pounds, no repeated lifting, bending, twisting or squatting. A job change was mandatory.

On September 14, 1978 a Second Determination Order granted claimant an additional award of 10% unscheduled disability for a total award to date of 25%.

A service coordinator contacted claimant and was told that he wanted to pursue his own employment plan and would not pursue any other line of work so his file was closed.

In December 1977 claimant came under the care of Dr. Boots, an osteopath. On February 2, 1978 Dr. Boots reported that claimant was an orthopedic cripple due to the accident herin and has been unable to work since December 1976. He felt claimant could not be gainfully employed and was permanently and totally disabled.

Claimant testified that he has constant low back pain down into his legs. Claimant has made no conscientious effort to seek employment.

The Referee found that motivation was not necessary to establish a prima facie case of odd-lot status, if the medical evidence, considered with other factors, supported claimant's inability to work. He felt claimant had met his burden and granted him permanent total disability.

The Board, on de novo review, finds that claimant has no motivation to return to work and turned down the services of vocational rehabilitation. The Board further finds that the medical evidence does not support a finding of permanent total disability.

All of the physicians who have examined claimant felt he could return to gainful employment and only Dr. Boots felt otherwise.

Since the medical evidence does not support a finding that claimant is totally incapacitated then he must make a showing that he is willing to seek regular and gainful employment and that he has made a reasonable effort to obtain such employment. Claimant has failed to do this.

The Board concludes, based on claimant's age, his education, his lack of skills, his work background and the fact that claimant is precluded from his regular occupation, that claimant has lost a significant amount of wage earning capacity. Claimant is, therefore, awarded 75% unscheduled disability.

ORDER

The order of the Referee, dated February 16, 1979, is hereby modified.

Claimant is hereby granted an award of 240° for 75% unscheduled disability. This award is in lieu of all previous awards including that granted by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 78-38 August 17, 1979

ELEANOR J. WILLIAMS, CLAIMANT
Pozzi, Wilson, et.al., Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-request by the SAIF

Reviewed by Board Members Wilson and McCallister.

Claimant and the Fund seek Board review of the order of the Referee which granted claimant 16° for 5% unscheduled disability.

Claimant is 38 years of age and was employed as a fish filleter and around April 28, 1976 she gradually developed a condition where her left thumbnail and the adjoining finger nail started to turn soft and white and the nail eventually fell off. Over a period of time claimant lost three nails.

On May 10, 1976 claimant was examined by Dr. Neikes who felt claimant had lamination and a loosening of the nail with results of either secondary to fungus or bacterial infection as the nail loosens. He recommended a job change. He stated that claimant's problem was recurrent and would continue as long as she worked as a fish filleter.

On June 11, 1976 claimant was released to return to work.

On July 28, 1976 a Determination Order granted claimant compensation for temporary total disability only.

Under the auspices of vocational rehabilitation claimant went to school to learn selling. She completed the school but did not find employment and did not particularly like selling. A Second Determination Order dated July 19, 1977 granted claimant further time loss only.

Claimant is presently back to work with this employer as a crab shaker and so far has had no recurrence of her nail problems. When she quit fish filleting her condition cleared up completely.

The Referee found that claimant's bodily processes had developed a systemic condition which places her claim into the unscheduled area. He felt she had sustained a 5% loss of her wage earning capacity as she could no longer be a fish filleter.

The Board, on de novo review, finds there is no medical evidence in the record to support the Referee's finding that claimant's condition is systemic in nature. The Board further finds there is no medical evidence that claimant has any loss of function of her left thumb.

Therefore, the Board concludes that the order of the Referee must be reversed.

ORDER

The order of the Referee, dated January 31, 1979, is reversed.

The Determination Order, dated July 19, 1977, is affirmed.

CLAIM NO. CP 635-7551-6-11-M August 17, 197

MYRTLE YORK, CLAIMANT
Velure & Heysell, Defense Attys.
Own Motion Determination

Claimant sustained a compensable injury on October 2, 1968 while working for Parkview Nursing Home. She felt immediate pain in her chest area and was treated conservatively by Dr. Russell. A subsequent scalenectomy was done and the claim was first closed on September 4, 1970 with an award of compensation equal to 19° for partial loss of the right arm and temporary total disability compensation from October 2, 1968 through August 8, 1970, less time worked.

On December 1, 1970 claimant had a right first rib resection done and she requested that her claim be reopened. This was originally denied and claimant requested a hearing. On June 29, 1971 a Stipulated Order granted her an additional 10° for loss of the right arm.

In 1972 claimant was enrolled in a vocational rehabilitation program learning to become a beautician/manicurist. She was able to receive additional training to become a cosmotology instructor and she now has her license to do this.

Claimant again requested reopening and, on July 31, 1973, a cervical laminectomy was performed. On May 24, 1974 a Stipulated Order dismissed claimant's request for hearing after a settlement was reached.

Claimant subsequently requested the Board to exercise its own motion jurisdiction and reopen her claim. It did so by an order dated January 21, 1977. Claimant underwent surgeries in August 1977 and January 1978. She was seen by Dr. Dunn who indicated that claimant could return to part-time work in September 1978. Claimant attempted to do so but experienced pain in her back and neck caused, she felt, by walking on cement floors. Dr. Dunn recommended claimant see a podiatrist and said her claim should be reopened for possible vocational counseling. Claimant returned to work on January 16, 1979 and did fairly well with the aid of a transcutaneous stimulator. Dr. Dunn felt her claim could be closed as of that date.

The carrier requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department found that claimant had been previously granted compensation totaling 29° for 15% loss of the right arm. It felt that claimant's disability was in the unscheduled area and she should be granted an award equal to 48° for 15% unscheduled shoulders, back and neck disability in lieu of the earlier awards. Time loss benefits should also be paid from August 2, 1977 through January 15, 1979, less time worked.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 2, 1977 through January 15, 1979, less time worked, and compensation equal to 48° for 15% unscheduled shoulders, back and neck disability. This award for unscheduled disability is in lieu of the previous awards claimant has received for loss of her right arm.

WCB CASE NO. 78-482 August 22, 1979
WCB CASE NO. 76-422

ROGER J. ANDREWS, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly & Barnett, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which affirmed the Third Determination Order dated July 21, 1975 (WCB Case No. 76-422) and the Determination Order dated October 11, 1978 (WCB Case No. 78-482).

The two cases identified above were tried on a consolidated basis.

Case No. 76-422 relates to an injury sustained by claimant on or about October 2, 1969. At the time of the 1969 injury claimant was 25 years old and working as a powder monkey. He slipped and fell while carrying a 50-pound box of dynamite. In June 1970 back surgery was performed at the L4-5 level and the claim was closed by a Determination Order, dated March 12, 1971, which gave claimant 64° for 20% unscheduled low back disability and 14° for 10% right foot disability.

In July claimant filed a claim for re-injury to his low back and his claim was reopened as an aggravation claim. Additional surgery was done at the L4-5 level and L5-S1 levels and the claim was again closed by the Second Determination Order awarding claimant an additional 48° for 15% unscheduled disability.

Pseudoarthrosis developed at both fusion sites and the claim was reopened for the performance of a refusion which was done on June 6, 1974 and the claim was again closed by the Third Determination Order of July 21, 1975 whereby claimant received an additional 80° for 25% unscheduled disability. This gave claimant a total of 192° for 60% unscheduled disability and 14° for 10% right leg disability.

Case No. 78-482 relates to an injury sustained on March 16, 1977 whereby the claimant was awarded compensation for temporary total disability only both by the First Determination Order dated August 25, 1977 and the Second Determination Order dated October 11, 1978.

Claimant contends as a result of a combination of these two industrial injuries he is now permanently and totally disabled. The primary issue before the Board on review is extent of permanent disability; additional issues are the assessment of penalties and awarding of attorney's fees, based on the Fund's unreasonable resistance to the payment of compensation.

Prior to the first injury claimant worked for two-and-a-half years as an apprentice butcher and for two years as an apprentice machinist. Apparently both of these apprenticeship programs were interrupted by some type of eruption on claimant's hands. In 1971 claimant had been found eligible for vocational rehabilitation and was placed in an on-the-job training program as a Volkswagen mechanic. Claimant voluntarily terminated the program after two weeks. Claimant was then authorized to enroll in the community college where he obtained his GED.

In August 1972 claimant was interested in becoming a machine operator and started a course at Technical Training Service. Later he switched to the welding program which he completed in March 1973. It is reported that claimant has been certified as a welder. Although he was referred to many potential employers and although the jobs were prescreened for claimant's physical limitations, claimant declined employment in the field for which he had been trained. Claimant decided to go into the antique business with his father-in-law and also commenced a business recyclying coveralls.

In March 1976 claimant was again found eligible for vocational rehabilitation in an approved three-term program which would train him as an automobile parts handler at Clackamas County College. Claimant finished the course and commenced working for Wallace Buick where he was reinjured in May 1977. In May 1978 claimant again was approved for an on-the-job training as a taxidermist but he terminated the program two months after it started.

The Referee found that claimant was alleged to have sustained substantial psychological damage as a result of his compensable injuries but he found there was indication that claimant's psychological dysfunction preceeded his 1969 industrial injury. As stated earlier, the two apprenticeship programs claimant entered were aborted because of a condition claimant had which caused his hands to break out. Both claimant and his psychologists were aware of this problem which apparently was a psychophysiological reaction rather than a manifestation of a disease process.

The Referee found that the evidence conveyed a strong impression that claimant's motivation could have been better. Prior to his first industrial injury he had changed jobs frequently and terminated two apprenticeship programs. After the first injury he had been authorized for training as a Volkswagen mechanic, for a GED, as a machine operator, a welder, a parts man, and a taxidermist. From that variety of opportunities claimant managed to complete the GED, the welding and the parts programs. The evidence indicates that although claimant had apparently been successful in the antique business with his father-in-law and in recycling coveralls he did not stay too long in either of these businesses.

The Referee concluded that claimant had failed to meet the minimum statutory requirements of ORS 656.206(3) and therefore found he was not permanently and totally disabled as a result of his October 2, 1969 injury nor as a result of his March 16, 1977 injury nor was he permanently and totally disabled as a result of the combined effects of the two injuries.

The Referee concluded that claimant had been adequately compensated for the 1969 injury by the awards which totalled 192° representing 60% unscheduled back disability and 14° for 10% right foot disability. The March 16, 1977 injury did not result in any permanent disability in the opinion of the Referee and, therefore, he affirmed the Third Determination Order, dated July 21, 1975 (WCB Case No. 76-422) and the Second Determination Order of October 11, 1978 (WCB Case No. 78-482).

With respect to penalties and attorney's fees, the Referee found that the evidence did not support the assessment of penalties or the award of attorney's fee. There was no evidence of any delay in accepting the claim for claimant's treatment at Northwest Pain Center, there was no delay in refusing to communicate with claimant's attorney regarding the status of the case and there was no unreasonable delay or refusal on the part of the carrier to process the claim.

The Board, on de novo review, finds that from a physical standpoint claimant has been adequately compensated; however, there is strong evidence that claimant's psychological problems have additionally added to his inability to perform the types of employment in which he has had prior experience and was able to do before his industrial injuries of 1969 and 1977.

Dr. Vizzard, in his report of February 20, 1979 which was based upon a review of objective tests and four psychological evaluations done between 1970 and the date of his report, concluded that:

> "It is clear that this man [claimant] has progressed from an individual who was functioning near approximately the normal range emotionally to an individual who is now highly depressed and anxious, somewhat angry and paranoid, withdrawing further and further from interacting with people, and verging on psychotic personality decompensation due to repeated threats to his ego defenses."

Dr. Vizzard related claimant's current emotional difficulties to the decompensation process beginning with his 1969 injury. His prognosis for restoration and rehabilitation was poor.

The evidence indicates that claimant was barely literate, while he was being evaluated for the mechanic training program it was noted that he had good aptitudes but was experiencing neurotic depression with some anxiety and probable conversion symptoms. It was anticipated that psychological factors would be something of a problem to claimant in the course of any rehabilitation and claimant was classified as having a moderate psychopathology attributable to his industrial injury.

The Board concludes that claimant is entitled to an additional award equal to 64° which is 20% of the maximum for unscheduled disability to compensate him for his psychological problems. This award will give claimant a total of 256° which represents 80% of the maximum allowable by statute for unscheduled disability and, in the opinion of the Board, will adequately compensate claimant for his present and potential loss of wage earning capacity resulting from the two industrial injuries claimant has suffered.

The Board finds no reason to disturb the award granted claimant for the right foot disability.

The Board concurs with the conclusion reached by the Referee on the issue of penalties and attorney's fees.

ORDER

The order of the Referee, dated March 19, 1979, is modified.

The Third Determination Order, dated July 21, 1975, is affirmed (WCB Case No. 76-422).

Claimant is awarded 64° of a maximum of 320° for unscheduled psychological disability. This award is in addition to all previous awards which claimant has received as a result of his industrial injury of March 16, 1977. (WCB Case No. 78-482).

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-6291 August 22, 1979

In the Matter of the Compensation
of The Beneficiaries of
ALAN D. BAKER, DECEASED
D. Richard Hammersley, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks review by the Board of the Referee's order which remanded the matter to it with instructions to accept the claim and provide all the benefits of the Workers' Compensation Law to the three children of Alan D. Baker, now deceased, and Victoria D. Wells.

The sole issue is whether the three children born to Alan D. Baker and Victoria D. Wells, while they were cohabitating in Oregon as husband and wife between December 1969 and December 1973 are entitled to compensation pursuant to the provisions of ORS 656.204 and 656.226.

Alan Baker was killed during the course and scope of his employment on June 30, 1978. Victoria D. Wells had left Mr. Baker and had married another man at the time of the fatal injury. She filed a claim for workers' compensation benefits in behalf of her three children, a son age 7, a daughter age 5, and a son age 4.

The employer denied the claim for benefits on August 22, 1978, stating that the children did not qualify as beneficiaries under the Workers' Compensation Law of Oregon.

The parties had stipulated that Mr. Baker had been the father of the three children and that Victoria Wells was the mother; a court order, dated August 1974, has adjudged the deceased to be the father of said children.

The attorney for the claimant, who filed on behalf of the three children of Victoria Wells, argues that the three children were the offspring of an unmarried man and unmarried woman who had cohabitated in Oregon as husband and wife for over a year prior to the date of fatal injury and, therefore, the children are entitled to compensation pursuant to the provisions of ORS 656.226 in the same manner as if the man and woman had been legally married.

The employer contends that there had been a failure to establish a state of dependency, stating that Mr. Baker had not provided too well for his three children after he left their mother and that ORS 656.226 required that the cohabitation must have occurred in the year prior to the industrial injury.

The Referee found that there was no requirement that the cohabitation must have occurred in the year immediately prior to the industrial injury. The statute merely says they must have cohabitated in Oregon for over one year prior to the date of the injury. The word "immediately" is conspicuously absent from the statute.

The Referee further interpreted ORS 656.226 as not requiring evidence of dependency.

He concluded that the three children involved were entitled to the benefits of the Workers' Compensation Law and remanded the matter to the employer to accept the claim on behalf of the three children and pay compensation, as provided by law, to them. He also awarded an attorney's fee to the attorney representing claimant for prevailing in a denied claim.

The Board, on de novo review, finds that the Workers' Compensation Law does not distinguish between the rights of a child born out of wedlock, assuming that the requirements set forth in ORS 656.226 have been met, and a child born of lawfully wedded parents insofar as entitlement to workers' compensation benefits. In this case, Mr. Baker and Ms. Wells lived together as husband and wife for over one year prior to his accidental death and as a result of that relationship three children were born. These children, all under 18 years of age, are entitled to benefits under the provisions of ORS 656.204 the same as children born to a legally married couple.

As the Referee has indicated claimant did not seek benefits for herself but only for her three natural children whose father was Mr. Baker.

There is nothing in the record to indicate that a guardian or a guardian ad lidum has been appointed for the three minor children. If this has not been done, it should be done so that the monies can be paid to a person legally authorized to disperse such monies for the benefit of the three minor children.

ORDER

The order of the Referee, dated February 9, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

WCB CASE NO. 78-4891 August 22, 1979

DAVID L. BAKER, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks review of the Referee's order which directed it to pay claimant compensation for temporary total disability for such periods of time subsequent to his industrial injury on January 19, 1976 that he had not been paid compensation, subject to appropriate reimbursement from the rehabilitation reserve of the Workers' Compensation Department.

The issues before the Referee were: (1) should the Determination Order, dated October 5, 1976, and the Determination Order, dated June 19, 1978, be set aside as being premature; (2) was claimant entitled to receive compensation payments continuously from the date of his industrial injury until the date of the hearing. The Referee found that both Determination Orders were properly entered, therefore, the only issue to be disposed of on review is whether claimant is entitled to receive compensation payments continuously from January 19, 1976, the date he was injured, until the date of the hearing, January 25, 1979.

Claimant suffered a fracture of his right wrist when he fell from a ladder on January 19, 1976. Claimant was seen by Dr. Schachner, an orthopedic physician, who carried out a closed manipulative reduction. Claimant's wrist was casted at that time. Claimant continued to be seen by Dr. Schachner until April 23, 1976. Subsequently, claimant came under the care of Dr. Singer, an orthopedic physician, who, on August 2, 1976, reported claimant's condition was medically stationary and recommended vocational retraining. At that time he did not believe surgical reconstruction would help.

A Determination Order, dated October 5, 1976, awarded claimant 30° for 20% loss function of the right forearm and compensation for temporary total disability from January 19, 1976 to August 2, 1976.

On November 26, 1976 Dr. Singer reported that claimant was complaining of increased pain in his wrist and the claim was reopened for nerve conduction studies which were indicative of a carpal tunnel syndrome. Dr. Singer advised the Fund on December 28 that surgery would be required. It was performed on February 2, 1977. Claimant contends this surgery was evidence that he was not medically stationary on October 5, 1976. However, the Referee found that Dr. Singer's report of November 26 indicated an aggravation of claimant's condition and did not contradict his finding of medical stability in August. Therefore, he did not set aside the October 5, 1976 Determination Order.

After the February 2, 1977 surgery, Dr. Ellison recommended additional surgery; however, Dr. Singer, on June 1, 1977, did not agree. Dr. Singer advised the Fund that it would be better to postpone the surgery at least temporarily and to proceed with claimant's vocational rehabilitation.

Claimant's physical condition did not improve and, on February 10, 1978, Dr. Ellison performed a decompression of the median nerve and the ulnar nerve at the right wrist and resection of the distal ulna. On May 22, 1978 Dr. Ellison stated that claimant was medically stationary and, based upon this statement, the claim was closed by a Determination Order, dated June 19, 1978, which awarded claimant an additional 45° for 15% loss function of the right forearm and compensation for temporary total disability from November 26, 1976, the date Dr. Singer had prescribed the nerve conduction studies, through May 22, 1978.

On September 14, 1978 Dr. Ellison reported that claimant's continuing problems were related to a nonstable radioulnar joint. The symptoms from this condition were significantly limiting claimant and he suggested one more attempt at reconstruction of the distal radioulnar joint with insertion of an ulnar head silastic prosthesis. He did this on October 23, 1978.

Again claimant contends this surgery subsequent to the entry of the Determination Order on June 19, 1978, indicates that his condition was not medically stationary on May 22, 1978. The Referee found that the Determination Order was appropriately entered on the basis of the medical recommendation of Dr. Ellison. He also construed Dr. Ellison's later reports to indicate a worsening of claimant's physical condition subsequent to the entry of the Second Determination Order despite claimant's testimony that his condition was not worse at the time of the October 1978 surgery than it had been on May 27, 1978.

The foregoing recital of events is necessary to show that between the January 19, 1976 industrial injury and the date of the hearing there were periods of time during which claimant did not receive compensation either for temporary total disability nor for permanent partial disability, thus creating gaps in the continuous flow of compensation to the claimant. Although Dr. Singer, when he found claimant medically stationary on August 2, 1976, had recommended vocational assistance, claimant testified that for a period of a couple weeks after the closure he declined to be retrained, thinking it was not necessary. Subsequently, he changed his mind and sought assistance from a counselor in the Vocational Rehabilitation Division. This counselor testified that claimant had signed an application for vocational assistance on August 24, 1976 and a request had been made to the Workers' Compensation Department for referral of claimant for vocational rehabilitation. Several additional requests were made but no referral.

The Referee found that on November 3, 1976 a vocational specialist with the Disability Prevention Division of the Workers' Compensation Board notified claimant of his non-referral, stating it was because claimant had indicated at the time his claim was closed that he did not wish any type of vocational assistance.

The Referee found that based upon the information supplied to the Board, the Disability Prevention Division should have been aware that claimant's initial disinterest had been discarded and that he now desired vocational assistance. He concluded that under those circumstances to deny a referral by the reason of claimant's earlier expression of disinterest was arbitrary, capricious, or characterized by abuse of discretion, citing OAR 436-61-060(2)(d).

The Referee concluded that had claimant been referred for vocational assistance it was quite probable that he would have been "enrolled and actively engaged in an authorized program of vocational rehabilitation" and, therefore, receiving temporary total disability benefits. Furthermore, if such benefits had, in fact, been paid, they would have been discontinued on November 26, 1976 when claimant was placed on "time loss" because of Dr. Singer's report.

Mr. Demers, a counselor from the Vocational Rehabilitation Division, testified that because of the impending surgery he placed claimant on a "interrupted status" in January 1977 but when Dr. Singer, in June 1977, recommended a postponement of this surgery the Disability Prevention Division advised claimant on September 21, 1977 that he was being referred.

In October Mr. Demers established a time for claimant to receive training in drafting at Lane Community College beginning in January 1978 and extending for a two-year period. However, before this plan could be put into effect, claimant had his surgery in February 1978. On March 2, 1978 the Field Services Division terminated claimant's vocational rehabilitation status due to the surgery but indicated claimant would be reinstated when he was medically capable of attending school. Thereafter, on May 22, 1978 Dr. Ellison found claimant to be medically stationary and the next day claimant contacted Mr. Demers who passed the information on to Field Services Division. They said it would be necessary to receive a statement from Dr. Ellison of how many hours claimant could take before they could re-refer claimant. Claimant testified that after telling Mr. Demers about the limitation placed by Dr. Ellison on class hours he heard nothing further until August 1978 when he again contacted Mr. Demers. Mr. Demers testified that he had done nothing with the matter until he heard from claimant on August 16, 1978 at which time claimant told him that the doctor had released him to return to school. The request for re-referral was then submitted and on September 11, 1978 claimant was again referred for vocational rehabilitation.

On September 21, 1978 claimant advised Mr. Demers that it was necessary for claimant to undergo further surgery and again the referral was withdrawn. After Dr. Ellison performed surgery on October 23, 1978 a vocational rehabilitation program was again set up to commence January 1979 and on January 4, 1979 claimant received a letter from Field Services Division indicating the program would be supported until September 1980.

The Referee felt that the breakdown in communication between claimant and Mr. Demers was, under the circumstances, not claimant's fault and, therefore, did not constitute such laxity on his part as to justify taking away benefits to which he might otherwise be entitled. Dr. Ellison's office had advised the Field Services Division several times that they would provide Mr. Demers with the doctor's opinion as to how many academic hours claimant could pursue.

In his determination of whether, under these circumstances, claimant was entitled to receive compensation for temporary total disability for the periods of time that he was not receiving "time loss" benefits by reason of recurrent exacerbations of his physical condition rendering him unemployable, the Referee relied to a great degree on the Court's ruling in Leedy v. Knox, 34 Or App 911, which held, in part, that:

> "The legislature amended the Worker's Compensation Law in 1973 and 1977 for the purpose, among others, of emphasizing the goal of vocational rehabilitation designed to minimize vocational disability where possible and return disabled workers to the competitive labor market. The amendments superimposed provisions for vocational rehabilitation upon the formally simple dispositional scheme. The procedural accomodation for rehabilitation treatment, however, did not eliminate the continuity of support for the worker, in some form, throughout the process."

The Referee found that although the revocations of referral of claimant for vocational rehabilitation constituted an administrative change in status so that claimant was not "enrolled and actively engaged in an authorized program of vocational rehabilitation", the record demonstrated that claimant was in continuing need of vocational rehabilitation immediately after progressing to the point of medical stability following each of his several surgeries. He concluded that the legislative intent for "continuity of support" was frustrated in the present case by the failure on the part of the Field Services Division to maintain or properly renew claimant's referral for vocational rehabilitation at such times as "time loss" benefits were discontinued because of claimant's undergoing medical treatment. He found that failure to be arbitrary, capricious, or characterized by abuse of discretion and directed that claimant be paid compensation, uninterrupted, from the date of his injury to the date of the hearing.

The Board, on de novo review, agrees that neither the October 5, 1976 Determination Order nor the June 19, 1978 Determination Order were prematurely entered. In each case claimant's condition apparently worsened after the entry of the Determination Order. The medical reports in no way indicated that claimant was not medically stationary at the time the claim was closed.

When claimant's condition was found to be medically stationary on August 2, 1976 he was not in an authorized program of vocational rehabilitation and, in fact, had refused the offer of vocational retraining. Later claimant changed his mind and requested vocational rehabilitation but it was refused. The Referee found this refusal to be arbitrary, capricious or characterized by abuse of discretion. He ordered the claimant to be paid compensation for temporary total disability from August 2, 1976 through November 3, 1976 when claimant was notified his non-referral for vocational rehabilitation.

After the first Determination Order was entered claimant's condition worsened and, upon the recommendation of Dr. Singer, the claim was reopened for additional surgery. A Second Determination Order, dated June 19, 1978, based upon Dr. Ellison's report that claimant's condition was medically stationary on May 22, 1978, the claim was again closed. On this date claimant was not currently referred for vocational rehabilitation and was not enrolled and actively engaged in an authorized program of vocational rehabilitation, however, the Referee directed that claimant be paid compensation from May 22, 1978, forward.

The Board concludes that claimant was medically stationary at each time his claim was closed and he was not at either time actively engaged in a rehabilitation program, therefore, it was proper to terminate his compensation for temporary total disability on the date he was found to be medically stationary. There is no basis for finding that claimant was in a continuing need of voctional rehabilitation immediately after progressing to the point of medical stability following each of his several surgeries. The sole issue in Leedy, was whether a disabled claimant whose condition was medically stationary and who was eligible for but not yet enrolled and actively participating in an authorized program of vocational rehabilitation was entitled to an interim determination of disability and award of benefits. As the Referee stated in his order, the facts in the case before him are very similar to those in Leedy; however, in Leedy claimant was not awarded compensation for temporary total disability. To the contrary, the Court stated:

". . . we hold that he was not entitled to temporary disability benefits, but that he was entitled to permanent disability benefits during the period."

In this case claimant should have been paid compensation for permanent partial disability awarded him by the Determination Order, dated October 5, 1976. Claimant also should have been paid compensation for permanent partial disability awarded him by the Determination Order, dated June 19, 1978, from that date and until the claim was reopened on October 23, 1978 for surgery. Claimant was apparently receiving compensation for temporary total disability at the time he was enrolled in an authorized program of vocational rehabilitation on January 4, 1979.

Although the Referee, in the body of his opinion, upheld the validity of the Determination Order dated October 5, 1976 and the validity of the Determination Order dated June 19, 1978, there was no reference made to it in his order which limited itself solely to a directive to the Fund to pay claimant compensation for temporary total disability for such periods of time subsequent to his injury on January 19, 1976 that he had not previously been paid compensation for temporary total disability or permanent partial disability. On this issue the Board reverses the Referee.

ORDER

The order of the Referee, dated March 21, 1979, is reversed.

The relief sought by claimant is hereby denied.

The Determination Orders, dated October 5, 1976 and June 19, 1978, are affirmed.

WCB CASE NO. 78-5346 August 22, 1979

RUSH W. BUTCHER, CLAIMANT
Panner, Johnson, Marceau, Karnopp & Kennedy, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Mccallister and Phillips.

Claimant seeks Board review of the Referee's order which granted him increased compensation for a total award equal to 108° for a loss of the left leg.

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

ORDER

The order of the Referee, dated March 7, 1979, is affirmed.

Board Member Phillips dissents as follows:

I respectfully dissent from the majority opinion. ORS 656.206(1)(a) defines permanent total disability as "'Permanent total disability' means the loss, of use or function of any scheduled . . . portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. . . .". The claimant in this case sustained injuries to both ankles and the left knee. The medical evidence indicates that even if claimant undergoes a complete knee joint replacement, he still couldn't return to any gainful and suitable employment. Dr. Skirving opines claimant is permanently and totally disabled. The Orthopaedic Consultants' report as of May 3, 1977 indicated claimant has a ". . . disability which makes him unable to work at any occupation we can perceive." Claimant has pain in his legs and cramping. He wears braces on both ankles and on his left knee because of instability. Due to his condition he can sleep only 2-3 hours per night. Claimant has difficulty walking, especially on uneven ground; his legs go to sleep; he falls due to his "stumbling" gait; his knee pops out and swells. Drs. Carroll and Mahoney note claimant has pain in his legs and opine he is considerably disabled. Claimant is now 60 years old and has an eighth grade education with no additional training. His work experience consists of heavy equipment operator and truck driving. It is obvious claimant cannot return to either of these occupations. It is this Board member's conclusion that based on all of the medical evidence, claimant is permanently and totally disabled.

WCB CASE NO. 78-5451 August 22, 1979

ROLF W. FERCHLAND, CLAIMANT
Starr & Vinson, Claimant's Attys.
Samuel Hall, Jr., Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which approved the employer's partial denial of July 5, 1978 for any responsibility for his neck condition.

Claimant was employed as a district sales manager for the employer and on December 4, 1974 sustained a compensable injury to his low back when lifting a 48-pound sack of coffee, he tripped and fell out of his truck.

The original diagnosis was probable ruptured disc L4-5 and on December 9 claimant was hospitalized and underwent a myelogram which verified the diagnosis. On December 13, 1974 Dr. Serbu performed a laminectomy at that level.

Dr. Serbu released claimant for regular work on May 13, 1975 with no restrictions.

On December 5, 1975 Dr. Serbu found claimant's condition was stationary and he rated claimant's impairment as mild to moderate.

On December 3, 1976 claimant terminated his employment due to his continued symptoms.

A Determination Order of February 17, 1976 granted claimant 15° for 10% loss of the right leg and 32° for 10% unscheduled low back disability.

On January 17, 1977 Dr. Valli examined claimant and found him in constant pain and the doctor felt claimant should avoid heavy lifting and frequent bending.

In August 1977 Dr. Pfeiffer, a neurosurgeon in California, examined claimant and recommended further surgery. Claimant was hospitalized and on January 11, 1978 Dr. Pfeiffer performed a laminectomy at L5.

The carrier requested a narrative report from Dr. Pfeiffer and on April 13, 1978 he responded. He stated that since claimant's lumbar surgery, he has been bothered by persistent neck stiffness and radiating left arm pain. Dr. Pfeiffer's interpretation of this was that during surgery, with claimant's neck rotated somewhat in a prone position, he probably had some nerve root compression. Dr. Pfeiffer said he realized claimant's present problem was not directly related to his original injury but there was "no question in my mind" that the problem was directly related to his recent lumbar laminectomy.

On July 5, 1978 the defendant issued its partial denial.

On October 27, 1978 Dr. Stainsby examined claimant. He diagnosed cervical spondylosis at two levels and recommended a discectomy. However, the doctor was skeptical as to the role of claimant's original history and surgery in the development of neck and arm pain.

The Referee found that Dr. Pfeiffer had not set forth the reasons by which he had arrived at his conclusion that claimant's neck problems began with the surgery. Therefore, Dr. Pfeiffer's opinion is based on speculation and the Referee affirmed the partial denial.

The Board, on de novo review, finds the partial denial must be reversed. Dr. Pfeiffer, who performed the laminectomy in January 1978, found that claimant's neck problem occurred at surgery from his neck being rotated in a prone position causing nerve root compression. Since Dr. Pfeiffer was the operating physician and was there at the time of surgery he is in the best position to state causal relationship and the Board so finds.

ORDER

The order of the Referee, dated April 17, 1979, is hereby reversed.

The partial denial of July 5, 1978 is reversed and claimant's neck condition claim is hereby remanded to the employer-carrier for acceptance and the payment of compensation as provided by law.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services before the Referee and at Board review, the sum of $1,000, payable by the employer-carrier.

Board Member McCallister dissents as follows:

I disagree with the opinion of the majority. I would affirm the Referee's decision. I find the claimant has failed to establish by a preponderance of the evidence a causal relationship between the December 4, 1974 injury or the treatment for that injury and his neck condition.

I agree with the Referee that the neck condition can be related to the second surgery by speculation, but not by any evidence that preponderates a relationship. The claimant's testimony at hearing regarding the onset of neck symptoms, when taken as a whole, is most compelling in support of the employer-carrier's denial.

I would approve the employer/carrier's denial of the neck condition.

WCB CASE NO. 78-4193 August 22, 1979
WCB CASE NO. 78-6819

HARRY HAMILTON, CLAIMANT
David R. Vandenberg, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

A request for review was received on August 9, 1979 in the above entitled matter. Subsequently, claimant, by and through his attorney, advised the Board that the request for review was inadvertently submitted and that the matter was still pending before Referee Terry Johnson for reconsideration of his Opinion and Order dated July 19, 1979.

THEREFORE, the claimant's request to withdraw his request for review is hereby granted.

WCB CASE NO. 78-8626 August 22, 1979

MARS J. HARET, CLAIMANT
Schwenn, Bradley & Batchelor,
Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Order Denying Motion

On May 15, 1979 claimant requested Board review of the Referee's Amended Opinion and Order, dated May 9, 1979. Receipt of said request was acknowledged on May 16, 1979 and a briefing schedule was furnished to both counsel which indicated that the final date for filing of briefs would be August 25, 1979.

On July 30, 1979 the Board received a letter from claimant's counsel; attached thereto was the claimant/appellant's brief and also a motion to allow additional evidence and an affidavit in support of said motion.

On August 15, 1979 the employer, by and through its counsel, advised the Board that it opposed the motion to allow additional evidence which consisted of vocational rehabilitation reports, on the grounds that such evidence was obtainable at the time of the hearing or, in the alternative, if the Board should allow additional evidence to be considered, that the matter be remanded to the Hearings Division for the taking of such evidence to enable the employer to have proper cross-examination rights.

On August 15 the employer's counsel asked the Board to hold in abeyance the filing of all briefs until the decision was made with regard to the claimant's motion to admit new evidence.

The Board, after considering the affidavit in support of the motion, finds no justification for either allowing the additional evidence in the record for its consideration nor for remanding the additional evidence to the Hearings Division to be received in evidence with rights of cross-examination granted to the employer.

Therefore, claimant's motion to allow additional evidence should be denied. Claimant/appellant's brief will be accepted, however, the employer/respondent shall be allowed 20 days from the date of this order within which to file its brief. Claimant may have 10 days after receipt of the respondent's brief within which to file a reply brief.

IT IS SO ORDERED.

WCB CASE NO. 78-6129 August 22, 1979

SHELBY HENDERSON, CLAIMANT
Stephen R. Frank, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks review by the Board of the Referee's Order which affirms a Determination Order, dated January 25, 1978, which granted claimant compensation for temporary total disability and 48° for 15% unscheduled neck disability.

The issue before the Referee was extent of permanent disability. The Referee, after considering all the evidence presented at the hearing affirmed the Determination Order dated January 25, 1978.

The majority of the Board, on de novo review, noting that claimant was enrolled in authorized rehabilitation program at the time of the hearing, finds that the Referee should have dismissed the matter as being premature. While worker is actively engaged in an authorized program of vocational rehabilitation that worker cannot contest the adequacy of the Determination Order because upon either completion or termination of the authorized program the worker disability will be reevaluated, assuming that his condition is still medically stationary.

In this case, the claimant's right to compensation is protected at all times. The Determination Order dated January 25, 1978, awarded claimant 48° for 15% unscheduled permanent partial disability until the time he was actually enrolled in an authorized program of vocational rehabilitation. This compensation terminated at the time of the enrollment but while enrolled claimant is entitled to compensation for temporary total disability and upon completion or abandonment of the program the award is subject to review and adjustment and closure pursuant to ORS 656.268. Leedy v. Knox, 34 Or App 911 (1978).

The majority of the Board concludes that the further consideration of claimant's disability must be held in abeyance pending either the termination or completion of his authorized program of vocational rehabilitation. At that time, the disability determination process will continue and a Determination Order will be entered, the adequacy of which claimant may request a hearing upon within a year thereafter. Milton Hill, claimant, WCB Case No. 78-4461, and Milton Miner, WCB Case No. 78-2995, (both May 15, 1979).

The majority of the Board concludes that the request for hearing was premature and, therefore, will not reach the merits of the case.

ORDER

The relief requested by the claimant's request for hearing, dated August 7, 1978 is, at this time, denied and the Referee's order dated January 19, 1979 is set aside and held for naught.

Board Member Phillips dissents as follows:

I respectfully dissent from the majority opinion. Claimant in this case had his claim closed by a Determination Order dated January 25, 1978 which awarded him compensation temporary total disability plus a 15% unscheduled disability award. He was dissatisfied with this award and requested a hearing. Prior to the hearing, claimant entered a vocational rehabilitation program. The parties proceeded to the hearing with the sole issue as the extent of disability as of the date of the Determination Order. The majority opinion would not allow claimant to have a hearing based on the fact claimant is now in a vocational rehabilitation program. ORS 656.283 provides for hearing requested by any party or the Board on any question concerning a claim within certain time limitations. Nothing in the statutes provides for the deletion of this right to a hearing because claimant subsequently enters a vocational rehabilitation program. I believe claimant is entitled, once he has requested a hearing to procede with it to its completion. Therefore, I would allow claimant to have a hearing on the issue of his extent of disability. Furthermore, I find that claimant is entitled to an increase of 15% unscheduled disability over and above that granted by the Referee's order.

SAIF CLAIM NO. A 651034 August 22, 1979

FOREST H. MAGDEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his right knee and left ankle on January 15, 1958 while working for the State Highway Department. Dr. Hiestand performed knee surgery on January 22, 1958. The claim was closed by final order issued by the State Industrial Accident Commission on July 23, 1958 whereby claimant received compensation for time loss and 11° for 10% loss of function of the right leg. Claimant requested the Fund to reopen his claim and because the aggravation rights relating thereto had expired the Fund referred the matter to the Board for consideration under its Own Motion jurisdiction.

Claimant was seen by Dr. Cherry on December 29, 1978 who, after examining claimant, requested the claim be reopened by a report dated January 4, 1979. He felt that arthrograms and possibly further knee surgery was indicated. Dr. Butler examined claimant on March 29, 1979 and stated that he felt claimant was an candidate for an arthroscopy for evaluation of the current status of the knee, primarily with the thought of what could be done in terms of reducing a very significant quantity of pain. He recommended a debridement procedure or possibly osteotomy might be in order. Dr. Butler referred claimant to Dr. Fitch who also felt that surgery might be required.

On April 10, 1979 an arthroscopy of the right knee was performed by Drs. Butler and Franklin and on June 12, 1979 Dr. Butler performed a right proximal tibial osteotomy.

On August 9, 1979 the Fund forwarded to the Board all of the medical reports heretofore referred to, stating that it would not oppose the reopening of the claimant's claim if the Board found justification therefor.

The Board concludes that the medical evidence justifies a reopening of claimant's claim as of the date the arthroscopy of the right knee was performed on April 10, 1979.

ORDER

Claimant's claim for an industrial injury to his right leg sustained on January 15, 1958 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing April 10, 1979 and until the claim is closed pursuant to the provisions of ORS 656.278.

WCB CASE NO. 78-4932 August 22, 1979

TIMOTHY RONNING, CLAIMANT
John D. Ryan, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order dated June 21, 1978 whereby claimant was awarded compensation for time loss and 32° for 10% unscheduled low back disability and 15° for 10% loss of the right leg.

The only issue is extent of permanent disability.

Claimant was a 31-year-old assembly line worker when he sustained a compensable injury to his low back on March 1, 1977 when he fell backwards from a riveting bench and struck a riveting tray. Claimant felt immediate pain and ceased working.

Claimant first consulted Robert M. Brown who diagnosed a strain to left hip. He was later seen by Dr. J. J. Fisher who found claimant had a moderately stiff back and was quite obese. Claimant was able to bend within six inches of the floor but extension was limited. Dr. Fisher diagnosed a degenerative disc disease and recommended physical therapy and limitation of movement.

On April 15, 1977 Dr. Hayes, an orthopedic physician, examined claimant. Claimant recited a history of falling at work which caused pain in his left hip area and subsequently pain in the back as well as in the left leg. The claimant also told Dr. Hayes of an incident where he fell in his own backyard three years ago and was off work for seven months. Dr. Hayes impression was that claimant had a back strain superimposed on degenerative disc disease and secondary osteoarthritis of the lower lumbar spine. These conditions may be pre-disposed to by his sacralization (x-rays of the lumbosacral spine had revealed symmetrically complete sacralization of L5). Dr. Hayes discussed the conditions with claimant and suggested that he continue conservative care and treatment. Claimant had lost approximately 35 pounds while under the supervision of Dr. Fisher (claimant is 6'4" tall and weighs approximately 350 pounds). Dr. Hayes anticipated claimant's condition would gradually improve, assuming he continues with his weight loss.

On May 18, 1977 Dr. McNeill, an orthopedic physician, examined claimant, noted his obesity and stated that claimant related a history of pain in his left hip and thigh which are exacerbated with prolonged standing and sitting. He has difficulty getting up and down from chairs and also getting in and out of a car. Dr. McNeill felt that claimants main symptom was trochanteric bursitis and he could inject that area with Xylocaine and Hydrocortisone to alleviate the pain. He found no neurological deficits and suggested claimant return to his own physician and discuss the matter of the injections with him.

On June 1, 1977 Dr. Fisher informed the employer that he was unable to make an estimate of permanent impairment at that time because he was not at all sure that claimant would have any permanent impairment especially if he gets his excess weight off and if his back improves as he anticipated that it would.

The Referee found that the claimant's employer had made every effort to persuade claimant to return to work, offering claimant jobs which, in the opinion of the Referee, claimant obviously could do without physical difficulty.

The Referee found some discrepancies in the histories claimant gave the various doctors who examined him, especially as related to the manner in which the injury occurred. It was not until Dr. McNeill examined claimant on May 8, 1977 that claimant gave a history of striking his back and hip on the side of a rivet tray.

The Referee stated that the various doctors had found objective medical findings which were not consistent. He found no evidence as to which of the findings made by the doctors, if any, were residuals of claimant's prior low back injury sustained when he fell in his own backyard in 1974 and which, if any, were residuals of June 21, 1978 injury.

The Referee concluded that claimant had failed to prove that he was entitled to any greater awards than those granted by the Determination Order dated June 21, 1978.

The Board, on de novo review, agrees with the final conclusion reached by the Referee. The Board finds that claimant's main problem is obesity and that the obesity cannot be attributed in any way to his industrial injury.

The Referee resorted to several gratuitous statements, personal in nature, which serve no purpose. If the Referee feels that claimant is not a credible witness, it is sufficient to state that he finds claimant not to be credible.

ORDER

The order of the Referee, dated December 5, 1978, is affirmed.

CLAIM NO. [illegible]EC 162857 August 22, 1979

LISLE STEELE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his left wrist while working for Lyle Sign Company on August 8, 1968. Surgery was performed in January 1973 and again in January 1975, both times by Dr. Ellison.

Claimant's claim was accepted, closed and his aggravation rights have expired.

Dr. Rex Peterson, a hand surgery specialist practicing in Arizona, advised the Fund on March 7, 1979 that claimant might need a wrist fusion and he referred him to Dr. Wilson for consideration of such surgery. He formally requested the claim be reopened.

Dr. Robert Lee Wilson, who also specializes in hand surgery in Phoenix, Arizona, reported on March 19, 1979 that claimant had been complaining of increasing pain in his left wrist over the last four months. He recommended that the case be reopened for treatment.

The Fund forwarded the medical reports to the Board, stating that since claimant's aggravation rights had expired it was referring the matter to the Board for own motion consideration. It said that it would not oppose the reopening of the claim if the Board found medical justification for it.

The Board, after due consideration of the medical reports from Dr. Peterson and Dr. Wilson, concludes that there is justification for reopening of the claim.

ORDER

Claimant's claim for an industrial injury sustained on August 8, 1968 is hereby remanded to the Fund to be accepted and for the payment of compensation, as provided by law, commencing on March 7, 1979, the date Dr. Peterson requested the claim be reopened, and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

WCB CASE NO. 78-5850 August 22, 1979

FREDERICK L. THOMBS, CLAIMANT
Allen G. Owen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

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

Originally there were several issues presented to the Referee for consideration, however, on February 6, 1979, after the hearing was adjourned, claimant's attorney advised the Referee that the only issue remaining to be decided was whether or not claimant was entitled to temporary total disability compensation from May 30, 1978 through December 8, 1978. Upon receipt of the letter, the Referee closed the hearing.

Claimant, at the time of his injury, was a 46-year-old plumber. He suffered an injury to his lower back on February 4, 1976 while working a hand snake wire down a plugged basin drain pipe. The claim was accepted and closed by a Determination Order dated July 13, 1978. Claimant was granted compensation for temporary total disability from February 4, 1976 through May 19, 1976 and for temporary partial disability from May 20, 1976 through January 16, 1977; also, for temporary total disability from January 17, 1977 through March 20, 1977 and for temporary partial disability from March 21, 1977 through May 30, 1978. Claimant was also awarded 64° for 20% unscheduled low and mid back disability.

Claimant contended that he was entitled to compensation for temporary total disability from May 30, 1978 because he had neither been found to be medically stationary, returned to work nor released by any doctor to return to work. In September 1978 claimant had enrolled in a vocational rehabilitation program of his own, studying electronics and he contends that program should be approved and compensation for temporary total disability made retroactive to that program.

After his injury on February 4, 1976 claimant was seen by Dr. Schuler, an orthopedist, who had performed a laminectomy and a fusion from L4 to the sacrum on claimant as the result of a 1970 job injury. Dr. Schuler saw claimant intermittently and later claimant asked Dr. Schuler if he could be hospitalized; also, he asked that another doctor take care of him.

Dr. Franks, a neurosurgeon, hospitalized claimant and performed a myelogram which showed a large L3-4 disc on the right. He did a lumbar discectomy on the right at that level. Dr. Franks has continued to see claimant. Since January 1978 claimant has seen Dr. Franks approximately every one or two months but he has had no further surgery since that performed by Dr. Franks on January 24, 1977.

Claimant attempted to return to light type work in March 1977 but was forced to take time off and ceased working in September 1977. At that time Dr. Franks reported claimant had no further leg pain but did have back pain. He stated that claimant would be unable to return to work.

On May 30, 1978 claimant was examined by the physicians at the Orthopaedic Consultants who stated they felt claimant's back condition was stationary and that the claim could be closed. No further active treatment was recommended, however, psychological or psychiatrict evaluation of claimant, particularly if anyone contemplated future surgery on the back, was recommended. They felt claimant could perform work in a supervisory capacity or that he could do some other type of employment not involving lifting, bending, or prolonged walking. They stated that vocational assistance might be necessary and they rated the present total loss of his back as moderate and loss of function due to the industrial injury as mild.

Based upon this report, the aforesaid Determination Order of July 13, 1978 was entered.

Dr. Franks did not agree with the Orthopaedic Consultants' statement that the osteoporosis and wedging of mid dorsal vertebrae were not related to the industrial injury or to the treatment thereof. It was his opinion that the compression fracture was work-related.

The Referee felt that claimant's contention that the Determination Order of July 13, 1978 was premature was not supported by the record, especially when consideration was given to the psychological reports from Dr. Colbach, a psychiatrist.

The Referee concluded that the finding by the Orthopaedic Consultants that claimant's condition was medically stationary was sufficient to justify the termination of compensation for temporary total disability and temporary partial disability on May 30, 1978. He chose to ignore Dr. Franks' letter of February 2, 1979 which stated that, based upon his examination of claimant on December 8, 1978, it was his opinion that claimant was, as of that date, medically stationary and would be able to return to his previous work.

The Board, on de novo review, finds that on December 29, 1978 claimant was advised by the Field Services Division of the Workers' Compensation Department that his vocational rehabilitation training plan had been submitted with the starting date of January 2, 1979 and that payments for time loss would continue from that starting date and until completion of the training on June 13, 1980 unless he was terminated prior to the completion of the program.

The Board finds that based upon claimant's attorney's letter addressed to the Referee, the sole issue is whether claimant is entitled to compensation beyond May 30, 1978. Dr. Franks was claimant's treating physician. The physicians at Orthopaedic Consultants examined claimant once and reviewed his medical history.

The Board concludes that the evidence indicates that although claimant had been able to do some light type of work between the date of his injury on February 4, 1976 and May 30, 1978 he was not able to work, had not been released by his treating physician to return to work and had not been declared medically stationary by his treating physician until December 8, 1978.

Inasmuch as the other issues originally before the Referee were resolved prior to the conclusion of the hearing before the Referee and were not before the Board on appeal it will not be necessary to discuss them in this order.

ORDER

The order of the Referee, dated February 14, 1979, is reversed.

The Determination Order, dated July 13, 1978, is modified to indicate that claimant was not medically stationary until December 8, 1978, therefore, claimant is entitled to receive payments of compensation from February 4, 1976, the date of his injury through December 8, 1978, which shall be construed to be the date of closure of the claim.

Claimant shall be entitled to receive payments for permanent partial disability from the date of closure and until he entered the authorized vocational rehabilitation program on January 2, 1979.

WCB CASE NO. 77-2895 August 22, 1979

SHARON S. WEBSTER, CLAIMANT
Pozzi, Wilson, et.al., Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review of that portion of the order of the Referee which found claimant entitled to compensation for permanent total disability as of March 10, 1978. The Referee's order further reversed the Fund's denial of claimant's claim for child care expenses incurred during July and August 1977 and directed it to pay nursing services from July 9 through July 20, 1977 and the child care services from June 25 through August 9, 1977. The Referee affirmed the Fund's denial for claimant's low back condition subsequent to April 30, 1975 and further approved its denial of June 20, 1978 of claimant's claim of aggravation but ordered the Fund to pay a hospital bill incurred in July 1978.

Claimant, 33 years of age, was employed by Pacific Power and Light as a clerk stenographer and on December 5, 1974 she slipped and twisted her ankle. Claimant has not worked nor sought any employment since.

Claimant was psychologically evaluted by Dr. Perkins on May 31, 1974. She found claimant was overfocused on physical problems and was suffering from depression. Dr. Perkins felt claimant's psychopathology was largely related to her lifestyle and only mildly related to the injury. Counseling was recommended.

In July 1974 Dr. Petroske became claimant's treating psychiatrist. He diagnosed depressive neurosis with anxiety attacks. He felt claimant could not be gainfully employed.

On October 23, 1975 claimant was evaluated by Dr. Quan who felt claimant's depression was somewhat serious and claimant's injury precipitated this condition. He rated her psychological impairment at 40% of the whole man.

Claimant had appealed the Determination Order from her original ankle claim which had granted her time loss only. After a hearing, the Referee affirmed the Determination Order; however, the Board on appeal, remanded the claim for the psychological treatment recommended commencing on April 2, 1975.

Dr. Petroske continued to treat her. On April 5, 1976 Dr. Petroske found her condition improving.

On June 8, 1977 claimant was evaluated by Dr. Colbach. He also found claimant's depression was related to the industrial injury but felt there was considerable secondary gain factors. He rated claimant's psychological impairment at 5-10% of the whole man.

On September 28, 1977 Dr. Parvaresh examined claimant. He found her lengthy course of treatment had increased her dependency. Dr. Parvaresh stated he certainly believed that after four years of psychiatric care claimant's condition was stationary. He felt that the degrees of psychological impairment present would not keep claimant from being gainfully employed. He rated impairment at 20%.

A Determination Order, dated March 10, 1978, granted claimant 32° for 10% psychological disability.

Dr. Parvaresh re-examined claimant on June 7, 1978 and found her considerably different. She was friendly and animated and clinically, greatly improved. He found her with less complaints and objective symptoms.

Dr. Petroske reported on July 17,1978 claimant was now manifesting severe depression, at times, psychotic in severity.

The Referee found that claimant's psychological condition would not permit her to be gainfully and regularly employed and he granted her compensation for permenant total disability.

The Board, on de novo review, finds that all of the psychiatrists who have examined claimant find her psychopathology related to her industrial injury. However, the physicians are at a variance as to the degree of her impairment, but only Dr. Petroske finds her permanently and totally disabled. The Board does not find that the medical evidence, taken as a whole, establishes claimant's entitlement to permanent total disability.

The Board concludes, taking into consideration claimant's age, her high school education, plus her business college courses, claimant's work background and her degree of psychological impairment, that claimant is entitled to an award of 30% psychological disability. The Board finds this award adequately compensates claimant for any loss of wage earning capacity due to her psychological condition.

ORDER

The order of the Referee, dated October 13, 1978, as amended by a supplemental order dated October 17, 1978, is modified.

Claimant is awarded 96° of a maximum of 320° for 30% unscheduled psychiatric disability, this being an increase of 64° or 20% unscheduled psychiatric disability awarded claimant by the Determination Order dated March 10, 1978. The award made by this order shall be in lieu of the award granted claimant for permanent total disability effective March 10, 1978 by the Referee's order which, in all other respects, is affirmed.

SAIF CLAIM NO. HB 119465 August 27, 1979

CAROLYN E. BECKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 19, 1979 the Board entered an Own Motion Determination in the above entitled matter.

Claimant's injury was sustained on November 6, 1964 prior to the enactment of Chapter 285, Oregon Laws 1965, which revised the Oregon Workers' Compensation Law. Under section 43, of Chapter 285, a claimant was given the option of using the procedures under the old statute, which included a petition for rehearing and then an appeal to the Circuit Court with the right to trial by jury, or proceeding under the revised law which required filing a request for hearing.

It has been brought to the Board's attention by claimant's attorney that claimant had elected to proceed under the old statute and has consistently since the date of her injury timely petitioned for rehearing and on several times proceeded to the Circuit Court and been granted awards by Stipulated Judgement Orders.

Claimant's claim has never been reopened on a "Own Motion" basis nor has the State Accident Insurance Fund, in prior proceedings, contested claimant's right to proceed in accordance with the old statute.

Under these circumstances, the Board concludes that it must set aside its Own Motion Determination entered on July 19, 1979.

IT IS SO ORDERED.

WCB CASE NO. 78-966 August 27, 1979

DONALD L. BENTON, CLAIMANT
Coons & Anderson, Claimant's Attys.
Acker, Underwood, Beers, Smith & Warren, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, McCallister and Phillips.

The Employer seeks review by the Board of that portion of the Referee's order which remanded claimant's claim for aggravation to it for acceptance and payment of compensation.

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

ORDER

The order of the Referee, dated February 15, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the carrier.

Dissent of Wilson:

In my opinion, the medical evidence in this matter is insufficient to support the Referee's finding of aggravation. Both Dr. Ellison, the treating and operating doctor and Dr. Stainsby, fail to support a finding of a worsened condition. The lay testimony is not supported by medical findings. Dr. Stainsby has remarked that the award of 35% is inadequate and that the disability award is rated at 60% impairment. The Referee transposes the impairment rating to loss of earning capacity and increases the award to 60%.

It may well be that the claimant should not have agreed that his loss of earning capacity amounted to 35% on July 25, 1975, when he executed the stipulation for that amount, but a claim for aggravation should not be used to contest the adequacy of the prior determination; rather the evidence must show a worsening of the condition, attributable to the industrial injury after July 25, 1975, and I conclude that claimant has failed to bear this burden.

CLAIM NO. C 604-11816 August 27, 1979

RUBY LEE DICKERSON, CLAIMANT
Leonard J. Keens, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to her low back on January 25, 1971 while working as a housekeeper for Rogue Valley Memorial Hospital. She was treated conservatively and the claim was first closed on February 2, 1971.

The claim was subsequently reopened and, after further treatment, was closed on December 8, 1971 with an award of compensation for 5% unscheduled low back disability. Claimant appealed and was awarded an additional 10% by a Referee for a total award of 48° for 15% unscheduled disability.

Claimant had difficulty with her back over the years but her claim remained in a closed status until the Board's Own Motion Order, dated December 6, 1978, ordered it to be reopened.

Claimant underwent surgery in April 1978 but continued to have complaints and was referred to Dr. Yamodis. He referred claimant to the Northwest Pain Center in January 1979 where she was weaned from pain medication and allowed to use a transcutaneous electrical stimulator.

Claimant is presently being assisted by the Field Services Division of the Workers' Compensation Department and she is medically stationary. On July 9, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommends no additional award of compensation for permanent partial disability; however, she is entitled to additional time loss benefits from April 11, 1978 through May 4, 1979, less time worked.

The Board Concurs.

ORDER

Claimant is hereby granted compensation for temporary total disaiblity from April 11, 1978 through May 4, 1979, less time worked.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of December 6, 1978.

WCB CASE NO. 78-7655 August 27, 1979

JULIE A. HUGHES, CLAIMANT
Wittemyer & Bisaccio, Claimant's Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, Phillips & McCallister.

The Employer seeks review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and the payment of compensation as required by law. The Employer contends there is no medical proof of causation nor proof that claimant's injury arose out of her employment.

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

ORDER

The order of the Referee, dated March 9, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the carrier.

I respectfully dissent from the majority of the Board as follows:

I find that claimant's onset of symptoms experienced after shrugging her shoulders to get comfortable is not compensable.

The instructor of the class testified at hearing that the classes were quite informal and the employees could get up and move around or leave the room for a moment as they chose. For this reason, I feel that claimant's sitting until she became uncomfortable was unreasonable and need not have occurred at all.

I further find, that the sole responsibility for the injury was claimant's and was caused by normal body movements and not caused by anything arising out of her employment.

Two doctors examined claimant. Dr. Christopherson, defined the diagnosed syndrome as being an inflammation of the chest joint and the condition was not work related. Dr. Soot found the symptoms secondary to an acute process like an injury. Claimant did not suffer an industrial injury, her shrugging of the shoulders merely brought on symptoms from the inflammed chest joint, which appears idiopathic in nature.

The work environment, considering the informal nature of the classes, did not expose the claimant to a greater risk than she would encounter in her nonwork environment.

The employer in this case, cannot be held responsible for the claimant's "chest joint inflammation" under any theory of compensability. To do so would expand compensability to include any manifestation of ill health so long as the symptoms first appear at work.

For all of these reasons I would reverse.

WCB CASE NO. 78-1617 August 27, 1979

EVELYN KEMHUS, CLAIMANT
Zafiratos & Roman, Claimant's Attys.
Jerry K. McCallister, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted her an additional 32° for 10% unscheduled low back disability.

The sole issue is extent of permanent disability. Claimant contends that she is permanently and totally disabled or if not, that her psychological and physical disability far exceeds the award of compensation she has received.

Claimant was a 43-year-old bartender who sustained a compensable injury to her back on September 18, 1974. Claimant had had back problems since 1966 when she was involved in an automobile accident. As a result of the earlier back injury, claimant had had surgery.

Four days after the 1974 injury, claimant saw Dr. Steinmann who diagnosed a lumbosacral back strain and hospitalized claimant for traction for one week. Claimant was sent to Portland from Astoria, where she worked, to have a myelogram. The myelogram ruled out a recurrent protruded intervertebral disc at L4-5.

In December 1974 Dr. Rankin examined claimant who had previously been evaluated by Dr. Hickman, a clinical psychologist, for the functional problems which accompanied her low back strain. Dr. Rankin prescribed a back brace and conservative treatment including several periods of hospital traction, physical therapy and medication.

Claimant improved but not to the extent that she could return to work. Between March and May 1975 claimant had 14 hours of psychotherapy with Dr. Hickman and, with the recommendation of Dr. Rankin, an orthopedic physician, and Dr. Hickman, the Vocational Rehabilitation Division set claimant up in her own tailoring shop in Astoria. Dr. Rankin had reported to the Fund that claimant had an organic base for her subjective complaints as well as psychiatric aggravation. Claimant continued to receive additional psychological counseling from Dr. Hickman and on November 11, 1975 Dr. Rankin stated that as far as he was concerned claimant's condition was medically stationary and she did not need any further orthopedic follow-up. On December 3, 1975 Dr. Hickman advised the Fund that claimant's psychological condition was stationary and that her claim could be closed as of the date she reportedly returned to work which was November 10, 1975.

Claimant's claim was not closed until the Determination Order was entered on January 21, 1978 which awarded her 64° for 20% unscheduled low back disability and stated that her condition had been found to be medically stationary on December 3, 1975, non-medically stationary on February 10, 1976, medically stationary again on October 22, 1976 and non-medically stationary again on March 29, 1977.

After claimant set up her own tailoring shop she also worked as a seamstress with the State Accident Insurance Fund supplementing her wages for approximately two years. Claimant stated she had difficulty with her work because she was in and out of the hospital during this period of time and was only able to work part time. She was hospitalized for approximately one month in early 1976 and then Dr. Steinmann referred her to the Pain Center in the fall of 1976. Dr. Seres diagnosed a mechanical low back pain, status post-laminectomy, with no evidence of nerve root compression, poor body mechanics and suspected depression. An organic brain syndrome was suspected, perhaps secondary to chronic alcohol usage and marked anxiety. Claimant was given a transcutaneous stimulator at the Pain Center and she has worn it continuously.

When claimant was discharged from the Pain Center she returned and continued to work as a seamstress at her own shop until March 1977 when, after an incident at home exacerabated her back condition, she closed the shop. She saw Dr. Steinmann again who hospitalized her for traction in June 1977.

The physicians at Orthopaedic Consultants examined claimant on September 7, 1977 and expressed their consensus opinion that the claimant had maximally recovered from her physical impairment and that her case could be considered stationary. There was no further specific remedial therapy indicated and the case could be closed. They found that claimant did not have a vocational handicap because she had job skills within her physical limitations. Psychological and emotional factors did contribute to her impairment and at the present time were the primary cause of her inability to work. They believed that if claimant did not return to self-employment, service coordinator assistance might be required. They concluded that claimant would need reassurance, encouragement and support for a period of time from her physician in returning to work and learning to work and live with her physical and emotional handicap.

Claimant again returned to the Pain Center and upon her discharge Dr. Seres was of the impression that her condition was medically stationary. He thought that claimant was over-utilizing the services at the Center. He wrote Dr. Steinmann, claimant's treating physician, urging him to allow her to handle her pain problems without medication or hospitalization but to insist that she follow through with the prescribed exercises. Dr. Steinmann agreed but stated that speaking of everyday care would not prove to be easy because when claimant became upset her back presented a very definite part of her problem.

Following the issuance of the Determination Order in July 1978, claimant was examined by Dr. Russell, a psychiatrist, at the request of her attorney. Dr. Russell thought claimant was permanently and totally disabled from gainful employment and that the rest of her life would consist of a series of hospitalizations, medications and so forth. He believed her current situation was directly related to her employment.

The Referee, at the hearing, noted that claimant appeared anxious as had been observed by the numerous physicians as well as a psychiatrist and clinical psychologist who examined her. She complained of a number of physical complaints, which, according to all of the doctors, had a psychological basis. The Referee found claimant's psychological problems were definitely interfering with her return to work and, according to the psychologist, they appeared to be related to general approach to life and primarily associated with her family problems. Although claimant's psychological problems have been evident from the beginning of her disability, she has a capacity to perform mild to moderate work as indicated by her working as a seamstress for a period of almost two years without jeopardizing her back.

Taking into consideration claimant's age, education, work background, her physical impairment and her psychological problems that are contributing to her injury but are related primarily to her general life style, the Referee concluded that claimant was not permanently and totally disabled but she was entitled to an additional award for her unscheduled disability. She, therefore, granted claimant an additional 32°, giving claimant a total of 96° which represents 30° of the maximum for unscheduled disability.

The Board, on de novo review, finds that claimant is able to do much more than she testifies that she can do. Claimant's psychological problems are the prime responsibility for her inability to return to work and only a small part of these psychological problems are related to her industrial injury and, therefore, the responsibility of the Fund.

The medical evidence, however, indicates that as a result of the combination of claimant's physiological and psychological disability, she has suffered a substantial loss of wage earning capacity.

The Board concludes that claimant would be adequately compensated for the loss that she has sustained in her wage earning capacity as a result of her industrial injury by an award of 160° which represents 50% of the maximum allowable for an unscheduled disability.

ORDER

The order of the Referee, dated February 15, 1979, is modified.

Claimant is awarded 64° out of a maximum of 320° for 20% unscheduled low back disability. This award is in addition to all previous awards claimant has received as a result of her September 18, 1974 industrial injury including the award granted by the Referee's order which in all other respects is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-8189 August 27, 1979

PETER McALISTER, CLAIMANT
S. David Eves, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Referee's order which granted claimant an award of compensation equal to 48° for 15% unscheduled disability. The employer contends this award is excessive and not supported by the evidence.

The sole issue is extent of disability.

Claimant was a 25-year-old sewer plant operator who sustained a compensable injury on October 4, 1976 when he strained his back while working with a large metal pole on a catwalk above a sewage tank. Claimant felt his balance waver above the tank and believing that he might fall in he used the pole as a prop to support himself. The force of gravity on the pole and the pulling on it to prevent the fall caused an immediate sharp pain in claimant's left shoulder. He was initially seen on October 6 by Dr. Stringham who diagnosed a muscle strain of the shoulder and recommended physical therapy, heat treatments, aspirin and rest. He told claimant to avoid heavy work.

Claimant continued to have these same problems and again saw Dr. Stringham on October 26. Physical therapy was continued.

In February 1977 Dr. Stingham suggested that claimant be referred to the Portland Pain Center. Claimant stated he was unable to attend at that time because he was experiencing marital difficulties and also had car problems which limited his transportation. Later, when these problems and limitations had been resolved, he requested admission but was unable to enter, however, he was put on the waiting list.

The claim was originally closed by a Determination Order dated February 23, 1977 which awarded claimant compensation for temporary total disability. Claimant requested a hearing but prior to the hearing the claim was reopened pursuant to a stipulation approved on November 28, 1977. In October 1977 Dr Knox, a neurologist, became claimant's primary treating physician. At that time claimant was attempting to work trimming trees on a Christmas tree farm. Dr. Knox did not feel that a myelogram was indicated but he thought claimant might benefit from a referral to the Pain Clinic and, pursuant to a stipulation, the claim was reopened for such treatment.

The three doctors at the Orthopaedic Consultants, who examined claimant, felt he could return to the same occupation with some limitations but he might need help in job placement. They did not feel he was in need of any psychological or psychiatric evaluation. They questioned his motivation. They rated his disability of the dorsal spine as minimal. Dr. Knox, on March 9, 1978, concurred with this report.

The claim was closed for the second time by a Determination Order, dated April 27, 1978, whereby claimant was awarded compensation, pursuant to the stipulation, for temporary total disability from May 1, 1977 through March 9, 1978, less time worked, but no award was granted for permanent partial disability.

On February 3, 1979 Dr. Knox stated that claimant's main problem was pain. He indicated that claimant had returned to work on the Christmas tree farm but was only able to work about four hours per day because of the back pain. He believed that claimant's pain placed considerable strain on him in terms of participating in any type of physical activity and thought claimant should be given some assistance in the nature of vocational rehabilitation or on-the-job training. Immediately prior to this placement, the service coordinator reported that claimant could not be rehired by the employer because the employer did not feel claimant's "heart was in his work".

Claimant stated he was interested in being a musical instrument salesman and the service coordinator stated she would work towards placing claimant in an on-the-job training in this field. She noted that there was a big question as to whether claimant had an actual vocational handicap. Subsequently, the coordinator reported that claimant had moved and contact had been lost, therefore, the claim was closed with the statement that it would be reopened if necessary.

On February 5, 1979 the physicians at Orthopaedic Consultants again examined claimant and found him to be a healthy appearing person who complained of pain in his dorsal spine. They found no evidence of functional disturbance during their examination which resulted in a diagnosis of dorsal strain. They felt there was no specific treatment indicated and there were no significant objective findings to explain claimant's subjective complaints. In their opinion claimant's problems were principally on motivational and psychological basis. They felt claimant could be employed on a full time basis and any residual disability would be of a minimal level.

The Referee found that Dr. Knox' reports indicated that claimant did have pain which was real and that physical exertion did cause a certain amount of pain. He did not believe claimant was overly motivated to return to work but felt he was a credible witness with respect to his complaints of pain. He believed no purpose could be served by again referring claimant to the Pain Clinic. Claimant has had one opportunity to go to the clinic and declined.

The Referee found that claimant was not well trained, however, he has the capabilities to do various types of employment. The Orthopaedic Consultants indicated claimant could do almost any type of work without much restriction. The Referee believed that claimant had suffered some disability by taking into consideration his age, work background, trainability, he concluded claimant would be adequately compensated for his loss of wage earning capacity by an award of 48° which represents 15% of the maximum for the unscheduled disability.

The Board, on de novo review, finds no evidence in the record which indicates that claimant has suffered any loss of wage earning capacity. The physicians at the Orthopaedic Consultants placed very little limitations upon his work activities. They said claimant could go back to the same job he had prior to his injury. Dr. Knox, who was claimant's primary treating physician, agreed with the opinion expressed by the Orthopaedic Consultants, both on the assessment of claimant's disability and his need for better motivation to return to work. The Referee had found claimant had pain but there is no evidence that this pain is disabling. Claimant had an opportunity to attend the Pain Center and chose not to do so; later he changed his mind but there was no availability at the Center.

Virtually all of the physicians who have treated and/or examined claimant have concluded that claimant is not motivated to return to work and claimant's attempts to rebut this are unsupported by the evidence. At the present time, claimant may be experiencing problems but they are motivational rather than medical in nature. Claimant has full range of motion in his shoulder and has had it since the day of his accident.

The Board concludes that claimant has suffered no permanent disability.

ORDER

The order of the Referee, dated March 28, 1979, is reversed.

The Determination Order, dated April 27, 1978, is affirmed.

WCB CASE NO. 78-3226 August 27, 1979

GENE NEVUE, CLAIMANT
Benton Flazel, Claimant's Atty.
Jack Mattison, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks Board Review of the Referee's order which directed employer/carrier to pay claimant compensation for temporary total disability for the period of March 9, 1976 through December 9, 1977, less time worked, either for wages or for labor contributed, to pay claimant 10% of the amounts due for that period as a penalty pursuant to ORS 656.262 and to pay claimant's attorney a reasonable attorney's fee of $850. The Referee's Order also affirmed the Determination Order dated August 9, 1978. Employer cross-appeals the Referee's ordering payment of temporary total disability and penalties.

The Board, after de novo review, adopts the findings of facts set forth in the Referee's Opinion and Order, a copy of which is attached hereto and, by this reference, made a part hereof.

However, the Board disagrees with the Referee's conclusion that claimant is entitled to receive compensation for temporary total disability from March 9, 1976 through December 9, 1977, less time worked, either for wages or labor contributed. Claimant is entitled to receive compensation between said dates less any time in which he is gainfully employed. Anytime during which claimant volunteered his services to perform labor, and for which he did not receive a remuneration, shall not be deducted from his compensation for temporary total disability.

The Board agrees with the Referee's assessment of the penalty and the award of attorney's fees and the affirmance of the Determination Order dated August 9, 1978.

ORDER

The order of the Referee, dated March 9, 1979 is modified.

Georgia-Pacific Corporation, a self-insured, shall pay claimant compensation for temporary total disability for the period of March 9, 1976 through December 9, 1977, less time during which claimant was gainfully employed. In all other respects the Referee's order is affirmed.

WCB CASE NO. 78-4798 August 27, 1979

NICHOLAS RELLIS, III, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe; Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Referee's order which directed it to pay claimant an award equal to 33° for 10% unscheduled left and right eye disability.

This award was an addition to the award granted by the Determination Order dated May 24, 1978 whereby claimant received 18° for 6% loss of binocular vision.

Employer contends that there is no evidence that claimant has suffered any loss of wage earning capacity at the present time as a result of the industrial injury.

Claimant was a 40 year old, employed by Boise Cascade, when he suffered a compensable injury to both of his eyes on February 11, 1977. A white caustic liquid which he was using at the time burned his eyes and eye lids. Claimant was treated by Dr. Hsu who operated twice to remove ingrown lashes from both upper lids.

Claimant testified that since his return to work, he has not lost any time because of his eye problems but, notwithstanding the two operations, he has to pull his eyelashes out every three or four week; the eyelids were so deformed by the injury that the lashes grow into his eyes and cause irritation if they are allowed to remain. The Referee found that claimant also lacked the natural protection afforded by the eyelashes, his eyes are susceptible to being irritated by foreign bodies, dust and small particles and he is bothered by bright lights.

Claimant contends that he has a loss of visual acuity in excess of the award granted by the Determination Order. He also contends that he has headaches which make him irritable.

The Referee found that claimant's testimony regarding the headaches was not convincing; they had not reached the stage where they were substantial enough to justify an award even if the claimant had proven causal relationship between such problems and his industrial injury, which he didn't.

The Referee concluded claimant had failed to sustain his burden of proving that he was entitled to an increased award for loss of vision.

The second issue is whether or not claimant, under the ruling of the Court of Appeals in Russell v. SAIF, 28 Or App 353, is entitled to an award for unscheduled disability. The Referee found that claimant's problems resulting from his loss of eyelashes have not occasioned any present loss wage earning capacity but never the less they are both permanent and sufficiently substantial to raise the probability of future permanent loss of wage earning capacity, either by way of loss of time from work or restricted general field of employment.

Based on that conclusion, the Referee awarded claimant an additional 32° for 10% unscheduled right and left eye disability.

The Board, on de novo review, find that the sole issue raised on review is whether claimant is entitled to an award for unscheduled disability based upon loss of wage earning capacity as a result of his industrial injury to his eyes. The Board finds no evidence, either medical or lay, which would indicate that claimant has suffered any loss of wage earning capacity.

The Board concludes that in the absence of such showing there is no justification for granting claimant an award for unscheduled disability. Claimant may have an injury which is in the unscheduled area. The evidence indicates he has residual superficial corneal scars on both eyes but that such scars did not interfere with his vision at the time of claim after closure when claimant was released to return to his regular work by a treating physician. The mere fact that claimant's injury has invaded the unscheduled area does not entitle claimant to an award absent a showing that as a result of such injury claimant has lost some of his earning capacity.

The Board, reverses the Referee and affirms the Determination Order of May 24, 1978 whereby claimant was granted compensation equal to 18° for 6% loss of binocular vision.

ORDER

The order of the Referee dated February 13, 1979 is reversed. The Determination Order, dated May 24, 1978, is affirmed.

SAIF CLAIM NO. KA 758573 August 27, 1979

LLOYD C. TRUMP, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a back injury on September 30, 1959 when he slipped while greasing a log lift. The claim was first closed by Commission Order on October 16, 1959. Claimant underwent a laminectomy in May 1960 and a fusion in February 1961. While hospitalized for the second surgery claimant developed thrombophelebitis of the left leg. He returned to work on February 12, 1962 and the claim was closed on July 26, 1962 with an award of compensation equal to 22° for 20% loss function of the left leg.

A Board's Own Motion Order, dated April 12, 1979, reopened claimant's claim for aggravation. Dr. Holecek, in his June 26, 1979 report, indicated claimant's condition was stabilized, although chronic recurring problems could be expected. Claimant did not plan to return to work.

The Fund, on July 2, 1979, requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional time loss benefits from September 21, 1978 through June 26, 1979 and an additional award of compensation equal to 33° for 30% loss of function of the left leg.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 21, 1978 through June 26, 1979, less time worked, and compensation equal to 33° for 30% loss function of the left leg. These awards are in addition to any awards previously granted claimant for his September 30, 1959 injury.

WCB CASE NO. 77-7097 August 30, 1979

MAE DeWHITT, CLAIMANT
Pozzi, Wilson, Atchison, et.al.,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Robert L. McCallister, Board Member, rspectfully dissents as follows:

I do not agree with the opinion of the majority. I do not find the claimant permanently and totally disabled. I do find the 25% unscheduled disability awarded by the Determination Order of November 15, 1979 inadequate. I would increase the award by 25% unscheduled disability making the total 50% of the maximum.

The medical evidence does not support an award of permanent total disability. The Orthopaedic Consultants found total loss of function to be moderate. They found claimant physically could returnto her receptionists job with only minor limitations. Dr. Clark, the treating physician urged and encouraged claimant to return to some type of work activity. In his report of November 23, 1977, Dr. Clark found claimant could not work because of her "state of mind". He found her continued symptons subjective only. I find no medical evidence to connect claimant's psychological problems to the compensable injury.

The medical evidence does not support a conclusion that claimant's injuries are so severe she can be excused from her statutory obligation to reduce the disabling effects of her injury by at least actively participating in the attempts to achieve the rehabilitation goal of the Oregon Worker's Compensation system.

Reviewed by Board Members Wilson, Phillips & McCallister.

The State Accident Insurance Fund seeks review by the Board of the Referee's order which granted claimant an award of permanent total disability effective July 26, 1977.

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

ORDER

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

The claimant declined to participate in the rehabilitation process. The claimant has an affirmative obligation under ORS 656.206 (3) to establish by a preponderance of the evidence a willingness to seek regular and gainful employment. She must demonstrate her willingness to seek employment by reasonable effort to obtain such employment. I find there is a failure of proof under ORS 656.206 (3).

The claimant, in my opinion, has "retired" from the labor market and the evidence supports a conclusion that this volational act has not to any material degree been precipitated by the compensable injury. As I have stated earlier, the claimant does have a residual permanent disability as a consequence of the compensable injury. The disability is not total, it is partial in nature and is, in my opinion, 50% of the maximum allowed by statute for unscheduled disability. This is an increase of 25% unscheduled disability over that awarded the claimant in the Determination Order of November 23, 1977.

WCB CASE NO. 78-7661 August 30, 1979

EDWARD LYDON, CLAIMANT
Richard S. Mannis, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the Second Determination Order dated October 17, 1977 whereby claimant was awarded compensation for additional temporary total disability and 32° for 10% unscheduled low back disability.

The sole issue is extent of disability. Claimant contends he is entitled to a greater award; the Fund contends that the award of 32° was adequate.

Claimant was a 32-year-old backhoe operator. Prior to his industrial injury the weather was so bad claimant was unable to run the backhoe and he visited his brother in Portland. His brother worked for American Auto Wrecking, the defendant-employer in this case. He was to help the defendant-employer for a few days and he said that he would. On April 10, 1975, while claimant was working as a parts puller, he was under a car which was hoisted by a cable 10 feet in the air. The cable broke and the car fell, hitting claimant on the head. Dr. Dineen diagnosed a comminuted fracture, mid-shaft, right tibia; possible small fracture of the anterior lateral portion of the left ankle with no displacement, head lacerations and low back pain. Closed reduction and a cast were applied on the fractured right tibia.

After the two fractures were healed, following appropriate medical treatment, the claim was closed by a Determination Order dated October 8, 1975 which granted claimant compensation for temporary total disability from April 10, 1975 through September 1, 1975 but no compensation for permanent partial disability. The claimant was released for regular work on September 16, 1975.

On October 21, 1975 claimant was examined by Dr. Grewe. He was complaining at that time of back pain. Dr. Grewe diagnosed cervical sprain with some residual discomfort and probable lumbar nerve root compression, mild on the right. He prescribed a lumbar brace. Claimant continued to have low back complaints and right leg numbness and was seen by Dr. Berselli on March 23, 1976. Dr. Berselli reported that the x-rays revealed a compression fracture of the first lumbar vertebra which he felt was healed and was mild in nature. It was his opinion that claimant's present condition was the result of his industrial injury. A myelgram of March 31, was normal.

On December 8, 1976 claimant was examined by Dr. Halferty at the Callahan Center. Dr. Halferty concurred with the findings made by Dr. Berselli.

The claim was reopened pursuant to a stipulation approved on February 22, 1977 to allow claimant the further medical care and treatment as recommended by Dr. Berselli, with temporary total disability commencing on September 2, 1975.

On March 21, 1977 Dr. Berselli advised the Fund that claimant's condition was medically stationary and the claim should be closed. Claimant was released for regular work as of March 2, 1977.

On July 13, 1977 claimant was examined by three physicians at the Orthopaedic Consultants who found the claimant's condition to be stationary and recommended claim closure. They stated claimant could return to the same occupation with limitations to avoid heavy lifting and no real jarring. They stated that claimant felt he could be driving a log truck which did not require loading on his part and they agreed that he could do this. In fact, the claimant stated that he might later try to return to working a backhoe. They felt claimant was looking for a job and that job placement was in order. Claimant needed no psychological examination but he should be furnished with a new back support so that whatever job he returns to he will be able to wear it for a period of time. They found no disability resulting from either the fracture of the right tibia or the fracture of the left ankle. With regard to the lumbar spine, the physicians felt claimant's total loss of function was mild due to the injury. They found claimant to be well motivated to return to work.

A Second Determination Order granted claimant 32° for 10% unscheduled disability.

The Referee found that claimant was 32 years old at the time of the industrial injury and has a ninth grade education. He has had work experience in wrecking yards and has also worked as a backhoe operator. It should be noted that after job placement was recommended by the Orthopaedic Consultants, claimant was put in an on-the-job training program as a backhoe operator, an occupation with which he was already familiar. Therefore, the Second Determination Order recited that claimant's condition was medically stationary on March 1, 1977, non-medically stationary on June 7, 1977 and again medically stationary on July 13, 1977. The claimant had been advised by a letter, dated August 29, 1977, that his vocational program was being terminated and that his claim could be closed pursuant to ORS 656.268 if he was medically stationary.

The Referee found that claimant's testimony that he could go back to working in a wrecking yard, might even be able to operate a backhoe and drive a log truck if he didn't have to load the truck, indicated that there were many activities both heavy and light in which claimant could engage. He further found that claimant had been doing some moderately heavy activities around his home. Claimant denied doing these activities but the Referee noticed that his hands were heavily calloused which indicated that claimant had recently been working with oil and grease.

The Referee found no medical evidence that would indicate claimant's condition was worse than the evaluation made of it by Dr. Berselli and the physicians at Orthopaedic Consultants and that claimant was able to return to his former occupation and had terminated that occupation only because of business failure. He felt claimant had been adequately compensated by the Determination Order.

The Board, on de novo review, finds that since the industrial injury claimant has been able to work a backhoe for short periods of time but is physically unable to perform such activity over long stretches of time. He worked six to eight weeks for one outfit but had to quit because the back pains became too severe. He operated a backhoe for one company on a training program for a few months but again was forced to quit because of back problems. Eventually, this outfit rehired claimant to work as a backhoe operator but it subsequently went out of business. The evidence taken as a whole indicates that claimant has never been able to operate a backhoe since his injury for more than short periods of time.

Other than operating a backhoe, claimant's occupational skills are undeveloped. He has serious reading deficiencies and based upon the testimony of claimant at the hearing before the Referee, he apparently is unskilled in expressing himself orally.

Claimant is a relatively small man, standing 5'6" and weighing 130 pounds. He is unable to perform heavy labor for any period of time as evidenced by the attempt to operate the backhoe. Apparently, claimant thought he could do more than he was really able to do when he made the statements to the physicians at the Orthopaedic Consultants. Claimant has not attempted to do any of those jobs with the exception of operating the backhoe.

The Board concludes that the medical evidence and the lay testimony support a conclusion that claimant has suffered more than 10% loss of his wage earning capacity as a result of the industrial injury. Therefore, claimant is entitled to an award equal to 64° which represents 20% of the maximum for unscheduled disability to adequately compensate him for this loss of wage earning capacity.

ORDER

The order of the Referee, dated February 21, 1979, is reversed.

Claimant is awarded 32° of a maximum of 320° for 10% unscheduled low back disability. This award is in addition to the prior awards received by claimant for permanent partial disability resulting from his April 10, 1975 industrial injury.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted claimant by this award, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-5530 August 30, 1979

SHIRLEY SEVERE, CLAIMANT
Jerome F. Bischoff, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which granted claimant 64° for 20% unscheduled low back disability.

The issues before the Board are the propriety of the Fund's denial, dated October 2, 1978, of claimant's request to reopen her claim or, the responsibility of the Fund for claimant's weight reduction program and the adequacy of the Determination Order dated July 13, 1978.

Claimant was a 38 year old skoog machine operator who suffered injury when she was startled by another worker who came up behind her, causing her to twist her back. The incident occurred on March 7, 1977. Claimant finished the work shift and returned to work the next day, however, the pain became more severe and she saw Dr. Buck, her family physician, who prescribed medication and bed rest, and diagnosed lumbosacral strain. Claimant was also seen by Dr. Cary on May 16, 1977 when her back began to bother her again. Claimant was released to work on May 22, 1977, having been off from May 16 to May 21.

Her claim was originally closed by a Determination Order, dated May 26, 1977, which awarded claimant compensation for temporary total disability only from March 10, through April 3, 1977.

On June 9, 1977, Dr. Stanley Filarski, who became claimant's primary treating physician, examined claimant. She was complaining of back pain which he diagnosed as discogenic back pain, possibility of L5-S1 lesion, radiating into her left leg, with associated degenerative disc disease at that level. Claimant received only conservative treatment and returned to work on June 26, 1977. She contined to have discomfort and Dr. Schroeder and Dr. Filarski both treated her. A myelogram, performed on September 9, 1977, revealed a swollen L5 nerve root.

Claimant's claim was reopened by a stipulation on September 27, 1977. On November 23, 1977, Dr. Stainsby gave claimant a neurologic evaulation and recommended no surgical procedure. He did provide claimant with a transcutaneous stimulator which gave claimant some relief. On March 16, 1978, Dr. Stainsby found claimant at a stationary point in her recovery and felt that if she were able to lose some weight her pain would disappear.

The Orthopaedic Consultants, who examined claimant on March 9, 1978, diagnosed chronic low back strain, by history; functional overlay, severe, and exogenous obesity. Her medical condition was considered stationary and it was felt she could return to the same occupation without limitations or she could also do clerical work. Claimant had done such work in the past. They felt claimant's primary disability was psychological. Total loss of function to the back due to the injury was considered minimal. Dr. Stainsby concurred.

Dr. Parvaresh, psychiatrist, examined claimant on April 28, 1978 and found no appreciable degree of psychiatric impairment, and no psychiatric pathology could appreciably be attributed to her injury.

Claim was again closed by a Determination Order dated July 13, 1978 which awarded claimant compensation only for temporary total disability from August 17, 1978 through April 28, 1978.

Claimant returned to work on July 17, but a different shift and on a non-automatic machine which claimant testified caused back pain and claimant quit and has not worked since.

On August 24, 1978, Dr. Becker reported claimant was working through him on physical therapy with Dr. Campbell, psychologist. Dr. Becker felt claimant's condition had worsened since claim closure.

Claimant was again examined the Orthopaedic Consultants on September 12, 1978 and it was felt that her condition has reached maximum improvement from her industrial injury. She was considered physically capable of performing light work and, from a physical standpoint, could probably return to her regular occupation with limitations of avoiding heavy lifting. She should continue a home program of back care, remedial and postural back exercises. They believed that obesity, emotional or functional problems were contributing to claimants vocational handicap. Again they rated the total loss of back, as related to the injury, as minimal.

On October 2, 1978, the Fund denied claimant's request to reopen her claim, that there were no medical reports that indicated that her condition has worsened since the closure by the second Determination Order dated July 13, 1978 that could be attributed to her March 7, 1977 injury.

Claimant was examined by Dr. Maltby, psychiatrist, on October 26, 1978 who found no psychiatric illness resulting from, or materially aggravated by, her industrial injury. He considered that claimant had no emotional problems as a result of her industrial injury; he found no severe depression but he did feel there was present a secondary gain condition which would remain until the claim was settled and no financial consideration existed.

On January 18, 1979, Dr. Becker, who had previously treated claimant, requested the Fund to refer claimant to a weight reduction program at a hospital because her weight problem was exacerbating her current symptoms. The Fund denied this request on January 30, 1979, on the grounds that it was not a direct result of the industrial injury but was a long standing problem.

The Referee found the claimants work background included six years working as an assistant to veterinarian, also work as a nurses aide, in a mill and as a secretaryclerk. At the present time, claimant weighs 230 pounds, at the time of her industrial injury she weighed between 170 and 180 pounds and was losing weight. She presently belongs to a weight loss club. She states that prior to her industrial injury she was very active but that since the injury she has not been able to engage in many activities. Her husband is totally disabled.

Claimant has personal insurance which pays her approximately $300 a month and the credit union is paying the car payments during her disability. At the time she was working, claimant was paid approximately $1,000 a month. She has not looked for work since July 1978 or sought vocational rehabilitation. Her excuse is that she does not feel she is capable of doing any type of work.

The Referee found that Dr. Becker had requested that the claim be reopened on July 19, 1978 by a letter to the Fund which indicated that claimant had been working with him through physical therapy and a relaxation program and that she was showing slow, steady improvement, however, in some ways, he felt her condition had worsened since the claim closure. He felt in the summer of 1978 claimant was having more severe low back pain and that her physical problems were compounded by depression as well as the exacerbation of the muscle strain. He concluded that she was totally disabled until the exacerbation was alleviated, at least to some extent.

The Referee concluded that the claim did not have to be reopened if all that claimant needed was medical treatment; such medical treatment could be furnished pursuant to ORS 656.245. He felt, based on Dr. Becker's opinion, that claimant's problems were due to chronic low back pain and depression, secondary thereto, and obesity which exacerbated those conditions and such conditions were insufficient basis for reopening the claim for the payment of temporary total disability. With respect to obesity, the Referee found that claimant had a duty to minimize this contributing factor of obesity as it related to her impairment.

With regard to the adequacy of the Determination Order dated July 13, 1978, the Referee found that the physicians at Orthopaedic Consultants found claimant primarily disabled on a psychological rather than a physical standpoint. They rated her loss of function as minimal and Dr. Stainsby concurred with this rating.

The Referee concluded that although claimant had many problems most of then were not job related, however, her industrial injury resulted in minimal back impairment that precludes her from doing any work that involves heavy lifting, therefore, she has lost some wage earning capacity. To compensate her for this loss the Referee awarded claimant 64° which represents 20% unscheduled low back disability.

The majority of the Board, on de novo review, finds the medical evidence does not support an award of 20% of the maximum for this claimant's loss of wage earning capacity. Both the medical evidence and the lay testimony support the position taken by the employer and its carrier that the loss of wage earning capacity which claimant has suffered as a result of her industrial injury is minimal.

It is true claimant has many problems but few of them were caused or aggravated by her industrial injury. Dr. Parvaresh and Dr. Maltby found, from a psychiatric standpoint, that claimant's present condition had no causal relationship to her industrial injury. The doctors at Orthopaedic Consultants found only a minimal loss of function to her back due to the injury and Dr. Stainsby concurred. Only Dr. Becker expressed an opinion that claimant has suffered any substaintial disability and he was unable to fully explain his reasons for such an opinion.

The Board concludes that claimant's main problems are psychological in nature and she also has a problem of obesity that neither of these problems are the responsibility of the employer. The medical evidence indicates claimant's impairment is minimal with a work restriction of no heavy lifting, therefore, the Board feels claimant is entitled to a small award for her loss of earning capacity. The Board concludes that claimant is entitled to 32° which represents 10% of the maximum for her unscheduled low back disability.

ORDER

The order of the Referee, dated March 23, 1978 is modified.

Claimant is awarded 32° of the maximum 320° for 10% unscheduled low back disability. This is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

Keith Wilson, Chairman of the Board, respectfully dissents as follows:

In the absence of a cross-request for review by State Accident Insurance Fund, the only issues on review were raised by the claimant. They were as follows:

Whether the Referee erred (1) in not requiring SAIF to reopen claimant's claim for compensation to include time loss and medical payments, and (2) in holding that SAIF was not responsible for a weight reduction program. These were two of the three original issues at the hearing, The other issue before the Referee was extent of disability, as an alternative issue. The Referee decided the first two issues adversely to the position of the claimant and awarded 20% unscheduled low back disability. Apparently claimant is satisfied with the appraisal of extent of disability as she did not argue this issue in her brief, although it may well be that if the fitst two issues had been decided in favor of claimant, the third issue of extent of disability would be moot.

I agree with the majority of the Board and the Referee that the evidence supports a possible need for medical treatment which can be provided under ORS 656.245, and that the claimant has the responsiblity for minimizing her disability by controlling and reducing her obesity, and that the Fund is not responsible for such treatment.

I dissent from the the reduction of the award of permanent partial disability by the majority of the Board, since it was not raised by request of the claimant nor by cross-request of the Fund.

In a letter to the Board dated August 6, 1979, which constituted the Fund's brief, the Board is respectfully asked to consider reducing the award. This sort of passing reference to a possible issue is not sufficient to raise the issue on review and does not meet the requirements of request for review as provided by OAR 436 83-700.

Had the issue of extent of disability been properly raised by the Fund on review, I would have reversed the Referee on his finding of 20% permanent partial disability and would have awarded none.

WCB CASE NO. 79-143 August 30, 1979

VEDA LINGELBACH, CLAIMANT
Engelstad & Odman, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which found that the State Accident Insurance Fund did not fail to provide needed care and treatment; and not failed to pay needed prescriptions and expenses; did not fail to provide claimant with a needed housekeeper, and had not deliberately attempted to frustrate claimant's claim or deny medical attention. The Referee's order also stated that the Fund was entitled to reimbursement for, among other things, compensation not in issue here, any unexplained prescriptions and for the unrebutted 127 days of padded home care. The Referee directed the Fund to continue to pursue possible fraud violations and ordered it to reschedule, if it desired to do so, an independent medical examination in accordance with OAR 436-54-283 as presently revised, and ordered the suspension of compensation if claimant did not submit to the Fund rescheduled independent medical examination in accordance with the aforesaid administrative rule.

No evidence was offered by either the claimant or the Fund. Documents were offered as exhibits and the opening statements were made by both parties. A copy of the 801 was belatedly received which indicated that claimant sustained an injury to her back on January 12, 1973 while working as a nurses aide for St. Judes Home.

The Referee, without benefit of testimony, relying solely upon the exhibits which were explained only by the respective counsel in their opening statement, concluded that the Fund had not failed to do anything which was required by the statute to do in so far as claimant's claim was concerned.

The Board, on de novo review, finds nothing in the record upon which to make a determination of whether or not the Fund acted properly. The burden is upon claimant to prove her case. In this particular case there is no way of determining if she met that burden of proof because claimant did not testify although she was physically present at the time of the hearing. It must, therefore, be assumed that claimant has failed to meet her burden of proof.

With respect to the Referee's ordering the Fund to continue to pursue possible fraud violations, this is beyond the scope of the Referee's authority. If the Fund believes there have been fraudulent acts upon the part of claimant it is up to it to pursue the matter independently. It is inconsistent to direct the Fund to reschedule an independent medical examination in accordance with the administrative rules when the clause "if it desires" is tacked on to such directive. Furthermore, compensation cannot be suspended if claimant refuses to submit to a independent medical examination without a finding that such a refusal is unreasonable.

The Board concludes that in the absense of any showing to the contrary, that claimant has failed to meet her burden of proving entitlement to benefits which she seeks.

Subject to the comments hereinabove made, the order of the Referee dated February 28, 1979, is affirmed.

The relief sought by claimant is hereby denied.

WCB CASE NO. 78-6425 August 30, 1979

DANIEL J. STEFFAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Keith D. Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks Board review of that portion of the Referee's order which modified the Determination Order dated May 31, 1978, and granted claimant 64° for 20% unscheduled low back disability; and affirmed the Determination Order on the award of compensation for temporary total disability.

The issue before the Board is extent of disability.

At the time of his injury on August 30, 1976, claimant was a 21 year old tapper carbon changer working in the pot room of the employer. Claimant had commenced working for the employer on May 25, 1976 and he testified that his low back pain developed over a period of time and on August 30 he had an exceptionally heavy work day which caused him to develop some right shoulder pain.

Claimant first saw Dr. Bratt and was referred by him to Dr. Lisac, an orthopedic physician, who examined claimant on September 24, 1976. The x-ray of the lower spine appeared normal and Dr. Lisac felt that claimant had sustained a low back strain from which he was slowly recovering. Claimant quit work in September 1976 and returned around November 1, 1976 doing lighter type work. He continued working with low back pain which radiated into both legs. On December 27, he went back to his job as a carbon setter and he re-strained his back. On January 4, 1977 claimant returned to work as a yard bird, but still had discomfort in his back.

Dr. Robinson, an orthopedic physician, examined him on January 5, and diagnosed a chronic strain of lumbar spine, superimposed on minor anomaly at the lumbosacral level of spine. It was Dr. Robinson's opinion that claimant should do light to medium work and should avoid heavy manual labor.

Claimant ceased working for the defendent-employer on January 18, 1977 because he re-injured his back using a jackhammer. On January 16, 1977, Dr. Mason, at the Callahan Center, evaluated claimant. He felt claimant could tolerate moderate work but should avoid excessive lifting, bending and twisting stresses. Dr. Mason did not feel a change of occupations was necessary on a physical basis, but was giving claimant the benefit of the doubt. On January 26, 1977 he was examined by Dr. William L. Smith, a neurosurgeon, who felt claimant might have a protruded disc at the L4-5 level on the right. A myelogram and EMG performed on February 2, 1977 was normal.

On July 8, 1977, Dr. Smith found claimant's condition stationary. Claimant was limited in frequent stooping, kneeling, crawling and climbing.

On November 11, 1977, Dr. Pasquesi reported claimant's condition was stationary and he rated impairment at 10% of the whole man.

On May 31, 1978 claimant's claim was closed with an award of compensation for temporary total disability from September 9, 1976 through April 3, 1978 and 16° for 5% unscheduled low back disability.

Since claimant quit working for defendent-employer, he has had several jobs, on working as a "top" man in a pipe-laying crew for two and a half months. He left this job because it required him to commute 88 miles each way. His union sent him a list of jobs, however, he refused some because they required too much travel, and some he quit because they required too much heavy work. At the present time, he is working primarily as a truck driver for a contractor engaged in earth moving projects. This employer is aware of claimant's back problems and avoids giving claimant heavy manual work.

The Referee concluded, after considering claimant's limitations placed upon him by doctors who examined and/or treated him, and claimant's age, education, training and general mental capacity and adaptability, that claimant had lost wage earning capacity as a result of his industrial injury and was entitled to be compensated therefore by an award of 64° for 20% of the maximum for the unscheduled disability.

The Referee found claimant does not fit within the definition of handicapped worker as defined in OAR 436-61-005-4 and therefore concluded claimant had failed to prove he was vocationally handicapped, and the non-referral was justified.

The Board, on de novo review, agrees with the findings and conclusions of the Referee, however, it is noted that the Referee stated that he concluded that the claimant had failed to prove he was vocationally handicapped as defined by OAR 436-61-005-4.

OAR 436-61-060 (2), states that a Referee may reverse or modify the decision made by the Field Services Division only if substantial rights of a party have been prejudiced because the decision violates the statute or rule; exceeds the statutory authority of the agency; was made upon an unlawful procedure, or was arbitrarily or capricious or characterized by abuse of discretion or clearly unwarrented exercise of discretion.

It is not within the province of a Referee to determine whether or not a worker is vocationally handicapped; that decision can only be made by the Field Services Division and may be overturned by a Referee only for violations mentioned above.

In this case, the Referee found that the non-referral was justified. That was sufficient.

The evidence indicates that claimant has been referred to a service coordinator in his geographic area for assistance in selective job placement.

ORDER

The order of the Referee dated February 14, 1979 is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee, the sum of $100, payable by the employer and its carrier.

WCB CASE NO. 78-8063 August 31, 1979

VERLA DURANT, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Don Olowinski, Defense Atty.
Order Denying Motion

On June 17, 1979 Referee John F. Drake entered his Opinion and Order in the above entitled matter. On July 2, 1979 the employer, by and through one of its attorneys, requested Board Review. The Board acknowledged receipt of the request and notified both parties.

Thereafter, there was some correspondence between both attorneys and Referee Drake concerning attorney's fees and, on July 11, 1979, Referee Drake entered a Supplemental Order which was concerned solely with the issue of an appropriate attorney's fee. At that time, Referee Drake had been divested of any jurisdiction over this case as the result of the intervening request for review by the employer, therefore, the order of July 11, 1979 was null and void.

On August 10, 1979 the employer requested review of the Referee's Supplemental Order. This request was inadvertently acknowledged; it should not have been because there was no valid order upon which a request for review could be based.

On August 23, 1979 the Board received from claimant's attorney a motion to dismiss the employer's request for review of the Referee's Supplemental Order, on the basis that it was not timely filed.

Based upon the chronology of the events set forth above the employer's request for review which was mailed on July 2, 1979 is the only valid request for review before the Board at the present time and it was timely filed.

Claimant's motion to dismiss the employer's request for review of the Referee's Supplemental Order, dated July 11, 1979, is hereby denied.

IT IS SO ORDERED.

WCB CASE NO. 77-1741 August 31, 1979

JAMES OHLIG, CLAIMANT
James L. Fallgren, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant
Cross-request by Employer

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of that portion of the Referee's order which affirmed the carrier's denial of responsibility for claimant's back condition. The employer cross-requested review of that portion of the order that awarded claimant compensation equal to 20.25° for 15% loss of the right foot, in lieu of the award of 6.75° for 5% loss of the right foot granted by the Determination Order dated February 28, 1977.

The issues before the Board are: (1) the propriety of the denial by the carrier of responsibility for claimant's back problem; (2) the adequacy of the award made by the Determination Order, dated February 28, 1977; and (3) claimant's entitlement to attorney's fees and penalties for unreasonable delay in accepting or denying the claim.

Claimant is a 25-year-old laborer who has obtained a GED and whose work experience has been mainly that of manual labor and working as a welder. He suffered a compensable injury on January 10, 1975 while pushing a boxcar, he slipped and fell on his right hip and twisted his right ankle. Dr. Rieke diagnosed a right foot contusion on January 13, 1975 and later claimant was referred to Dr. Keist who diagnosed a chronic sprain of the right ankle. Surgery to repair the ankle was scheduled but deferred because of legal difficulties which led to claimant's incarceration in the Clark County Jail. Dr. Keist did not wish to perform a surgical procedure at that time and he felt that claimant's condition was medically stationary and that the claim could be closed; however, only with the realization that claimant might have an ankle problem that would require future treatment.

Claimant's claim was closed by a Determination Order dated July 8, 1975 whereby he was granted compensation for temporary total disability and 6.75° for 5% loss of the right foot.

On May 4, 1976 Dr. Keist performed ankle stabilization surgery. The hospital admission summary indicates that, according to Dr. Keist, claimant did not have other problems involving the rest of his body and was in good general physical condition.

Dr. Keist released claimant for his regular work on August 23, 1976.

Claimant was next seen by Dr. McKillop on August 27, 1976. At that time claimant was complaining of problems with his right ankle, stating that when he was walking the foot would suddenly turn in causing him to fall forward. Physical therapy was recommended.

On October 19, 1976 Dr. Blosser examined claimant and fitted him with an ankle brace, and on November 22 released claimant for regular work.

On February 28, 1977 a Second Determination Order closed the claim with no additional award of compensation for permanent partial disability.

Dr. McKillop re-examined claimant in April 1977 and rated his permanent disability as mild and ranged from 10-15% loss function. In June 1977 Dr. Blosser reported he first suspected a lumbar spine problem in January 1977 and he noted at that time there had been complaints of low back problems and also increasing trouble with claimant's right leg. In May 1977 claimant told him that his whole leg would buckle and cause him to fall; he stated that this had been going on since the original injury when he fell on his right side which resulted in the ankle strain.

On September 21, 1977 claimant was hospitalized for a myelogram which revealed a sizable disc protrusion at the L4-5 level and mid-line and Dr. Blosser was of the opinion that this was most likely what caused the leg to give way. He said that based upon a description of the original accident he could conclude that the disc problem most likely arose as a result of that accident.

Dr. Kloos examined claimant in October 1977; claimant related to him a history of twisting his ankle and falling on his right hip at the time of the original injury. He stated that from then on he was aware of aching in his low back but he did not pay much attention to that because of the severity of discomfort in his ankle. He also stated his low back, right hip and leg symptoms had become increasingly severe over the past few months. Based upon this history, Dr. Kloos concluded that claimant's low back problem had its onset when he fell on January 10, 1975.

Dr. Kloos performed a laminectomy and removal of the 4th lumbar disc on November 29, 1977.

In May 1978 claimant advised Dr. Kloos that he had very little back pain, no pain in his leg and he no longer fell because of intermittent leg weakness. Claimant wanted to return to work as a welder.

Dr. Keist reported that he found no reference in his records to any low back distress or any problems that could be construed as a herniated disc. Dr. Blosser, upon being deposed, testified that it was most likely the onset of the disc problem was the result of the January 10, 1975 injury, however, on cross-examination he stated he could say it was medically probable.

Dr. Kloos testified that he found consistency between claimant's history to him, the pattern of complaints, the myelogram and what he found at surgery. What he found at surgery, the contents of the interspaces indicated to him that the original trauma occurred some time ago--longer than six months and could be up to three years.

Dr. Kloos felt claimant's leg giving way was caused by back motion budging the disc, swaping the nerve root against the bone and briefly knocking it out causing weakness. Under a reasonable medical probability claimant's disc problem probably started by pushing the boxcar and the falling injury.

The Referee found that the conclusions reached by Dr. Blosser and Dr. Kloos failed to establish a causal relationship when viewed in light of the evidence upon which such conclusions were based. The Referee did not find the necessary scientific probability that claimant's back injury resulted from his industrial injury. Both Dr. Blosser and Dr. Kloos stated it was most likely or definitely possible that the onset of the disc problem was the result of the industrial injury, but most of their findings were based upon a history related to them by claimant two-and-a-half years after that accident.

The Referee found that in view of Dr. McKillop's findings that claimant's award for his disability to his leg was insufficient and that the evidence indicated claimant was medically stationary insofar as this particular condition was concerned on December 14, 1976, the date claimant's award for temporary total disability was terminated by the Second Determination Order dated February 28, 1977.

The Referee affirmed the carrier's partial denial of responsibility for claimant's back condition but increased the award for the right leg from 5% to 15% of the maximum allowable for that scheduled disability.

The Board, on de novo review, finds that the medical evidence, especially the reports of Dr. Kloos and Dr. Blosser, are sufficient to warrant a finding that there was a causal relationship between claimant's back problems and his industrial injury of January 10, 1975. It is quite reasonable to assume that because of the intense pain claimant was suffering as a result of his ankle injury, he gave little attention to his problems relating to his low back and hip until a later time. It is also evident from the medical reports that after the back surgery, claimant's problems were substantially alleviated and, in fact, claimant suggested that he return to work as a welder.

Dr. Keist found no reference in his records to any complaints of low back problems, however, Dr. Blosser and Dr. Kloos did and the Board feels that the preponderance of the medical evidence is in favor of establishing the causal relationship required to make the carrier responsible for claimant's present back problem.

Dr. McKillop was concerned primarily with claimant's leg condition and, based upon his reports, the Board finds no justification for increasing the award granted by the Determination Order which represented 5% of the maximum.

It was not until the hearing was convened that the carrier orally denied responsibility for claimant's back problems, yet it had received Dr. Kloos' report on December 20, 1977 which certainly put it on notice that there was a good probability that claimant's back condition was related to his industrial injury.

The Board construes this delay on the part of the carrier in taking any action to be unreasonable delay in accepting or denying the claim which subjects the carrier to a penalty from the date of Dr. Kloos' report, December 20, 1977, until the date of the hearing, August 25, 1978.

ORDER

The order of the Referee, dated October 20, 1978, is reversed.

The denial, made orally by the carrier at the hearing, for responsibility of claimant's back problem, is found to be improper and claimant's claim for that problem is remanded to the employer and its carrier to be accepted and for the payment of compensation, as provided by law, commencing on January 10, 1975, and until the claim is closed pursuant to the provisions of ORS 656.268.

Claimant is awarded additional compensation equal to 25% of the compensation due him from December 20, 1977 to August 25, 1978, as a penalty for the unreasonable delay in the payment of compensation by the employer and its carrier.

The Determination Order, dated February 28, 1968, which relates solely to compensation awarded for loss of the right foot, is hereby affirmed.

Claimant's attorney is awarded a reasonable attorney's fee of $1,000 for prevailing on a rejected claim both at hearings level and Board review level payable by the employer and its carrier.

SAIF CLAIM NO. EC 148830 September 5, 1979

JACK RUTHERFORD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury on August 10, 1968; his aggravation rights have expired. His claim was last closed by an Own Motion Determination, dated December 12, 1977, with an award of compensation for temporary total disability only.

Claimant's treating physician, Dr. Edward J. Lackner, subsequently requested claimant's claim be reopened on two different occasions. The first request was denied by the Board because any treatment claimant required could be provided under the provisions of ORS 656.245. The second request, on April 20, 1979, resulted in the Own Motion Order of June 5, 1979 which directed that the Fund have claimant examined by an orthopedic physician in the area in which he lived. Upon receipt by the Board of the medical report from that doctor, it would determine whether or not claimant's claim should be reopened.

The Board received Dr. Kenneth Young's medical report on July 27, 1979. Dr. Young found claimant had good motor control of his lower extremities with rather diffuse weakness; he found no evidence of atrophy of the calf or thigh muscles and no isolated motor or sensory deficit. Claimant did have a hypesthesia on the medial side of his left foot and he seemed to be overly sensitive to palpation in the lumbar region. Dr. Young found oversensitivity also in the upper spine region with good motion in the neck. There was diminution of sensation in both arms and slight loss of sensation in the right half of his face. Dr. Young found an obvious personality defect in claimant which caused claimant to magnify his symptoms. He felt it was to be expected that claimant had some disability as a result of his multiple back surgeries. He indicated it would be a mistake to perform any surgery on claimant except in an emergency situation.

On August 27, 1979 the Fund responded to Dr. Young's letter, stating it still opposed the reopening of claimant's claim based on the doctor's findings in his report.

The Board, after thoroughly considering the evidence before it, concludes that there is no evidence that claimant's condition has worsened since the last award or arrangement of compensation. Dr. Young does not even feel any treatment is warranted and based upon his report the Board finds that claimant's request for own motion relief, relating to his August 10, 1968 industrial injury, should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. AC 294400 September 7, 1979

R. W. AUSTAD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination:

Claimant sustained a compensable injury to his left knee on March 15, 1971 when he slipped on a belt line. The claim was initially closed on June 30, 1971 with an award of compensation equal to 8° for 5% loss of function of the left leg. Claimant's aggravation rights have expired.

By a Board's Own Motion Order, dated April 4, 1979, claimant's claim was remanded to the Fund for acceptance and payment of compensation, as provided by law, commencing on February 2, 1979 and until closed pursuant to ORS 656.278. Claimant had undergone surgery on February 1, 1979 to remove multiple loose bodies from the left knee.

With the help of exercises claimant's knee healed well. Dr. Becker's closing report of July 9, 1979 indicated claimant's condition was medically stationary and the claim could be closed. He found claimant's pain was much less than before the surgery and there was no swelling. He noted no gross atrophy in the quadriceps, very minimal, if any, effusion, and no synovial thickening. Dr. Becker found claimant had a rather loose knee in all parameters but no disruption of the collateral or cruciate ligaments. Claimant had some grating on patellofemoral excursion and some tenderness along the medial joint line, but his range of motion was full.

On July 31, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for time loss from February 2, 1979 to July 9, 1979 and an additional 10% award for his permanent partial disability in the left leg.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 2, 1979 through July 9, 1979, less time worked, and compensation equal to 15° for 10% loss of function of the left leg. These awards are in addition to the previous awards received by claimant for this industrial injury.

WCB CASE NO. 78-5234 September 7, 1979

WILLIAM DWYRE, CLAIMANT
Alan M. Scott, Claimant's Atty.
Roger Luedtke, Employer's Atty.
Request for Review by Employer

Reviewed by Board Members Wilson, McCallister & Phillips.

The employer seeks review by the Board of the Referee's order which remanded claimant's heart claim to it for acceptance and the payment of compensation pursuant to law.

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

ORDER

The order of the Referee, dated January 25, 1979, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the carrier.

Board Member McCallister dissents as follows:

I respectfully dissent from the opinion of the majority. I would reverse the Referee and affirm the employer's denial.

The history of the developments of symptoms was determinative of the opinions expressed by the two medical experts, Dr. Griswold and Dr. Sutherland. The medical expertise of both physicians is not in question. The accuracy of the history upon which the experts based their opinions on causation is in question. My review of all the evidence convinces me that Dr. Sutherland was the only medical expert who had a complete and accurate history. His opinion must be given the greater weight.

Dr. Griswold testified at the hearing that he had reached a conclusion based on his examination and the history he had taken from claimant as to the probable cause of the myocardial infarction. At Tr. p. 70, lines 21 through 25, and Tr. p. 71, lines 1 through 4, he recites his understanding of the history as follows:

"It was my medical opinion that the work activity he was performing -- I think in Coos Bay on the 24th of May, late in the day about 9 o'clock where he unloaded a truck and had symptoms of angina pectoris, that type associated with his work activity. The story I got, he had two or three -- at least three such episodes, did not feel well and drove straight home, arrived in Portland about 4:00 a.m., went home, slept fitfully about two hours and had more chest pain and consulted medical attention."

Based on that history Dr. Griswold testified he concluded the work activity was the material contributing or the precipitating cause of claimant's acute myocardial infarction (Tr. p. 71, lines 7 and 8).

The record indicates that the attacks of angina which the claimant experienced while unloading at Coos Bay occurred at times when his work activity involved little if any exertion. Notwithstanding the fact that the occurrence of the angina was coincidental to the mimimal exertion, or "normal pace" work activity. The fact is the claimant did not drive straight home and then go home. Upon arrival in Portland he unloaded pallets and moved a freezer all without symptoms of angina. He then spent some time in the lunch room talking with a fellow-employee, and then went home. The "story" Dr. Griswold "got" is incomplete and erroneous. His opinion based on that incomplete and erroneous history must be given less weight than that of Dr. Sutherland who had a complete and accurate history.

The history which unfolds as the record is reviewed is substantially that recited by Dr. Sutherland. The history, in material part, led Dr. Sutherland to conclude that claimant's angina and subsequent myocardial infarction were separate and distinct events and not an active process which culminated in the "heart attack".

The claimant's case must fail for lack of medical proof.

I would reverse the Referee and affirm the employer's denial.

WCB CASE NO. 78-7495 September 7, 1979

BONNIE J. FERGESON, CLAIMANT
Andson & Creighton, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the 4th Determination Order, dated July 19, 1978, whereby claimant was awarded additional compensation for temporary total disability but no additional compensation for permanent partial disability in excess of that previously granted. Claimant had received by a second Determination Order, dated August 12, 1974, 32° for 10% unscheduled low back disability and by a stipulation, approved on October 2, 1974, an additional 32° for a total of 64° for 20% unscheduled low back disability.

The issue before the Board is extent of permanent disability. Claimant contends that she is permanently and totally disabled.

Claimant was a 37 year old teacher when she suffered a compensable injury on September 29, 1971. A bus was loading and claimant said a child, who had been told not to, grabbed onto the half open window of the bus; she pursued him after he dropped from the bus and in doing so pulled some muscles. Claimant was seen by Dr. Geist who treated her until May 26, 1972 when he advised the Fund that for all practical purposes he felt claimant had fully recovered from the effects of her industrial injury and recommended claim closure.

The claim was initially closed on June 23, 1972 which granted claimant compensation for temporary total disability only.

On October 13, 1972, Dr. Geist informed the Fund that in October 1970, claimant had had a laminectomy at L5-S1 with excision of a large disc as well as a lumbosacral fusion and that following that surgery she had done exceedingly well until she injured her back on September 29, 1971. He further stated that claimant improved after her claim was closed but that she now has spontaneously developed recurrance of her back and leg pain. He requested that the claim be reopened.

Over the next period of two years, claimant had exacerbation of her condition for which she received treatments and also periods of remission; during this same period of time there were claims for aggravation, denials, stipulations and determination orders which ultimately resulted in claimant receiving an award of 64°.

On March 21, 1975, at the request of Dr. Geist, Dr. Parsons examined claimant. His diagnostic impression was chronic lumbar pain, status postop from lumbar laminectomy and fusion. And, based upon his examination, he found very little evidence of further lumbar nerve root compression. He did discuss with claimant the possibility of further x-rays studies to rule out the presence of a nerve root compression if the pain continued to severely bother her. At that time claimant did not want any further studies because she felt it would interfere with her teaching.

On January 14, 1976, Dr. Parsons did a lumbar myelogram which was negative. Based upon his neurological examination and the myelogram, Dr. Parsons felt the claimant would not be benefited by further neurosurgical procedures.

On April 15, 1976, Dr. Parsons advised Dr. Parcher, Chief Medical Consultant for the Fund, that, in his opinion, claimant would benefit at that time by an evaluation at the Pain Clinic in Emanual Hospital. He asked the Fund to make such a referral. Claimant was admitted to the Pain Clinic on June 28, 1976, the provisional admitting diagnosis was low back and right leg pain.

In July 1978 claimant was hospitalized for intestinal bleeding and for a flareup of surgical infection.

The Referee concluded that claimant had failed to meet the minimum requirements ORS 656.206(3) and, therefore, she had failed to establish a prima facie case of permanent total disability. He stated that claimant had previously been awarded 64° which represents 20% of the maximum for low back disability and that such disability is evaulated by determining the effects of the injury on the claimant's earning capacity. He found the medical evidence clearly established that the 1971 injury was merely a serious exacerbation of a pre-existing condition and the sugery

necessitated by that condition (presumably he was referring to the onset of low back difficulties in 1958 which ultimately resulted in laminectomy and fusion in October 1970).

He concluded that claimant's emotional instability and her underlying physical problems pre-existed her compensable injury and there was no medical evidence attributing claimant's present symptomatology to the 1971 exacerbation of her pre-existing condition.

The Board, on de novo review, finds that the medical evidence indicates claimant's industrial injury aggravated both her physical condition and psychological problems.

Dr. Seres in his report dated June 28, 1976 stated that claimant presented herself as an emotionally vulnerable individual who allowed herself to be continuously victimized in her relationships. His diagnosic impressions included: marked hysterical features; moderate depression, secondary to injury and unstable marital relationships; passive dependent personality structure, has difficulty expressing angry feelings in appropriate manner; emotionally labile; martyr complex; good work history, although pain may provide secondary gains in other areas; bright average to superior range of intellectual functioning and motivated for pain relief and reasonable motivation for rehabilitation.

On May 31, 1977 Dr. Parsons wrote Dr. Painter, who was assisting claimant at the Pain Clinic, stating that he found no evidence when he examined claimant on May 31 which would account for claimant's increased pain on an organic basis. He stated he was somewhat concerned that because claimant appeared to be more emotionally disturbed on May 31 than she was when he last examined her in July 1976.

On June 21, 1977 Dr. Painter advised the Fund that claimant continued to have chronic back pain which was decidedly worse under situational stress and she continued to suffer from hysterical neurosis complicated by periods of profound depression. He stated it was very difficult to designate absolutely the cause of emotional difficulties when they are related to a physical problem; however, it seemed apparently clear that claimant suffered a significant change in her self image following her industrial injury.

Claimant was also evaulated by Dr. Duncan, a psychiatrist, who felt claimant was totally disabled from performing gainful employment, however, the permanent nature of the disability was not at that time obvious. He found a tendency on the part of claimant to back away abruptly from what she felt might be an intolerable demand upon her. Dr. Duncan suggested that efforts of rehabilitation would require care and good communication.

Dr. Painter informed the Fund on October 10, 1977 the claimant was not medically stationary from a psychological point of view but if no gains were made within the next 3 months he doubted any would ever be made. At the time she could be considered stationary. He said the prognosis for her return to work was guarded; the prognosis for reduction of pain was fair.

The Board concludes that the awards which claimant has received based on her physical conditions have adequately compensated her for that disability; however, claimant has also suffered a loss of earning capacity as a result of her psychological problems.

It is clear from a review of the reports of Dr. Duncan, Dr. Painter, and Dr. Parsons that claimant has lost earning capacity as a result of her psychological condition and that although both claimant's physical and phychological conditions may have pre-existed the industrial injury of September 29, 1971 that injury exacerbated both conditions. Therefore, the Board concludes that claimant is entitled to an additional 64° for her loss of wage earning capacity resulting from her psychological condition. This will give claimant a total of 128° for 40% of the maximum for unscheduled disability.

ORDER

The Order of the Referee dated March 29, 1979, is reversed.

Claimant is awarded 64° of a maximum of 320° for 20% unscheduled low back and psychological disability. This award is in addition to all awards of compensation claimant has received for both temporary total disability and permanent partial disability which relate to her injdustrial injury of September 29, 1971.

Claimant's attorney is awarded as a reasonable attorney's fee a sum equal to 25% of the additional compensation awarded claimant by this Order, payable out of such compensation as paid, not to exceed $3,000.

CLAIM NO. 425 September 7, 1979

ARCHIE F. KEPHART, CLAIMANT
David A. Vinson, Claimant's Atty.
Cheney & Kelley, Employer's Attys.
Own Motion Order

Claimant sustained a compensable injury to his low back on December 5, 1969. The claim was initially closed on July 10, 1970 with an award equal to 32° for 10% unscheduled low back disability. In addition to this first award, claimant has been granted additional awards for a total of 128° for 40% unscheduled low back disability. The last award of compensation was made pursuant to an Own Motion Determination dated July 10, 1978 which granted claimant an additional 32°.

On July 20, 1979 claimant requested the Board to exercise its own motion relief with respect to the 1969 industrial injury. He was, at that time, hospitalized under the care of Dr. Donald T. Smith, a neurosurgeon. On July 26, 1979 the Board requested a current medical report from Dr. Smith to assist it in considering claimant's request.

The carrier, on July 30, objected to claimant's request on the basis that there was no showing of the reason for claimant's hospitalization and no evidence that claimant's current condition was causally related to his industrial injury of December 5, 1969.

Claimant submitted several medical reports from Dr. Smith which indicated he was suffering an acute exacerbation of back pain with muscle spasm. He connected claimant's condition to previous back problems and surgeries and found no new injury. In the history of his report, dated July 11, 1979, Dr. Smith indicated that claimant first had back problems in 1976 associated with his work as a heavy equipment operator. Based on these reports, the carrier, in its letter of August 16, 1979, objected to a reopening.

The Own Motion Determination, dated July 10, 1978, provides a summary of the medical attention claimant received between 1972 and the date of that order.

The Board, after thoroughly considering the medical evidence before it, concludes that it would be in the best interests of the parties to refer this matter to its Hearings Division for a hearing on the issue of whether claimant's current condition, resulting in his hospitalization in July 1979, is related to his December 5, 1969 industrial injury and represents a worsening thereof since the last arrangement and award of compensation on July 10, 1978.

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

WCB CASE NO. 78-3795 September 7, 1979

GEORGE L'ESPERANCE, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Order Of Dismissal

This case is scheduled for hearing on February 9, 1979. I am advised by the parties that subsequent to the issuance of the Determination Order of April 21, 1978 and claimant's request for hearing, claimant enrolled in and is now participating in an authorized program of Vocational Rehabilitation. The principal issue for consideration on February 9, 1979 is the extent of unscheduled permanent disability. The facts of this case are distinguishable from Leedy v Knox 34 Or App 911 (1978) where the claimant was eligible for but not yet enrolled and actively participating in an authorized program of vocational rehabilition and was not receiving compensation at the time of the hearing. Here claimant is receiving compensation and will continue to receive compensation until a new Determination Order is issued. OAR 436-61-052. Upon notification that claimant is not enrolled and actively engaged in, or has completed the authorized vocational program, the evaluation division will issue a new Determination Order. OAR 436-61-050 (3). At that time claimant will be able to raise and litigate the identical issues presented here. Accordingly, it appears that no purpose would be served by trying the case on the date scheduled.

ORDER

IT IS HEREBY ORDERED that claimant's request for hearing is dismissed without prejudice and any issues that could have been tried on February 9, 1979 are reserved to the claimant.

WCB CASE NO. 78-3938 September 7, 1979

NORMAN REILING, CLAIMANT
Roger Leo, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Order On Review

On August 17, 1979 the Board entered its Order on Review in the above entitled matter which affirmed and adopted the Opinion and Order of the Referee dated December 18, 1978.

The State Accident Insurance Fund had requested the Board review and it failed to prevail, therefore, claimant's attorney should have been awarded a reasonable attorney's fee, payable by the Fund, for his services at Board review. The Order on Review inadvertently omitted this attorney's fee and should be amended by adding the following paragraph to follow the last paragraph of the order.

> "Claimant's attorney shall be awarded as a reasonable attorney's fee for his services at Board review the sum of $300, payable by the State Accident Insurance Fund."

In all other respects, the Order on Review should be reaffirmed and republished.

IT IS SO ORDERED.

WCB CASE NO. 77-4607 September 7, 1979
WCB CASE NO. 77-4608

STEWART W. SAUER, CLAIMANT
Charles Paulson, Claimant's Atty.
Souther, Spaulding, Kinsey
Williamson & Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Referee's order which affirmed the May 24, 1977 denial by the carrier of claimant's claim for an injury of March 31, 1976 but reversed the May 20, 1977 denial by the carrier of claimant's claim for an injury of March 9, 1977. That claim was remanded to the carrier for acceptance and payment of compensation, as provided by law, and claimant's attorney was granted $1,000 as a reasonable attorney's fee.

The issue before the Board involves the compensability of two separate claims.

Claimant suffered a coughing spell on March 31, 1976 while returning from his bathroom to the dining room table where he had been working. The coughing spell caused claimant to violently lurch forward and aggravate his back with which he had had previous problems.

Claimant did not return to work and was treated by his family doctor, Dr. Metz, who diagnosed lumbosacral sprain with left sciatica. X-rays were taken which revealed no disc narrowing, moderate marginal osteophytic spurring, osteoarthritis of L4-5 and slight scoliosis convex to left. Dr. Metz referred claimant to Dr. Stumme, a neurologist, who examined him in May 1976 and diagnosed a herniated disc. He suggested a myelogram and laminectomy, however, the claimant rejected this suggestion.

Claimant continued to have intermittent symptoms but elected not to file a claim because he felt that the passage of time would correct his problem and that the actual medical expense involved was rather minimal. He also felt that because he had not missed 14 consecutive days from work that the expenses would have to be borne by him; therefore, it would be of little benefit to him to file a claim.

On March 9, 1977 claimant again had an episode of pain in the same area of his back. This occurred as claimant was taking a step from his desk while at work. Claimant finished the shift and the following day because of the severity of his pain he consulted Dr. Metz who found a paravertebral muscle spasm with pain on motion. Later Dr. Metz treated claimant conservatively but without success.

Dr. Stumme performed a myelogram on April 14, 1977 which revealed a protrusion of the L4-5 disc. He referred claimant to Dr. Berkeley, a neurosurgeon, who performed a lumbar laminectomy on May 9, 1977.

It was the opinion of Dr. Metz that both the 1976 and the 1977 episodes were material contributing factors in the development of claimant's ruptured disc with subsequent need for surgery. Dr. Stumme felt that there was evidence of a ruptured lumbar disc in May of 1976 and again in March 1977 and both incidents contributed to the need for surgery. He believed that the disc was extruded when claimant had his coughing spell and that there was a further extrusion in the same area when claimant had the incident in March 1977. His opinion was based both upon history related to him by claimant and his findings upon examination.

Dr. Berkeley was of the opinion that the employment activity of the claimant on March 9, 1977 was purely coincidental with the onset of his back symptoms.

The Referee found that the claimant was in the course of his employment when the March 31, 1976 injury occurred even though he was working at home. At the time claimant was working for the employer and the evidence indicated this was a usual practice for claimant to indulge in from time to time. However, the Referee found that the injury did not arise out of the course of the employment because there was no causal connection between the injury and his employment; the fact that the injury occurred during the employment does not necessarily establish connection between the injury and the employment.

With respect to the March 9, 1977 injury, the Referee found that claimant was working at the office of the employer for him during regular work hours at the time of the injury, therefore, this established the incident was in the course of employment. To determine whether it arose out of the course of employment there must be a finding that the risk of rising from a chair in the manner in which claimant did was in any way peculiar to or increased by claimant's employment.

The Referee concluded that it was, stating that but for the fact that claimant's desk was cluttered and he had to sit forward and bent over in such a manner that, when he swiveled his chair, it caused him to be in a position which in all probability would place an undue strain on his back.

The Board, on de novo review, finds that both the March 31, 1976 incident and the March 9, 1977 incident arose in the course of the employment but neither arose out of the employment.

The medical evidence sufficiently establishes that on March 31, 1976 and March 9, 1977 claimant suffered extrusions of the L4-5 disc, however, to meet required burden of proving a compensable injury the claimant must prove that his work was a materially contributing factor to those extrusions and the resulting surgery.

> "Before an accident can be said to arise out of the employment, the injury must be directly traceable to the nature of the work or to some risk to which the employer's business exposes the employe" Larson v. State Industrial Accident Commission, 135 Or 137.

Both Dr. Stumme and Dr. Berkeley are specialists in their respective fields to whom claimant's family physician, Dr. Metz, referred for a problem which he undoubtedly felt he was not qualified to handle. Dr. Stumme and Dr. Berkeley each expressed an unequivocal opinion that the work activities of claimant was coincidental. Dr. Metz stated, generally, that claimant's activity must have contributed to this extrusion because of the chronological sequence, but he also said the activities were not peculiar to claimant's job.

The Board concludes that the Referee was correct in affirming the May 24, 1977 denial but incorrect in reversing the May 20, 1977 denial and remanding that claim to the carrier.

ORDER

The order of the Referee, dated March 9, 1979, is modified.

The carrier's denial, dated May 20, 1977, of claimant's claim for an industrial injury sustained on March 9, 1977 and the denial, dated May 24, 1977, of claimant's claim for an industrial injury sustained on March 31, 1976 are hereby affirmed.

The carrier does not have to pay claimant's attorney an attorney's fee.

SAIF CLAIM NO. ZC 427475 September 7, 1979

JAMES L. SOUZA, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right leg on December 15, 1972 when he slipped and fell while working for the Towne House, a bar and restaurant.

Claimant had injured the same leg in an automobile accident in 1950.

In February 1973 Dr. Burr found a history of chronic osteomyelitis of the right femur with severe degenerative arthritis of the right knee. Claimant was fitted with a brace for control of varus and valgus strains to the right knee. He was able to work until March 9, 1973 and on March 13 he underwent an irrigation and debridement with sequestrectomy of the right distal femur.

Claimant returned to work in May and on July 31, 1973 Dr. Burr found claimant had recovered satisfactorily but he should continue to wear the brace for stability. The Determination Order of August 30, 1973 granted claimant time loss benefits and an award equal to 22.5° for 15% loss of the right leg.

Claimant worked until September 29, 1978 when an infection in the right leg forced him to quit. On October 6, 1978 Dr. Burr aspirated the distal right lateral femur and claimant was able to return to work on December 1, 1978. Claimant continued to have complaints and on May 14, 1979 Dr. Burr ordered an ischial weight bearing brace for claimant.

Dr. Burr, on July 19, 1979, indicated claimant was medically stationary and his claim could be closed. He felt claimant should continue to wear the brace.

On August 7, 1979 the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional time loss benefits from September 29, 1978 through November 30, 1978 and additional compensation equal to 15° for 10% loss of the right leg.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 29, 1978 through November 30, 1978, less time worked, and compensation equal to 15° for 10% loss of function of the right leg. These awards are in addition to all awards previously granted claimant for his December 15, 1972 injury.

WCB CASE NO. 76-5730 September 7, 1979
WCB CASE NO. 77-6090

In the Matter of the Compensation
of The Beneficiaries of
GEORGE W. WEBER, DECEASED
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Gearin, Landis & Aebi, Defense Attys.
Order On Review

Reviewed by Board Members Wilson and McCallister.

The claimant, for the purposes of this order the workman's widow, requested Board review of the Referee's order which found that the worker at the time of his death was not permanently and totally disabled but that he would have been entitled to additional awards of permanent partial disability equal to 97.6° for loss of the right arm, 15° for 10% loss of the left leg, and 32° for 10% unscheduled neck and low back disability. The order directed this additional compensation be paid to the surviving beneficiaries of the decedent-worker, as provided by law.

The issue before the Referee was the extent of the worker's permanent disability prior to his death. Claimant contends that prior to his death he had been totally disabled.

The worker had suffered two compensable injuries. The first on December 28, 1972, the second on May 31, 1973. Both injuries occurred prior to the amendment of ORS 656.218 by Oregon Laws of 1973, Chapter 355, Section 1.

It is not necessary to restate the findings made by the Referee; it is sufficient to state that based upon the medical and lay evidence before him, the Referee found that the worker was not permanently and totally disabled by reason of his industrial injury at the time of his death. The Referee did find that the worker was entitled to additional compensation for the disability as the result of the two injuries.

The two issues before the Board are: (1) was the worker permanently and totally disabled as a result of his industrial injuries prior to his death? (2) does the widow of the worker have any right to seek a re-determination of the degree of her husband's permanent partial disability at the time of his death?

The Board, on de novo review, concurs with the findings of the Referee with respect to permanent total disability. The worker was not permanently and totally disabled as the result of his industrial injuries at the time of his death.

The Board does not agree with the Referee's award of additional compensation based upon claimant's request for hearing on the adequacy of the Determination Orders.

After the Board had received briefs from both parties, it was asked to defer ruling upon the request for review pending a decision of the Supreme Court to review the decision handed down on February 19, 1979 in The Beneficiaries of Marvin Bradley, Deceased, Claimant, vs. SAIF, 38 Or App 559 (1979). On August 23, 1979 the Board was informed that the Supreme Court had denied the petition for review in Bradley vs. SAIF, 387 OR 123, and the Court of Appeals ruling was final.

In Bradley the facts were very similar to those in this case. The widow had appealed from a Referee's order which had found her husband was not permanently and totally disabled as a result of his industrial injury at the time of his death and that she was barred under the provisions of ORS 656.218 from seeking re-determination of the degree of his permanent partial disability at the time of his death.

The Court agreed with the findings of the Referee and the Board that at the time of his death the deceased worker was not permanently and totally disabled as a result of his industrial injury.

The Court said it did not reach the question of whether the worker's permanent partial disability exceeded the award in effect at the time of his death because, in its opinion, ORS 656.202(2) and 656.218(1), as written at the time of the worker's injury, precluded a survivor from seeking a re-determination after the worker's death of the degree of his permanent disability.

ORS 656.202(2) provides for the payment of benefits for injuries or death thereby indicating it contemplates payment to survivors of deceased workers as well to living but disabled workers. However, in that statute the word "continued" is interpreted by the Court to mean continuance of such payments as had been made to the worker during the time of his life. The payments which the worker was receiving at the time of his death become fixed and the survivor is entitled to receive whatever is left from the award which had been previously given to her husband prior to his death.

It would serve little purpose to repeat what Judge Gillette stated in Bradley; the questions which are at the present time before the Board and which are almost identical to those in Bradley have been fully answered in his opinion.

The Board concludes that the medical evidence does not justify a finding of permanent total disability and that under the provisions of ORS 656.202(2) the claimant, widow of the deceased worker, is only entitled to receive payment for the compensation which her husband had been previously awarded prior to his death. She is not entitled to any additional compensation after his death.

The Board takes note that after the effective date of Oregon Laws 1973, Chapter 355, Section 1, ORS 656.218(1) would entitle a deceased worker's survivor to litigate the issue of the worker's permanent partial disability whether or not there had been a prior determination, but that was not the law in effect at the time of either of the deceased worker's injuries. Therefore, the Referee's order must be reversed and the two Determination Orders reinstated.

ORDER

The order of the Referee, dated January 18, 1979, is reversed.

The Determination Order, dated September 6, 1977, which related to the December 28, 1972 injury (WCB Case No. 77-6090) is affirmed as is the Determination Order, dated October 14, 1976, which related to the industrial injury of May 31, 1973 (WCB Case No. 76-5730).

SAIF CLAIM NO. A 652851 September 10, 1979

CLYDE L. BAKER, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on January 31, 1958 while employed by George L. Roberts. The injury was to claimant's back. On May 15, 1958 Dr. Donald E. Moore informed the State Industrial Accident Commission, predecessor of the Fund, that claimant had developed acute thrombophlebitis of the left leg as a complication to the lumbosacral strain of January 31, 1958. The claim was closed by final order dated January 6, 1959 whereby claimant was given an award equal to 20% loss function of the left arm and 15% loss function of an arm for his unscheduled disability. Claimant's aggravation rights have expired.

On July 12, 1979 claimant, by and through his attorneys, requested that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for the January 31, 1958 industrial injury.

The Board advised the Fund that it had received the request for own motion relief and asked it to respond thereto.

On July 31, 1979 the Fund forwarded to the Board medical documentation dating from 1958 through 1961 which related to claimant's 1958 industrial injury and stated that it would not oppose reopening if the Board found the medical evidence justified it.

The Board, having given consideration to the medical documents, originally forwarded to it and also to the report from Dr. William L. Streitz, an orthopedic surgeon, dated April 5, 1979, which was addressed to the Fund and advised it of his opinion that claimant's problem of varicose veins were related to the January 31, 1958 industrial injury, concludes that there is sufficient medical to justify the reopening of the claim as of the date claimant commenced to receive treatment from Dr. Streitz for his varicosities.

ORDER

Claimant's claim for an industrial injury sustained on January 31, 1958 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant commenced to receive treatment for the obstruction of the inferior vena cava or such other treatment as Dr. Streitz and/or Dr. Casebolt found necessary to relieve claimant's problem of varicose veins, and until the claim is closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation for temporary total disability claimant may be granted by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 78-5384 September 10, 1979

ROBERT A. BROWN, CLAIMANT
Keane, Harper, Pearlman & Copeland,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which approved the Determination Order, dated June 21, 1978, awarding claimant compensation for temporary total disability from January 5, 1977 through May 1, 1978, less time worked, and 32° for 10% unscheduled low back disability.

Claimant, at the time of the hearing, was 29 years old, has a high school education and has completed a two-year tool and die course for which he received a certificate from San Mateo Junior College in 1970. Claimant also spent one year at Mt. Hood Community College studying welding and tool design and two terms in psychology and music at Portland Community College. In addition, claimant has taken the necessary real estate courses at Clackamas Community College to enable him to try for a real estate salesman's license in Oregon. He does not have a license.

On August 29, 1975 claimant sustained a compensable injury to his low back while employed as a greenskeeper at Bowman's Inc. when he fell off a mower into a ditch. This claim was first accepted by the Fund as a non-disabling injury. Claimant was first seen by Dr. Rohrberg on September 5, 1975 who diagnosed an acute lumbosacral strain.

In December 1975 claimant became employed as a maintenance man for the Thunderbird Motor Inn. He continued to complain of low back pain and he has been treated and/or examined by Dr. Mossman, an osteopath; Dr. Butler, an orthopedic physician, and Dr. Lombaert, a chiropractor. The diagnosis has been consistently that of a low back strain.

In February 1977 Dr. Chuinard reported claimant was unable to work as of January 28, 1977. On March 4, 1977 Dr. Smith found claimant's condition physically unstable and in June 1977 reported claimant was still unable to perform his regular occupation.

On April 6, 1977 the Fund had denied claimant's request to reopen his claim for the August 29, 1975 injury and claimant filed a claim for low back problems incurred while working for Thunderbird, whose carrier also was the Fund. The Fund denied this claim on July 29, 1977.

Referee Gemmell, after a hearing on January 26, 1978, approved the denial of April 29, 1977 by the Fund for a new injury at Thunderbird Motor Inn but remanded claimant's aggravation claim to the Fund for acceptance.

On May 5, 1978 claimant was examined by Dr. Pasquesi who diagnosed chronic lumbar instability. He rated claimant's impairment at 12% of the whole man and found his condition medically stationary.

The June 21, 1978 Determination Order granted claimant 32° for 10% unscheduled disability.

The claimant testified that he now feels unsafe on ladders and scaffolding because of his imbalance and he is unable to operate heavy equipment, unable to lift anything heavy and is prohibited from engaging in strenuous activities. His prior work experience had been in machine shops as a maintenance engineer, as an inside painter, as a carpenter's helper and framer, as a heavy equipment operator, as a landscaper, all of which are considered heavy type work, and he has also been an apartment manager. Claimant feels that he cannot hold any of these jobs at the present time.

Dr. Smith testified at hearing that claimant was limited to no lifting over 25 pounds.

The Referee concluded that claimant had failed to prove that he had suffered a loss of earning capacity greater than that for which he had been awarded by the Determination Order. He approved the Determination Order.

The Board, on de novo review, based primarily on Dr. Smith's testimony, finds that claimant has suffered a greater loss of wage earning capacity than that represented by the award made by the Determination Order.

On October 6, 1978 Dr. Smith had advised claimant's attorney that claimant's condition was medically stable without any realistic prospect for significant improvement or deterioration in the foreseeable future. His residual back pain was related to impairment in motion of the lower lumbospinal segments, sufficient to restrict spinal flexion by approximately 50%, but not causing impairment of other movements or low back functions. At first blush this might be interpreted as an indication that claimant's condition had improved over the past year while under the treatment of Dr. Smith; however, after taking into consideration the limitations which Dr. Smith placed upon claimant's work activities, to which Dr. Pasquesi agreed, it is the opinion of the Board that claimant has lost more than 10% of the labor market which was previously available to him before his industrial injury.

To adequately compensate claimant for his loss of wage earning capacity the Board concludes that claimant is entitled to an award equal to 64° which represents 20% of the maximum for unscheduled disability.

ORDER

The order of the Referee, dated February 1, 1979, is modified.

Claimant is awarded an additional 32° of a maximum of 320° for 10% unscheduled low back disability. This award is in addition to the award made by the Determination Order of June 21, 1978 which was approved by the Referee's Order.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum equal to 25% of the additional compensation awarded claimant by this order, payable as paid, not to exceed $3,000.

SAIF CLAIM NO. SC 288027 September 10, 1979

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

On August 8, 1979 the Board received from claimant, by and through her attorney, a request that it exercise its own motion jurisdiction and reopen her claim for an injury sustained on February 2, 1971 while working for Lake Improvement Company. The claim was first closed on September 25, 1972 and her aggravation rights have expired.

Attached to claimant's petition were two reports from Dr. Slocum. In his February 5, 1979 report he stated that Dr. Becker felt claimant was suffering from a resolving peroneal neuropathy which would recover spontaneously. Dr. Slocum said he would recheck her in about a month. In his May 4, 1979 letter he said that claimant's peroneal palsy was related to her industrial injury of February 2, 1971. He indicated that when claimant hit the side of her knee on a refrigerator in November 1978 it was probably caused by awkwardness and gait which were the result of an arthrodesed knee.

On August 15, 1979 the Board asked the Fund to respond within 20 days stating its position with respect to claimant's petition.

On August 27, 1979 the Fund responded, stating that there was currently a request for hearing pending before the Board's Hearings Division and, because the Fund opposed the reopening of claimant's claim, it requested that this own motion request be consolidated with the hearing presently pending. The case before the Hearings Division (WCB Case No. 79-4222) involves failure of the Fund to provide medical reports and pay mileage and medical expenses under ORS 656.245 for the February 1971 industrial injury.

The Board feels that it would be in the best interest of the parties involved to refer claimant's petition for own motion relief to the Hearings Division with instructions to consolidate it for hearing with WCB Case No. 79-4222 and to take evidence on all the issues, including the issue of whether claimant's condition at the present time is related to her industrial injury of February 2, 1971 and, if so, if her condition has worsened since the last arrangement or award of compensation.

The Referee is instructed to cause a transcript of the proceeding to be prepared and submitted to the Board with his recommendations concerning claimant's own motion petition.

WCB CASE NO. 78-8219 September 10, 1979

IVAN L. EVANS, CLAIMANT
Lively & Wiswall, Claimant's Attys.
SAIF, Legal Serivces, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

The claimant seeks Board review of the Referee's order which affirmed the October 6, 1978 denial by the Fund of claimant's claim for aggravation.

Claimant suffered a compensable injury to his back on July 18, 1974 while moving an electric range. At the time, claimant was managing an apartment building. Claimant received some chiropractic treatment and was examined in December 1974 by Dr. Carter who found a protruded L5-S1 disc. Dr. Carter performed back surgery on April 3, 1975.

Claimant had a slow recovery and Dr. Carter's closing examination of December 31, 1975 indicated that claimant would have a permanent restriction of lifting no greater than 20 to 25 pounds but that he would be able to return to his prior work as an apartment manager. He found a considerable amount of functional overlay which he felt might make it difficult to assist claimant in getting back to any type of employment but he did find his condition to be medically stationary as of January 1, 1976 and recommended claim closure.

On February 10, 1976 a Determination Order granted claimant compensation equal to 32° for 10% low back disability. He was also granted compensation for temporary total disability from December 9, 1974 through January 31, 1976, less time worked.

Claimant, while in prison,was examined by Dr. Becker on April 27, 1976. Dr. Becker found no evidence of current nerve root compression syndrome. He felt claimant had a chronic lumbosacral strain symptoms with early degenerative disc disease, minimal to mild sciatica on the left. He thought it was alright for claimant to do light type work, but no medium or heavy lifting.

Claimant requested a hearing on the determination order and on June 15, 1976 it was stipulated that claimant be given an additional award of 80° for 25% unscheduled disability, giving claimant a total of 112° for 35% of the maximum.

After claimant was released from prison he was employed as a pilot car driver; he ultimately established his own pilot car business. Claimant claims his legs are numb and that on one occassion because of the numbness he didn't even notice a cut on his foot. The numbness bothers his driving and also causes headaches, according to claimant. When he was changing a tire he felt a "catch" in his back, causing the pain in that area to "flareup".

On January 4, 1977 Dr. Stainsby examined claimant and stated that the x-rays of the lumbosacral spine revealed some narrowing of the L5, S1 interspace with some early sclerosis of the margins of the interspaces. He thought there was a suggestion of some posterior subluxation of L5 on S1 but it was minimal.

On March 7, 1977 Dr. Becker examined claimant and found no evidence of recurring disc protrusion or extrusion nor did he feel a myelogram was warranted. He believed that claimant had chronic subjective complaints primarily of a functional nature. He recommended claimant return to work and also that claimant do stretching exercises. He released claimant to do light work, with no lifting over 30 pounds.

On September 6, 1978 claimant was examined by the physicians at Orthopaedic Consultants who found his condition was no worse then than it was at the time of the last arrangement of compensation on June 15, 1976. They found the loss of function due to the injury to be in the mildly moderate range. Dr. Stainsby found it to be moderate.

On May 26, 1978 claimant requested his claim be reopened. The Fund denied the request on October 6, 1978.

The Referee found that claimant had failed to establish by a preponderance of the evidence that his condition had worsened since the stipulation was approved on June 15, 1976 whereby claimant was awarded an additional 80° for 25% unscheduled disability. Since claimant's release from prison he has worked consistently and undoubtedly at time he has been working under some stress and strain and pain in order to avoid revocation of his parole, in the opinion of the Referee.

The Referee concluded that claimant could not request that his claim be reopened as an aggravation just to avoid the legal consequences of the settlement on June 15, 1976 which may have been insufficient. The claim could be reopened only if the evidence shows as a whole that claimant's condition has worsened since that date.

The Referee concluded that the denial of claimant's claim for aggravation was proper and that claimant's request for relief should be denied.

The Board, on de novo review, concurrs in the findings and conclusions reached by the Referee in this case. It does not feel that it is necessary, as was done in this case, to quote verbatim and at a great length from medical reports which have already been reviewed by the Board during their de novo review. A simple statement relating to the impressions of the doctor and his recommended treatment, if any, is sufficient.

ORDER

The order of the Referee dated April 6, 1979, is affirmed.

WCB CASE NO. 77-7780 September 10, 1979

BEULAH HAMLIN, CLAIMANT
William A. Barton, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson, Phillips and McCallister.

The employer seeks review by the Board of the Referee's order which awarded claimant compensation equal to 160° for 50% unscheduled disability.

On February 15, 1972 claimant was employed by Roseburg Lumber Company as a plugger and filed a claim for exposure to welding fumes. Claimant has not been employed since this exposure.

Dr. Fletcher, an osteopathic physician, diagnosed acute bronchitis and asthma attack. He found claimant's condition was stationary; however, in March 1972 claimant had an acute attack and was hospitalized.

On May 18, 1972 Dr. Perlman of an allergy clinic examined claimant whose complaints were coughing, wheezing and shortness of breath. The doctor felt there was an infectuous element involved.

Dr. Fletcher released claimant for regular work in June 1972 and again in January 1973. By May 1973 claimant had a relapse and Dr. Fletcher felt claimant might not be able to ever return to her regular occupation.

In June 1974 Dr. Vitums examined claimant for a pulmonary consultation. He diagnosed reactive airway disease etiology unknown. He felt claimant's exposure to welding fumes precipitated the asthmatic attack by aggravating her underlying reactive airway disease. However, this aggravation was only temporary with no permanent damage.

On December 17, 1974 a Determination Order granted claimant time loss only.

Claimant appealed the Determination Order and, after a hearing, by an Opinion and Order dated October 31, 1975, the Referee affirmed the Determination Order by concluding that claimant did not suffer any permanent partial disability.

This order was appealed to the Board which in turn affirmed the Referee's order. The claimant then appealed to the circuit court and on December 10, 1976 the court entered a memorandum opinion finding that claimant did have permanent disability as a result of her exposure to welding fumes in the course of her employment and remanded the claim to the Board for its determination on the extent of claimant's permanent partial disability.

In conformance with this remand the Evaluation Division issued a Determination Order after a re-evaluation and concluded that claimant had suffered no permanent disability from her exposure. On August 17, 1977 the Court of Appeals affirmed the order of the circuit court.

On February 11, 1977 Dr. Tuhy examined claimant. Her complaints were shortness of breath on exertion, asthma attacks seven to ten days per month, nasal drainage and sniffling, easy fatigue and frequent wheezing. It was Dr. Tuhy's opinion that it would be extremely far-fetched and speculative to say that claimant's work exposure changed her immunologic status making her asthma worse. Dr. Tuhy felt claimant's temporary total disability from welding fumes exposure would have lasted only 2-3 weeks. Claimant's impairment was due to the natural progression of her disease, symptoms which began over 20 years before.

On August 8, 1978 Dr. Fletcher reported that claimant's condition had been stable most of the time since 1975 and her ability to work was good with limitations. Claimant could not return to her regular occupation, no employment which would require physical exertion, no employment with rapid change in temperatures, nor employment around air pollution. With these limitations, Dr. Fletcher felt claimant could be employed eight hours a day, five days a week.

Claimant testified she uses a respiratory machine to aide with breathing. She felt she was unable to do anything being unable to run or work. She did perform her own housework and felt she could work in an office three hours a day. Claimant has sought no employment.

Dr. Tuhy testified at the hearing the same information which appears in his medical reports but did add that it was possible that the triggering factor to claimant's condition was not from exposure to fumes but from a long infection that claimant had which hospitalized her in early 1972 right after her exposure.

The Referee found that the only new evidence before him since the 1975 hearing was the reports and testimony of Dr. Tuhy which he felt did not add very much to the overall evidence. The Referee concluded, based upon all of the evidence and taking into accout claimant's residuals from the natural progression of her underlying disease, that claimant was entitled to an award of 50% of the maximum allowable by law for her loss of wage earning capacity.

The majority of the Board finds this appeal is not an attempt to relitigate the previous hearing but is an appeal from the Determination Order of March 8, 1977.

The Board, in its present review, has the obligation under its de novo review, to evaluate the record as of the date of the last hearing. The Board is fully cognizant of the prior findings of the circuit court and the Court of Appeals that the claimant did suffer permanent disability as the result of her industrial injury.

Two important factors influence the majority of the Board in concluding at this time that the claimant has not suffered any loss of earning capacity as the result of her industrial exposure. The first is that additional expert evidence from Dr. Tuhy, now fortifies the conclusions previously expressed by Dr. Perlman and Dr. Vitums. All of these doctors are highly qualified specialists in the fields of pulmonary disease and allergies, and all conclude that the claimant suffered no permanent disability from the industrial exposure. The second persuasive factor influencing the majority of the Board, is the line of cases such as Weller, Stupfel and others, decided by the Court of Appeals since the time of its original consideration of this case. Having found, based upon the preponderance and weight of the evidence that the claimant's condition was only temporarily exacerbated by the industrial exposure, it follows that under Weller, Stupfel et. al., that no permanent disability exists.

ORDER

The order of the Referee, dated December 27, 1978, is reversed.

The Determination Order, dated March 8, 1977, is affirmed.

Board Member Phillips dissents as follows:

I would respectfully dissent from the opinion of the majority of the Board. On August 17, 1977 the Court of Appeals found that the claimant did have a permanent disability as a result of her exposure to welding fumes in the course of her employment. I am not persuaded that a contrary opinion as of this time is within the authority of the Workers' Compensation Department or the Board.

The remaining question is to the extent of that disability and its effect upon her earning capacity. In that regard I find that she is precluded from employment in areas which have an adverse affect upon her ability to breathe because of exertion or because of the presence of fumes or particles in the area. I believe that her loss of earning capacity as a result of those restrictions to be 60% and would so rule.

CLAIM NO. B53-132639 September 10, 1979

WILLIAM E. HARSHMAN, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury to his back on September 22, 1969. The claim was first closed on January 22, 1970 and his aggravation rights have expired. Claimant has been granted no permanent disability compensation in this claim.

Because of a flare-up in claimant's back complaints, the carrier voluntarily reopened claimant's claim with time loss benefits commencing on October 17, 1977. Over a period of time claimant experienced episodes of back pain for which he was treated. He was on and off work several times but apparently returned to work on February 27, 1978 and has worked since. Treatment during this time included traction, medication, physical therapy and periodic check-ups. On July 17, 1979 Dr. Carroll, claimant's treating physician, indicated claimant was doing well and he anticipated no increased disability as a result of the 1969 industrial injury. Claimant continues to do the same type of work he was doing at the time of his injury and has demonstrated no decrease in wage earning capacity.

The carrier, on August 13, 1979, requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended claimant be granted compensation for temporary total disability from October 17, 1977 through October 30, 1977, from December 23, 1977 through January 22, 1978 and from January 31, 1978 through February 26, 1978.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 17, 1977 through October 30, 1977, from December 23, 1977 through January 22, 1978 and from January 31, 1978 through February 26, 1978, less time worked.

WCB CASE NO. 78-7419 September 10, 1979

KEITH W. MILES, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requested and the claimant cross-requested Board review of the Referee's order which set aside the Fund's September 7, 1978 denial of claimant's claim for aggravation and awarded claimant an additional 160° for his unscheduled right shoulder disability.

The issues before the Board are whether or not the claimant's scheduled and unscheduled disabilities were aggravated by an intervening non-industrial injury sustained on May 27, 1976 and, if so, the extent of claimant's permanent disability. Claimant contends that he is permanently and totally disabled.

Claimant suffered a compensable injury on May 13, 1974 when he attempted to prevent some welding tanks from falling. He ruptured the biceps tendon near his right elbow which required surgical repair on May 23, 1974. As a result of the surgery claimant had an extension of 15° at the right elbow and developed pain in the right shoulder while recuperating.

His claim was closed by a Determination Order dated October 29, 1975 with an award of 38.4° for 20% loss of the right arm and 48° for 15% unscheduled right shoulder disability.

On or about May 27, 1976, while claimant was in North Carolina, he received severe burns to his right arm, back and shoulders when the engine of his Dodge truck apparently blew up. Claimant was attempting to pour gasoline in the carburetor. Claimant was immediately taken to the Veterans Hospital in Ashville, North Carolina. The physician at that hospital called Dr. Lindgren, a plastic surgeon in Oregon, who had previously seen claimant and it was arranged to have claimant transferred directly to the Burn Unit at Brooke Army Hospital where he underwent skin grafting to his right arm, right hand, right side of his chest, abdomen and neck independently.

When claimant returned to Oregon after being discharged from the hospital on July 7, 1976, he saw Dr. Lindgren who felt that most of the areas had healed with the exception of one or two small ones which he felt would granulate in well. The grafts themselves were quite tender and the skin had not matured and there was a tendency for the scar tissue to be hypotrophic.

Dr. Lindgren had claimant transferred to the Veterans Hospital in Portland and recommended Jobst stockings be ordered for him to wear on his hands, arms and legs. He felt that in the future it would be necessary to do a Z-plasty to help correct the scar contracture on the arm but he wished to postpone it until the scars had softened and matured more. He did not feel that claimant was able to return to the type of work for which he had been trained, i.e., welding and employment involving heavy lifting.

On May 18, 1978 the Z-plasty surgery was performed and, on January 5, 1979, claimant was found to have the same limitation of motion of his right elbow that existed at the time of his claim closure.

Dr. Burr, an orthopedic physician, who had examined claimant after the May 13, 1974 industrial injury and had treated him up to the date of the claim closure, saw claimant again on April 26, 1977. X-rays taken reveal significant degenerative arthritis of the shoulder joint. Dr. Burr could not say that the arthritis was related to his injury of May 1974; he thought the increased pain in the shoulder in April 1977 was probably associated with the entire arm, the burn and the flexion contraction of the elbow and the decreased strength in function of the wrist which placed more stress at the shoulder itself. He believed that claimant at that time could not return to work as a welder and probably would not be able to do so in the future.

Dr. Coletti, an orthopedic physician, examined claimant on May 22, 1978 at the request of claimant's attorney. He noted that claimant has had intermittent and continued elbow pain since the surgical procedure but has never been able to fully extend or flex his arm, a source of disability and functioning with that extremity. He believed claimant was suffering from multiple problems and, discounting the burn for which he had no evidence of any significant musculoskeletal change, claimant had lost considerable motion and strength of the arm as a result of the rupture of the biceps tendon in 1974. Claimant also has considerable restriction of motion in the right shoulder due to degenerative joint disease and, to a slight degree, muscle atrophy occasioned by his injury.

On June 20, 1978 claimant, by and through his attorney, requested that his claim be reopened on the basis of aggravation.

On September 7, 1978 the Fund denied the claim, stating it had no evidence that claimant's right arm and shoulder condition resulting from the May 13, 1974 injury had materially worsened since his claim had been closed; that the current right arm and shoulder problems were mainly due to a subsequent burn injury.

On October 26, 1978 Dr. Lindgren advised claimant's attorney that although he had not seen claimant at the time he ruptured his biceps tendon he had treated claimant following the burn injury and, after reviewing the records, he felt that the burn itself had caused the pain in the arm which claimant presently has with the exception of some limitation of motion from the scar contracture which was still present. He stated that, in general, it should not be too severely related to the burn and that he concurred with the report of Dr. Coletti.

The Referee found that both Dr. Burr and Dr. Coletti agreed that the compensable elbow injury contributed to the worsening of the condition of claimant's right shoulder since his claim closure in 1975 but that they disagreed as to whether or not the burns contributed. Dr. Coletti felt that they did not; Dr. Burr was of the opinion that the increased disability to the right shoulder resulted from both the compensable injury and the effects of the burns. The Referee accepted the opinion of Dr. Burr.

The Fund contends that ORS 656.273(1) precludes finding that there has been aggravation unless the worsened condition results only from the original injury. The Fund cites several Oregon cases which involved successive accidents covered by different carries in which the court has held that a materially exacerbated condition becomes a new injury for compensation purposes. The Referee concluded, however, that claimant had suffered an aggravation to his right shoulder because his compensable injury materially contributed to his worsened condition.

The Referee found that claimant's testimony that he suffered little increased disability as a result of his burn injuries was not consistent with his observation of claimant at the hearing. With respect to claimant's right hand and arm the Referee concluded that claimant's increased impairment resulted from his burns and that his compensable injury had not materially contributed to the worsening of this condition.

The Referee found that claimant's condition was medically stationary and it was appropriate for him to determine the extent of claimant's disability. Stating that he was disregarding the direct effect of claimant's burns as they reduced claimant's earning capacity because they post-dated the compensable injury, he found that claimant had lost a substantial wage earning capacity as a result of the aggravation of the right shoulder and he granted claimant an additional 160°, giving claimant a total of 208° for 70% of the maximum for unscheduled right shoulder disability. He did not change the award for scheduled disability; it was his opinion that the worsening of that condition was caused primarily by the burn injuries.

The Board, on de novo review, reverses the Referee.

ORS 656.273(1) states: "After the last award or arrangement of compensation, an injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury" (emphasis supplied).

In response to an inquiry from the claimant's attorney, Dr. Burr stated:

> "As to the regards of the severe burn he suffered to the right upper extremity we do know that burns can produce secondary arthrosis of joints and in this man's case the severe burn probably aggravated the above situation.
>
> "I have read the letters of Dr. Lindgren and Dr. Coletti and I partially agree with them. However, I do want to point out to you that severe burns requiring the skin grafts that Mr. Miles [claimant] required, can indeed aggravate joints by secondary arthrosis as indicated before."

It is the Fund's contention that the 1976 burn injuries constituted an intervening injury which materially contributed to claimant's worsened conditions to the extent that a claim for increased compensation could not be awarded under the statute if claimant's worsened condition, even in part, resulted from other than the original injury.

The Oregon rule of law is quite clear regarding successive injury cases. In Smith v. Ed's Pancake House, 27 Or App 361 (1976), the Oregon Court of Appeals relied upon the Massachusetts-Michigan rule of the "last injurious exposure" which places full liability upon the carrier covering the risk at the time of the most recent injury that bears the cause of relationship to the disability.

If the second injury takes the form of merely a recurrence of the first, and if the second injury does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. If the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed to the major part to the final condition [emphasis added].

The Board concludes that the burn injuries suffered by claimant in North Carolina contributed independently to the claimant's present condition and because the second incident was a non-industrial injury the Fund has no responsibility for claimant's present condition.

The Referee had concluded that the claimant was medically stationary and he proceeded to rate his disability. The Board does not find either medical or lay evidence in the record sufficient to justify an award to claimant for his unscheduled disability in excess of that granted by the Determination Order dated October 29, 1975.

Claimant obviously has lost some wage earning capacity but it is difficult to determine how much of that loss is attributable to his industrial injury and how much to the residuals of his severe burn injuries which were non-industrially incurred.

The Referee did not alter the award for the scheduled disability to claimant's right arm and the Board agrees that there is no basis for doing so.

ORDER

The order of the Referee, dated April 10, 1979, is reversed.

The Determination Order, dated October 29, 1975, is affirmed.

SAIF CLAIM NO. EA 465982 September 10, 1979

RICHARD OLSON, CLAIMANT
Hugh Cole, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained an industrial injury to his low back on February 25, 1955 while employed by the National Cash Register Company. The claim was first closed with an award of compensation for temporary total disability and 75% loss of use of an arm for unscheduled disability. By an Own Motion Order, dated January 19, 1977, claimant's claim was remanded to the Fund for acceptance and payment of compensation, commencing January 17, 1975 and until closed pursuant to ORS 656.278.

Dr. Woolpert, in his report of August 3, 1979, indicated that claimant was doing very well with only one mild flare-up over the past two years. Examination showed a large scar in the back area with almost no motion in the dorsal lumbar area secondary to an earlier fusion, osteomyelitis and other operative procedures. Claimant can bend forward to with 24 inches of the floor, lateral bending 34% of normal, and extension 15-20% of normal. Dr. Woolpert found claimant's condition to be stationary and the case could be closed. He found the disability to be in the severe range.

On June 28, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for tempoarary total disability from January 17, 1975 through June 19, 1979.

The Board agrees with the recommendation for temporary total disability but finds that claimant is entitled to a greater award of compensation for permanent disability, based on Dr. Woolpert's report. Claimant's condition has been rated as severe with infections recurring frequently. The Board concludes that claimant should be granted an additional award of compensation equal to 15% loss function of an arm for his unscheduled disability.

ORDER

The claimant is hereby granted compensation for temporary total disability from January 17, 1975 through June 19, 1979, less time worked, and compensation equal to 15% loss function of an arm. These awards are in addition to the previous awards claimant has been granted.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of January 19, 1977 for the award of temporary total disability compensation granted claimant by this order.

Claimant's attorney is also entitled to an attorney's fee equal to 25% of the increased compensation for permanent partial disability granted by this order, payable out of said compensation as paid, not to exceed $3,000.

SAIF CLAIM NO.: PC 276019 September 10, 1979

JUNE PYLE, CLAIMANT
Robert Grant, Claimant's Atty.
SAIF, Legal Services, Defense atty.
Own Motion Order

Claimant sustained a compensable injury to her left hand on November 9, 1970. Her claim was closed and claimant's aggravation rights have expired.

On June 22, 1977 a Board's Own Motion Order reopened her claim for surgery which was performed on August 30, 1977. This surgery involved a transplantation of sections of the sural nerves from both lower legs into the left forearm and resulted in neurological deficits in both of claimant's lower legs and feet.

An Own Motion Determination of May 18, 1979 granted claimant compensation for disability in both legs and unscheduled psychological disability.

Claimant, by and through her attorney, requested that the Board consider her eye and breast problems which she felt were a direct result of the operations necessitated by her industrial injury. The Board informed claimant that it had insufficient medical evidence and asked her to forward medical proof of causal relationship. Claimant did so on July 31, 1979.

Claimant submitted several medical reports from Drs. Dunn, Parrish and McCook. Very little mention is made of breast or eye problems except by Dr. Dunn in his July 26, 1978 check-up report which stated claimant's left eyelid has been droopy since injection.

The Fund was requested by the Board to respond to claimant's petition. On August 17, 1979 it replied, stating it was not aware of the issue claimant wanted considered and, therefore, could not provide an intelligent response.

The Board, after considering the medical evidence before it, finds nothing to warrant reopening claimant's claim. The conditions for which claimant seeks relief are merely mentioned "in passing" by the treating doctors and are not considered to be substantial enough to require treatment. The Board, at this time, concludes that claimant's request for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-6453 September 10, 1979

ANSELMO REYES, CLAIMANT
Douglas L. Minson, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant requested Board review of the Referee's order affirming the Determination Order, dated August 9, 1978, which awarded claimant compensation equal to 64° for 20% unscheduled left shoulder disability.

The issues before the Board are premature closure of claimant's claim by the August 9, 1979 Determination Order and extent of unscheduled disability and entitlement to a separate award for left arm disability.

Claimant had suffered an injury to his left shoulder on October 6, 1976 while he was pulling a painting stencil from a railroad car. He received treatment from Dr. Rullman, Dr. Eilers and Dr. Pasquesi. Claimant was able to return to work during February 1977. This claim was then closed on March 12, 1977 with compensation for temporary total disability from October 6, 1976 through February 6, 1977.

Claimant had only been back to work about six weeks when the second injury occurred on March 15, 1977 when a rope he was pulling on a winch snapped causing him to strain his left shoulder. After the original diagnosis by Dr. Jones, Dr. Eilers again treated claimant. It was believed that claimant would be able to return to his former job, however, after unsuccessful conservative treatment he was referred to the Callahan Center for evaluation. He was there from August 5 to September 16, 1977 and his discharge summary which was prepared by Dr. Van Osdel indicated a reluctance to recommend surgery at that time. He found no clinical evidence of bicipital tendinitis and no discomfort in the left shoulder when claimant lifted 100 pounds from the floor to the waist. However, he noted claimant had considerable discomfort on abduction over 120° in the left acromio-clavicular joint; also, claimant had problems when lifting as little as 10 pounds above shoulder level. He recommended a limitation of lifting and repetitive lifting, suggested job modification and referral to service coordinator for assistance in returning to work after the contemplated surgery.

Dr. Eilers and Dr. Fry each diagnosed chronic bicipital tendinitis and in October 1977, claimant had a surgical exploration of his left shoulder with the release of the bicep tendon and placing it on the numerus with a staple and also release of his coracoacromial ligament. It was hoped this would relieve claimant of the persistant pain in his shoulder which was diagnosed as chronic tenosynovitis of the biceps tendon. Claimant's recovery was slow.

In April 1978 Dr. Eilers reported claimant had good range of motion and his complaints were more subjective than objective.

Dr. Pasquesi examined claimant in May 1978 and diagnosed chronic capsulitis, tendinitis and fibrositis in the left shoulder. He felt claimant should limit his repetitive lifting and also the weight of any type of lifting. He said claimant should not use his left arm above 90°. Dr. Eilers concurred. The Determination Order of August 9, 1978 closed his claim, awarding claimant compensation equal to 64° for 20% unscheduled disability for his left shoulder injury of March 15, 1977.

The employers prepared a re-training program for claimant and submitted it to Dr. Eilers who approved it, stating that he felt claimant would be a good candidate for a technical training program that would use the skills that he has, but would not require him to do heavy mechanical work which he had done in the past. He also stated that it would be advisable for claimant to return to his office for physical evaluation of his problem. Claimant was released by Dr. Eilers to attend the training program as of December 14, 1978, four days before this hearing.

The Referee found that the claimant had been declared medically stationary by his treating physician Dr. Eilers, on April 12, 1978 and that this opinion was concurred in by Dr. Pasquesi on May 19, 1978 and reiterated by Dr. Eilers on June 12, 1978. The Referee concluded that claimant's claim was not closed prematurely on June 12, 1978, despite claimant's contention that although he was being trained under the employer's re-training program the employer was able to terminate such program at any time without the permission from the Board and therefore claimant was at the employer's mercy.

The Referee found that the evidence was not convincing the claimant was entitled to a separate award for scheduled left arm disability as well as an unscheduled disability. He concluded that the award of 64° granted by the Determination Order of August 9, 1978 adequately compensated claimant for his loss of wage earning capacity and that claimant had not suffered a separate injury to his left arm. The objective findings were minimal, the restricted arm motions were on the basis primarily of subjective complaints.

The Board, on de novo reivew, finds that the medical evidence clearly indicates that claimant was medically stationary on June 12, 1978.

Claimant's contention that he should have received a scheduled award for loss of function of his left arm is not supported by the medical evidence. In this case, claimant has failed to show any loss of function; he has pain in his left shoulder area but, functionally, Dr. Van Osdel found claimant could raise his left arm as far as his right arm on abduction at 90°. There is no evidence that the use of claimant's left arm is limited.

ORDER

The order of the Referee, dated January 11, 1979, is affirmed.

CLAIM NO. C604-9967 September 10, 1979

DELORES A SKIDMORE, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury to her back on September 28, 1969 when she slipped on a wet floor and fell, straining her back. Claimant has a history of back problems and her obesity has contributed greatly to them.

The claim was first closed by the August 3, 1972 Determination Order which granted her compensation for 25% low back disability. Claimant's claim was reopened and closed several times. Ultimately claimant received awards totalling 240° for 75% unscheduled low back disability.

At the time of the last claim closure the Orthopaedic Consultants indicated that claimant had severe loss of function of the low back. They felt she could do sedentary work and her condition would improve if she lost weight, although this might not be possible for claimant.

On July 10, 1978 claimant was hospitalized for recurrent low back strain and recurrent bilateral trochantive bursitis. The claim was reopened during this time. On April 13, 1979 Dr Robins, her treating internist, indicated that claimant's general disability was greater due to her obesity, hypertensive cardiovascular disease, atrial fibrillation, and intermittent mild congestive heart failure.

Dr. Boyden, on June 12, 1979, indicated her condition was stationary and the disability rating given by the Orthopaedic Consultants in 1977 should remain unchanged. He felt she would never be able to return to any type of work.

The carrier requested a determination of claimant's present disability on July 10, 1979. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted time loss benefits from July 10, 1978 through June 12, 1979. It found that claimant's disability has not worsened since the last closure and recommended no additional compensation for permanent disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 10, 1978 through June 12, 1979, less time worked.

WCB CASE NO. 78-6337 September 10, 1979

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

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which affirmed the Determination Order dated June 21, 1978 granting claimant compensation equal to 80° for 25% unscheduled disability resulting from injury to the central nervous system and emotional reaction to the injury.

The issue before the Board is extent of disability. Claimant contends that he is permanently and totally disabled.

Claimant, at the time of the injury, was a 52-year-old bus driver for Tri Met. On July 11, 1977 while driving the bus claimant turned to talk to some passengers standing in the front of the bus. When he faced forward he discovered the car in front of him had stopped which necessitated claimant applying the brakes immediately. As a result the three passengers were thrown to the floor and the bus rear-ended the car. Claimant assisted the three passengers and then reported the accident to his supervisor and to the police. After the accident claimant reported feeling dizzy and consulted a physician. Soon thereafter he went under the medical care of Dr. Stolzberg who has continued to be his treating physician.

In addition to treatment claimant has received from Dr. Stolzberg who is a neurologist, claimant has been examined by the physicians at Orthopaedic Consultants and by Dr. Colbach and Dr. Butler, both psychiatrists. The initial diagnosis was acute disturbance of a vestibular function. Dr. Stolzberg's present opinion was that claimant has an undiagnosed disease of the nervous system. The orthopedic diagnosis is cervical and thoracic strain, by history. The psychiatric diagnosis is hysterical conversion reaction.

Claimant has not returned to work since July 11 and contends that he is unable to work because anything that he does causes such severe dizziness, neck and back pain that he is unable to continue. He feels that he is permanently and totally disabled and this opinion is shared by Dr. Stolzberg.

The Crawford Rehabilitation Service which has afforded assistance to claimant expressed its opinion that claimant's uncontrollable and highly unpredictable physical condition prevented re-employment. However, a neighbor of claimant's testified that he had observed claimant doing many things around his home, e.g., repairing motorcycles, working on a travel trailer, working on his Cadillac Eldorado, driving motorcycles and motor vehicles. The neighbor testified that claimant appeared to be able to walk and move about in a normal manner.

The doctors who have examined and/or treated claimant have been given a history of many complaints, however, the objective findings have been minimal.

The Referee found that Dr. Stolzberg based his opinion on his finding that claimant's spinal fluid protein was approximately three times normal; however, Dr. Robert G. Miller, a professor in the Department of Neurology at the University of Oregon Health Sciences Center, was of the opinion that this was a non-specific finding, i.e., the finding standing by itself is of little significance.

The Referee found that under the peculiar circumstances of the bus-car accident it was reasonable to assume that claimant would not have suffered an injury. He was persuaded by testimony of claimant's neighbor that claimant was able to do many things and that apparently his inability to return to his former job is based upon his decision to retire rather than upon the injury.

The Referee found no evidence of a central nervous system disease which was caused by the incident of July 11, 1977. He found that claimant's back pain and/or any psychiatric or psychological dysfunction claimant might have were not related to the July 11, 1977 accident. He affirmed the Determination Order of June 21, 1978.

The Board, on de novo review, finds that claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled. It agrees that claimant has been adequately compensated for his loss of wage earning capacity by the award of 80° which represents 25% of the maximum for unscheduled disability. Dr. Stolzberg apparently gave great weight to the finding that claimant's spinal fluid protein was approximately three times normal but none of the other physicians were particularly impressed by this finding; especially, in the absence of any other objective findings.

Dr. Colbach stated that it was difficult to determine whether there was in fact much organic pathology. The physicians at Orthopaedic Consultants referred to cervical and thoracic strain and also to functional disturbances.

Dr. Miller stated that it was quite possible that claimant's symptoms of vertigo, headache, low back pain and neck pain might be attributable to the July 11, 1977 accident but in view of the mild abnormalities present in every single neurological examination, it was highly unlikely that this claimant's disability would be severe.

The Board concludes that claimant's physical disability was relatively minor but that it had been increased in this case by conversion hysteria and, therefore, in considering the full disability of claimant, loss of wage earning capacity, the effects of the conversion hysteria must be considered. To compensate claimant for this loss the award made by the Determination Order was adequate.

ORDER

The order of the Referee, dated April 16, 1979, is affirmed.

WCB CASE NO. 77-6551 September 10, 1979

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

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the order of the Referee which awarded him 112° for 35% unscheduled low back disability. Claimant contends he is permanently and totally disabled.

Claimant was employed by Ruyle Home Buildings as a carpenter and on April 20, 1976 was lifting a 40-foot long wall and experienced back pain. Claimant suffered a prior compensable back injury while employed by this employer in 1972 for which claimant testified he had continuing problems. In February 1976 claimant was in an automobile accident and injured his back and pelvis.

The State Accident Insurance Fund was the carrier for this employer at the time of the 1976 injury and issued a denial on claimant's claim on November 4, 1976. North Pacific Insurance Company, who was the carrier at the time of claimant's 1972 injury, denied responsibility on July 23, 1976. Claimant appealed both denials but by an interim stipulation of the parties, dated March 18, 1977, the Fund was named as the paying agent and commenced payment of temporary total disability until a later hearing could be held or until the case was settled.

On March 25, 1977 claimant was examined by the Orthopaedic Consultants with complaints of constant low back soreness and aching pain down the backs of both thighs. The physicians diagnosed chronic lumbosacral sprain superimposed on degenerative osteoarthritis. Claimant's condition was medically stationary and he could return to the same occupation with limitations. Total loss of function from this injury was mild.

On May 15, 1977 Dr. Klass reported he was in concurrence with the Orthopaedic Consultants' report with the exception that he felt claimant could not return to his regular occupation.

By a stipulation of the parties dated July 19, 1977 the Fund withdrew its denial and accepted responsibility for claimant's condition.

On October 10, 1977 a Determination Order granted claimant 64° for 20% unscheduled low back disability.

On January 18, 1978 Dr. Martens examined claimant and found no neurological deficit. Claimant was unable to return to his regular job due to bending, lifting, twisting, prolonged standing, walking and climbing which the job required.

Mr. Rollins, a vocational rehabilitation consultant, reported in July 1978 that claimant considers himself severely disabled. Mr. Rollins felt claimant could perform light carpentry work, and could be gainfully employed if he were motivated.

On July 26, 1978 Dr. Ackerman, a clinical psychologist, evaluated claimant. Claimant was considerably frustrated by his predicament feeling he was too old and uneducated for retraining. Claimant had a 7th grade education. Diagnosis was hypochondriacal neurosis, social maladjustment, passive-aggressive personality-aggressive type. Claimant's IQ was dull-normal. Dr. Ackerman felt the industrial injury was a significant contributing factor to the three diagnoses.

Claimant was re-evaluated by the Orthopaedic Consultants in January 1979. The diagnosis remained the same. The physicians felt claimant's degenerative disease would continue to progress and cause complaints and was due solely to the natural aging process. The overall examination of claimant was the same as in 1977 and, if anything, there was a slight improvement. Claimant was capable of sedentary to light employment and was not permanently and totally disabled.

Claimant testified that the last day of his working was the date of injury, however, the employer's records indicate claimant worked after this injury until October 29, 1976. Claimant has not worked nor looked for work since that date.

Claimant's past work experience besides carpentry, was operation of a road grader and crane while serving in the military, and truck driver. Claimant testified he could sit only 30 minutes and stand for only 10, in one position.

The Referee found that claimant lacks motivation to return to work. He further felt that the psychological disability, if any, could not be rated as the report of the psychologist did not mention permanency. The Referee felt claimant was entitled to an award of 35% to adequately compensate him for his loss of wage earning capacity and his preclusion from certain segments of the labor market.

The Board, on de novo review, finds that claimant is entitled to a greater award for his loss of wage earning capacity. Claimant is 59 years old with a 7th grade education and very limited working experience to which he cannot now return. The medical reports indicate claimant can only perform sedentary to light employment. The Board also finds that claimant does lack motivation and the evidence in the record does not support a finding of permanent total disability.

The Board concludes claimant is entitled to an award of 160° for 50% unscheduled disability.

ORDER

The order of the Referee, dated March 30, 1979, is modified.

Claimant is hereby granted an award of 160° for 50% (being an increase of 15%) unscheduled low back disability. This award is in lieu of all prior awards granted to claimant.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-9361 September 12, 1979

BRENDA GEORGE, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Heysell & Velure, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order granting her 64° for 20% unscheduled disability. Claimant contends she is entitled to a greater award for unscheduled disability and is also entitled to an award for disability to her left hand.

Claimant, at the time of the hearing, was a 33-year-old mill worker who sustained a compensable injury on April 18, 1972 when she was knocked over by a jitney. Claimant struck the right side of her head on a 2"x4" and hit the occipital region of her head on the floor; she was unconscious for a few minutes.

Claimant was taken to the Douglas Community Hospital in Roseburg and seen by Dr. Lewis Michalek. She was discharged from the hospital on April 23, 1972; at that time she was complaining that she had positional dizziness, continued headaches and photophobia and nervous spasms. Claimant also appeared to be extremely depressed and she needed the assistance of her husband and family to get around.

The feeling of depression remained with the claimant and from July 1972 through December 1975 claimant was treated by Dr. Meyers, a Eugene neurologist. Dr. Meyers felt claimant had a left side weakness and was uncoordinated. An EEG was normal. Later, in 1972, claimant experienced two seizures. Claimant's history of the events are somewhat vague, however, claimant's husband testified that the episodes were quite severe. Claimant began to develop a jerking motion and loss of function in her right arm and also a jerking or twitching in the rest of her body. Dr. Meyers saw claimant in August 1973; at that time claimant had had several grand mal seizures, indications of tremor and hyperventilation, nausea and vomiting. According to claimant's husband's testimony most of these spells were associated with emotional events.

Claimant was hospitalized by Dr. Meyers and an angiogram and lumbar puncture were performed, however, no abnormalities were revealed. An EEG was done in November 1973 which revealed sharp waves that Dr. Meyers felt were of a convulsive significance.

Dr. Davis, a neurosurgeon, examined claimant in January 1974. He felt her history of seizures was real and that she had real weakness in her left arm. He did not believe the seizures were controlled. Dr. Jones, a neurologist, examined claimant in November 1974. He found no definite neurological signs of impairment and felt her history of seizures were rather bizarre. He suggested psychiatric evaluation. Another EEG was done in February, 1975 which showed sharp wave dysrhythmia which suggested convulsive disorder.

In April 1975 Dr. Holland, a Eugene psychiatrist, felt that claimant had a fairly high level of anxiety and he recommended psychiatric treatment. Claimant was seen by Dr. Dewey, a clinical psychologist in Portland, in August 1975. He was not sure if claimant had true convulsive episodes.

Dr. Franklin, a neurologist, who examined claimant on February 16, 1977, stated that many of claimant's seizures, if not all of them, were related to severe anxiety attacks, hyperventilation and hysteria.

In February 1977 Dr. Meyers stated that the only original disability was convulsive disorder which appeared to be under control with anti-convulsant drugs. On March 22 he expressed his opinion that the sooner the claim was closed and claimant returned to employment the better off she would be. On June 22, 1977, Dr. Michalek, claimant's original treating physician, stated that at that time claimant was reporting no seizures to him and that she was able to do some limited driving by herself and continued to do well on anti-convulsant medication.

On October 12, 1977 Dr Meyers indicated that he had not seen claimant since June 28, 1977 and that he would concur in Dr. Michalek's opinion that claimant had reached a stationary level in her condition and that the claim should be closed.

On June 19, 1978 a Determination Order awarded claimant compensation for temporary total disability from April 18, 1972 through February 13, 1978, less time worked, but awarded no compensation for permanent partial disability.

The Referee found that claimant had a permanent convulsive disorder which caused spasms much like an epileptic seizure. He also found that the claimant's psychological problems resulted from her industrial injury and prevented her from ever returning to the mill work. The testimony of claimant's husband indicated her last seizure occurred when they went to the Roseburg plant to pick up some plywood. Claimant saw the hysters and had a grand mal seizure after they left the plant.

The Referee found that claimant has not had a seizure for nearly three years and she has been able to work off and on for a few weeks at a hardware store which indicated that she has the ability to work eight hours a day. However, claimant does get extremely tired. She plans in the future to work for a meat processing plant in Riddle where she lives.

Some film was introduced by the employer, however, the Referee found they revealed claimant doing only certain activities which she had already admitted that she could do.

He did not find that claimant lacked motivation to return to work; to the contrary, he thought that she would prefer to return to work although she did enjoy being a housewife. Although claimant has been able to work eight hours a day she has not been able to put in a 40-hour week; she is required to take some breaks during the day she works and to take some days off.

The Referee concluded that claimant had lost some of her earning capacity as a result of her industrial injury even though the seizures are at the present time under control through the anti-convulsant medication she is taking. Nevertheless, in the Referee's opinion, there will always be a strong possibility that the seizures may return. Also, claimant will not be able to return to mill work she had done prior to her injury because of the adverse psychological effect upon claimant when she is even around a mill. He concluded that claimant was entitled to an award of 64° which represents 20% of the maximum for an unscheduled disability to adequately compensate her for her loss of wage earning capacity due to the industrial injury.

The Board, on de novo review, agrees with the findings and conclusions reached by the Referee insofar as they apply to claimant's unscheduled disability. However, the medical evidence indicates that claimant also has sustained loss of function in her left forearm which was wholly unrelated to her unscheduled disability for which she has been awarded compensation for her loss of wage earning capacity.

The medical evidence indicates that claimant's left hand is not functioning as well as it did prior to the injury and she is unable to perform fine motor work with it; she is unable to do rapid alternating movements with her left hand and perform fine finger movements. Dr. Meyers' report of February 28, 1977 stated that there was a possibility of some difficulty with fine control with the left hand or easy fatigueability in the use of the left hand.

Claimant's husband testified that claimant had a very limited use of her left hand; he stated that if she picked up an object with her left hand she would either drop it or switch it to her right hand. Claimant has entered some pistol shooting contests and hopes by doing so she can develop some strength in her left hand. She used to shoot with either hand but now she has to resort to her right hand.

In Foster V. SAIF, 259 Or 86, the court said:

> "We have come to the conclusion that two awards should continue to be made in the situation where an injury to an unscheduled portion of the body results in disability to both unscheduled and scheduled portions.
>
> " . . . . if one award for unscheduled disability were given for both the shoulder and the arm, the disability to both would have to be included. Theoretically, the claimant is in an inferior position where total disability is divided between a scheduled and an unscheduled award because lack of earning capacity may be taken into consideration for only that part of his disability which is unscheduled."

The Board concludes that claimant is entitled to a separate award for loss function of her left forearm and, in its opinion, would be adequately compensated for this loss of function by an award equal to 15° for 10% loss function of that scheduled member.

ORDER

The order of the Referee, dated May 9, 1979, is modified.

Claimant is awarded 15° of a maximum of 150° for 10% loss of function of the left forearm. This award is in addition to the award for unscheduled disability granted claimant by the Referee's order which in all other respects is affirmed.

Claimant's attorney is granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-8904 September 12, 1979

EDWARD DEAN HUMMEL, CLAIMANT
Lively & Wiswall, Claimant's Attys.
Rankin, McMurry, Osburn, Gallagher & VavRosky, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which denied his claim for out-of-state medical services under ORS 656.245.

Claimant, a stock clerk, suffered a compensable injury to his back on October 28, 1972 while stacking boxes. Dr. Erickson saw him on the day of the injury and diagnosed a back strain. Claimant was hospitalized for traction.

The March 27, 1973 Determination Order granted one day of time loss only.

Claimant was examined by Dr. Larson in June 1974 who found that he continued to have back discomfort with the pain radiating to the right leg and both hips.

On August 12, 1974 Dr. Degge examined claimant who had been off work due to back pain since late June, and found instability and tropism of the L4-5 and L5-S1 apophyseal joints along with symptoms of the first sacral nerve root irritation. On August 19 he performed a laminotomy and a two-level fusion between L4-5 and S1.

Claimant's recovery was uneventful and on September 30, 1975 the fusion was found to be solid. Claimant continued to complain of low back pain aggravated by standing and changing positions, however, Dr. Degge concluded the symptoms were aggravated by claimant's obesity, and both hysterical and hypochondriacal features appeared to complicate his progress. Permanent residuals were moderate.

The claim was again closed by a Determination Order, dated October 29, 1975, which granted claimant 64° for 20% unscheduled low back disability.

Claimant commenced working for the Radio Shack on August 9, 1976.

By stipulation of February 21, 1977 claimant was granted an additional award of 20% for a total award of permanent partial disability of 40%.

Dr. Tsai saw claimant on May 4, 1978. X-rays of the lumbar spine indicated satisfactory fusion with normal disc spacing in the lumbar area. There was no functional interference and he suggested claimant return to Dr. Degge for an orthopedic follow-up.

On January 25, 1978 Dr. Glubka, a chiropractic physician, commenced treating claimant with chiropractic adjustments. Dr. Glubka diagnosed a chronic lumbar and cervical subluxation and strain complicated by the altered spinal mechanics due to the surgically fused lower lumbar spine.

On June 26, 1978 Dr. Stainsby gave claimant a neurological examination and found that there were no functional elements interferring with the examination, that the pain apparently was increased by sitting or standing in one position for long lengths of time and also by bending and lifting in a repetitive manner. He found claimant to be obese and recommended a reduction diet with an exercise program and Williams exercises. He thought there was a possibility of a pseudoarthrosis at the L4-5 level but it was minimal and, at that time, not in need of surgical repair. He rated permanent impairment in the upper levels of moderate.

Dr. Glubka, who continued to treat claimant, concluded in August 1978 that his course of treatment only gave claimant temporary relief and recommended that claimant enter the Spears Chiropractic Hospital in Denver, Colorado, where claimant would have available to him the intensive care and many forms of therapeutic treatment which was not possible to give claimant on an outpatient basis. Dr. Glubka felt the Spears Hospital treatment would allow claimant to return to gainful employment.

On January 25, 1979 Dr. Degge again examined claimant and found pseudoarthrosis through the lumbar fusion at the L4-5 level. He stated that the only way to correct the pseudoarthrosis would be surgically. He recommended against referral out of state for chiropractic treatment and felt that only surgery could correct the pseudoarthrosis. Such surgery could be performed in the state of Oregon. He felt that if the symptoms became worse then surgery should be done.

ORS 656.245 provides for continuing medical services for conditions resulting from an industrial injury and the worker is allowed to choose his own attending physician within the state of Oregon.

In this case claimant seeks out-of-state medical services. The Referee found that the services which Dr. Glubka recommended claimant obtain from the Spears Center in Colorado could be provided in Oregon and, more to the point, that Dr. Degge felt that surgery would be the only proper way to correct the pseudoarthrosis at the L4-5 level which was claimant's present primary problem. Inasmuch as Dr. Degge is an orthopedic physician practicing in the state of Oregon and it is obvious that that surgery can be performed within the state, the Referee concluded that claimant's claim for out-of-state services was not well taken.

The Board, on de novo review, agrees with the Referee's findings and conclusions.

ORDER

The order of the Referee, dated April 11, 1979, is affirmed.

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

WCB CASE NO. 78-402 September 12, 1979

DORENA JOHNSON, CLAIMANT
Bryan Peterson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks Board Review of the Referee's order which granted her 48° for 15% unscheduled back disability; affirmed the employer's April 3, 1978 denial of claimant's claim for aggravation and dismissed claimant's claim for additional medical expenses and premature claim closure.

The issues before the Board on review are claimant's entitlement to additional medical expenses; propriety of the employer's denial on April 3, 1978 of claimant's claim of aggravation and extent of claimant's permanent disability.

Claimant is an 18-year-old high school student who worked part time after school as a laundry worker at a nursing home. She slipped and fell and sustained a compensable injury to her low back on June 1, 1977. X-rays were taken which revealed Scheuerman's disease of the L1-3 and possibly T12. Subsequently, claimant came under the care of Dr. Rusch, an orthopedist, who diagnosed thoracolumbar back strain, secondary to a lumbar back strain with pre-existant vertebral abnormalities (Schmorl's nodes).

Claimant was examined by Dr. Crumpacker, a neurologist, who found no evidence objectively of neurologic dysfuction. A nerve conduction study and EMG of the right lower extremity both were normal and Dr. Crumpacker felt the illness was compatible with a hysterical neurologic dysfunction of the lower extremities.

In August 1977, Dr. Wolgamott, a psychiatrist, examined claimant and concluded she had a conversion reaction. On October 31, 1977, claimant was examined by the physicians at Orthopaedic Consultants. They made several diagnoses, all compatible with those previously made, and expressed the opinion that claimant should restrict her activities to light type work. They found no permanent partial disability as a result of the injury but recommended psychiatric follow-up. They found claimant was medically stationary at that time.

Dr. Rusch examined claimant in January 1978 and found her to be medically stationary; the back pain was due to thoracic lumbar back strain superimposed on Scheuerman's disease and the chronic lumbar back strain was of the same variety. He rated the permanent partial disability as mild.

On January 4, 1978, a day after claimant had been examined by Dr. Rusch, the Determination Order closed the claim with an award of compensation for temporary total disability from June 1, 1977 through October 31, 1977 and 16° for 5% unscheduled disability.

In February 1978, claimant came under the care of Dr. Cherry who felt claimant had severe chronic back strain with possibly an active destructive process in the back which should be observed over several months in order to make such a determination. Claimant was seen by Dr. Cherry a week later and complained that her legs had given away causing her to fall; also she had extreme pain in her pelvis and left thigh. Dr. Cherry hospitalized claimant for 17 days. A myelogram proved negative and Dr. Cherry prescribed a brace.

On March 31, claimant was involved in a car accident which caused her pain in her legs, ribs, shoulder, head and stomach. X-rays of the thoracic spine showed no abnormalities and x-rays of the low back revealed it was considerably flat and that there was a destructive process going on in the upper lumbar vertabrae.

Dr. Cherry considered claimant disabled but could not give an accurate prognosis. It was his opinion that claimant had not been medically stationary on October 31, 1977 and her condition had varied at different times since then. The carrier denied claimant's claim for aggravation on April 3, 1978 on the grounds that it did not arise out of her June 1, 1977 injury.

Dr. Cherry reported that the charges from St. Vincent's Hospital for the FebruaryMarch 1978 hospitalization and his bill through May 15, 1978 were reasonably incurred in the treatment of injuries which arose out of claimant's industrial injury, including the related fall on February 10, 1978, which she had reported to Dr. Cherry prior to her hospitalization.

Dr. Wolgamott, saw claimant in August 1978. He felt she was suffering from conversion reaction due to a hysterical personality disorder and he recommended supportive educative psychiatric assistance to help her mature emotionally.

Claimant testified that her back has gradually become worse and she has constant pain. She also testified she continues to have weakness in legs and knees buckle occasionally. She stated that the car accident had caused her back to feel worse. The claimant has looked for work in various places but has been unable to find any type that would not have an adverse effect upon her back problems.

The Referee found the evidence clearly established that claimant was medically stationary as of October 31, 1977. The physicians at the Orthopaedic Consultants had found her to be stationary at that time although they recommended a psychiatric follow-up. This report was sent to Dr. Frank, a neurosurgon, who had examined claimant at the request of her physician. He concurred in the findings and recommendations. Dr. Wolgamott also agreed that claimant's condition was medically stationary and in January 1978, Dr. Rusch, claimant's treating physician, stated that he was basically in agreement with the report except he felt claimant would have a mild degree of permanent partial disability. Only Dr. Cherry who did not see claimant until February 4, 1978 was of the opinion that she had not been medically stationary on October 31, 1977. He based his opinion on the fact that her condition had worsened and varied since that date but he did not support his conclusions nor was he able to relate her present problems to the June 1, 1977 injury.

Claimant bases her claim for aggravation on the fact that her condition had worsened since the last award of compensation because said condition caused her to fall in 1978 when her legs buckled. The Referee found that claimant had complained about these problems from the onset of her industrial injury but none of the doctors who had examined and/or treated claimant was able to find any physical cause for such complaints. It was the consensus opinion that the symptoms resulted from a conversion reaction and there was no evidence that linked the conversion reaction to the industrial injury. The Referee concluded that Dr. Cherry's reports did not support a finding that claimant's condition had worsened since the entry of the Determination Order.

The Referee found that Dr. Cherry's care of claimant was related solely to her pre-existing underlying disease which he described as an ongoing process and he concluded, therefore, that the medical, hospital and drug charges submitted by claimant were not the responsibility of the employer or its carrier.

Based upon Dr. Rusch's opinion that claimant had sustained some mild permanent partial disability the Referee awarded claimant an additional 10%, giving claimant a total award of 15% of the maximum for her unscheduled back disability.

The majority of the Board, on de novo review, finds the award for permanent partial disability to be on the generous side, however, the Fund did not file a cross-appeal nor did it file a brief, therefore, the Board assumes that the Fund does not protest this award.

The majority of the Board agrees with the Referee's finding that the Fund's denial dated April 3, 1978 should be sustained and also that claimant's claim was not prematurely closed. However, the majority of the Board finds that Dr. Cherry's treatment of claimant did relate to her industrial injury; therefore, the medical, hospital and drug charges submitted by claimant were the responsibility of the Fund. The majority of the Board further finds that the Fund was unreasonably delinquent in paying these charges and should pay claimant as a penalty an additional sum representing a percentage of the total amount of such charges and also pay claimant's attorney an attorney's fee.

ORDER

The order of the Referee, dated February 2, 1979, is modified.

The Fund is directed to pay the medical, hospital and drug charges submitted to it by the claimant and to also pay claimant an additional sum equal to 25% of the total amount of the medical, hospital and drug charges for unreasonable resistance in the payment of said charges.

In all other respects, the Referee's order of February 2, 1979 is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed a maximum of $100.

Board Member McCallister dissents as follows:

I agree with the majority of the Board on all issues except their opinion on the Board's authority on review.

The Board concluded, after review of the entire record, the Referee's finding that the claimant has a residual 15% unscheduled permanent disability is not supported by the evidence. The majority of the Board would not disturb the Referee's finding because the respondent-carrier did not cross appeal on the issue of extent of disability and for the further reason the respondent did not file a brief. The majority holds that the carrier's failure to cross appeal and/or file a brief limits and restricts the Board's review only to that which the appellant-claimant requested.

I do not interpret the Board's review authority and the scope of the review so narrowly. Having found, as did the majority, that the evidence does not support the Referee's finding on extent of unscheduled permanent disability, I would reverse and reinstate the Determination Order. ORS 656.295 gives the Board broad authority to review an order of a Referee. The review can be requested by either (or any) party and need only state that a review is requested. The review is de novo on the record. The "record" is that which has been developed at the hearing(s) before the Referee plus such written or oral argument as the Board may receive.

I find nothing in the statute which restricts the Board's review after request for review has been received from either (or anyone) of the parties regardless of such post-hearing writings as the Board may or may not receive. On the contrary, ORS 656.295 clearly gives the Board authority to affirm, reverse, modify or supplement the order of the Referee and make such disposition of the case as it determines to be appropriate. This action is to occur after a "review" of the record made at the hearing(s).

The Board is an administrative agency and is not bound in its hearings or its review process to the rules of evidence or restricted by any generally accepted rules of procedure. There is nothing contained in the Board's Administrative Rules which could restrict the Board's scope of review.

When one reads ORS 656.295 together with ORS 656.298 and compares these two sections it becomes evident the intent is to minimize the constraints of formal, legal procedures at the Board level and provide a simple mechanism for the Board to review and, when necessary, correct the orders of its Referees. This conclusion follows the general concept that the Board, through its review function, is to establish policy and provide direction to facilitate the adjudication of disputes under ORS 656.001 to ORS 656.990.

WCB CASE NO. 78-3226 September 12, 1979

GENE NEVUE, CLAIMANT
Benton Flaxel, Claimant's Atty.
Jack Mattison, Defense Atty.
Amended Order On Review

On August 27, 1979 the Board entered its Order on Review in the above entitled matter. The Board modified the order of the Referee to the extent that it found claimant was entitled to compensation for temporary total disability from March 9, 1976 through December 9, 1977, less time which claimant was gainfully employed, whereas the Referee's order had granted it for the same period of time less time worked either for wages or for labor contributed.

The Referee had assessed a 10% penalty on the amounts due for the aforesaid period pursuant to ORS 656.262(8). The Board agreed with the Referee's assessment of the penalty, and inasmuch as the modification of the Referee's order undoubtedly will result in claimant receiving additional compensation for temporary total disability it is the Board's intention that the penalty of 10% apply on the additional amount as well.

Inadvertently, the Order on Review omitted the award of attorney's fees to which claimant's attorney was entitled. Therefore, the order should be amended by inserting after the first paragraph on page two of said order the following paragraph:

"Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation for temporary total disability which claimant may receive as a result of the Board's Order on Review, payable out of said compensation as paid, not to exceed a maximum of $750.

"It is further ordered that Georgia-Pacific Corporation shall pay 10% of the amount due for temporary total disability required by this order as a penalty pursuant to ORS 656.262(8)."

In all other respects the Board's order should be reaffirmed and republished.

IT IS SO ORDERED.

WCB CASE NO. 76-4604 September 12, 1979

GEORGE RILEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Keith D. Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks review by the Board of the order of the Referee which granted claimant an award of permanent total disability effective July 30, 1976; affirmed its de facto denial of claimant's claim for hearing loss and affirmed its denial of claimant's alleged cardiac conditions.

Claimant is 59 years of age and was employed as a millwright for U. S. Plywood. On February 24, 1973 he slipped and fell on his tailbone. The diagnosis was contusion to coccyx. On that date Dr. Stem examined claimant and felt he had a lumbar-sacroiliac strain. By August Dr. Stem diagnosed a cervical strain. From this injury claimant missed no time from work.

On March 13, 1974 claimant sustained a second injury to his neck. This claim was accepted by the employer/carrier and made part of the first claim.

In June 1974 Dr. Weinman, after taking x-rays, diagnosed severe degenerative joint disease at C6-7. On August 1, 1974 claimant was hospitalized for neck pain, headaches and inability to control his extremities. While hospitalized Dr. Campagna examined claimant and diagnosed cervical headaches secondary to post-traumatic aggravation of degenerative cervical disc disease. In October 1974 claimant was re-hospitalized for traction. On October 11, 1974 Dr. Campagna performed a decompressive laminectomy C6-7.

Claimant was again hospitalized and on June 27, 1975 Dr. Campagna performed a discectomy with acrylic fixation. In September 1975 Dr. Campagna said claimant was improving and was going to retire.

On December 19, 1975 claimant was hospitalized and had surgery to remove osteophytes.

Claimant was examined by Dr. Sublette on April 16, 1976 for ringing in his ears which claimant said he had experienced for two to three years. An audiogram indicated symmetrical bilateral sensori-neural hearing loss which Dr. Sublette felt was most likely due to normal aging and acoustical trauma.

Claimant was hospitalized from June 17 through June 20, 1976 for chest and neck pain. He was short of breath, had range of neck motion limited to 50%. Dr. Campagna, at that time, expressed the opinion that claimant was permanently and totally disabled from heart and lung problems. Claimant's neck condition was stationary with impairment rated as moderate.

On July 30, 1976 a Determination Order granted claimant 160° for 50% unscheduled neck disability and compensation for temporary total disability from July 22, 1974 through June 29, 1976.

On September 13, 1976 claimant filed a claim for hearing loss from acoustical trauma.

Dr. Williams wrote to the carrier on October 28, 1976 indicating that claimant's June 1976 hospitalization was for neck pain and severe headaches, job related and that the pain was quite severe and most likely initiated claimant's angina.

On January 19, 1977 Dr. Rush examined claimant and reported claimant's angina was from coronary artery disease. However, Dr. Rush felt that angina could be brought on by pain which accelerates the heart rate and elevates blood pressure. However, he found no evidence that claimant had suffered a myocardial infarction.

On March 1, 1977 the Orthopaedic Consultants examined him. They found claimant was drawing social security benefits. His neck condition was stationary and claimant could return to his regular occupation with limitations on crawling and twisting. Total loss of neck function from this injury was moderate. They found no relationship of the heart condition to his industrial injury.

On May 27, 1977 the employer/carrier issued a denial of responsibility for any neck, head or heart problems.

Claimant appealed the denial of May 27, 1977 and, after a hearing, an Opinion and Order dated April 26, 1978 ordered claimant's cervical condition suffered on February 24, 1973 to be accepted. The Referee took no action on compensation for the heart condition or the hearing loss.

Claimant was hospitalized on June 18, 1978 after suffering a myocardial infarction.

Claimant has an 11th grade education with past work experience all in physical labor, 30 years as a millwright. Claimant has sought no employment.

The Referee found it was unrealistic that claimant could sell his services to any employer and found him permanently and totally disabled. The Referee affirmed the denial of responsibility for any heart or hearing loss claims.

The Board, on de novo review, finds the denial of claimant's heart condition and hearing loss must be affirmed as claimant failed in his burden of proof.

The Board further finds claimant is not permanently and totally disabled as a consequence of the compensable injuries. Claimant has demonstrated no motivation and has sought no employment or any vocational assistance to return to the labor market. The medical evidence relating to the cervical spine is consistent that claimant's impairment of his cervical spine is moderate. Considering the moderate impairment together with claimant's age, education, training and in the light of our finding of lack of motivation the Board finds an award of 272° which is 85% unscheduled neck disability adequately compensates claimant for his loss of wage earning capacity.

The Board further finds that the medical evidence indicates claimant's hospitalization in June 1976 was related to his neck condition. By report to the employer/carrier dated October 28, 1976 Dr. Williams so indicated and this report put the employer/carrier on notice and is a valid claim for aggravation.

The record contains unpaid medical bills which clearly relate to claimant's neck condition and the Board finds the employer/carrier is responsible for such billings and their failure to pay is deemed unreasonable.

The Board concludes that claimant is entitled to compensation for temporary total disability from October 28, 1976, the date of Dr. Williams' report, to May 27, 1977, the date of the carrier's denial. Further, the employer/carrier shall pay to claimant 25% of said amount as and for a reasonable penalty for its unreasonable resistance to the payment of compensation and an attorney fee to claimant's attorney, payable by the employer/carrier.

Upon review of the entire record, the Board finds that the first issue on review presented by the employer/carrier, that is that the two claims were lumped together which was an error going back to the beginning of the case, is without merit.

The second issue presented by the employer/carrier, the rejection of admittance of the Orthopaedic Consultants' report, the Board finds that report, dated March 8, 1977, was admitted as Referee's Exhibit 5.

ORDER

The order of the Referee, dated December 20, 1978, is modified.

The denial of claimant's claim for hearing loss and cardiac condition issued on May 27, 1977 is affirmed.

Claimant is granted an award of 272° for 85% unscheduled neck disability. This award is in lieu of all previous awards granted to claimant.

The employer/carrier is ordered to pay claimant compensation for temporary total disability from October 28, 1976 through May 27, 1977 and 25% of said amount payable as a penalty for its unreasonable resistance to the payment of compensation.

The employer/carrier is ordered to pay all medical bills unpaid relating to claimant's neck condition as ordered by Referee Fitzgerald's Opinion and Order of April 26, 1978 and 10% of that sum payable to the claimant as a penalty.

The employer/carrier is hereby ordered to pay claimant's attorney the sum of $100 as and for a reasonable attorney's fee, pursuant to ORS 656.382.

SAIF CLAIM NO. DC 267527 September 12, 1979

KENNETH G. WISE, CLAIMANT
Michael H. Arant, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back and left leg on September 16, 1970 when a piece of steel plating fell and hit his back. The claim was first closed on February 12, 1971 and claimant's aggravation rights have expired. The claim was reopened in January 1972 for surgery and closed on June 4, 1973 with an award equal to 35% unscheduled low back disability.

On June 7, 1978 Dr. Thompson requested that claimant's claim be reopened for further medical treatment. He stated that claimant's present condition was an aggravation of his 1970 industrial injury. The claim was reopened by a Board's Own Motion Order, dated January 12, 1979.

A lumbar myelogram was performed on January 18, 1979 which showed a definite extradural defect at the L4-5 interspace. Dr. Thompson recommended a laminectomy be done. Dr. Van Osdel at the Callahan Center felt that claimant would benefit from a program of exercises. He indicated that claimant was overfocusing on his physical symptoms but he continued to desire to do work which was too heavy for him. They did not recommend surgery and the Fund denied Dr. Thompson's request for surgery, based on the report from the Callahan Center. Claimant decided the only thing he could do was return to Alaska and work as long as his back would allow him.

The Fund, on August 9, 1979, requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended claimant be granted compensation for temporary total disability from June 7, 1978, based upon the Own Motion Order, through June 14, 1979, the date claimant was released to return to light work.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from June 7, 1978 through July 14, 1979, less time worked. This award is in addition to any previous awards claimant has been granted.

WCB CASE NO. 79-5013 September 19, 1979
WCB CASE NO. 79-5014
WCB CASE NO. 79-5015

HUNNUM H. BOUTIN, CLAIMANT
John H. Bogardus, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On July 11, 1979 the Board entered an Own Motion Order Referring For Hearing the above entitled matter.

On August 3, 1979 the State Accident Insurance Fund, by and through one of its attorneys, requested the Board to withdraw, cancel and hold for naught said order.

On August 15, 1979 the Board, after receiving a response to the Fund's request from claimant's attorney and being fully advised in the premises, concluded that the request made by the Fund should be denied.

On August 28, 1979 the Board received a letter from Earl M. Preston, an attorney for the Fund, stating that since the Fund had received the Board's letter of August 15, 1979 which denied its request, that it had been furnished a copy of the letter from claimant's attorney, dated August 16, 1979, to which was attached a report from Dr. Gilsdorf.

The Fund again requested that the Board give reconsideration to its order and grant his motion of August 3, 1979.

The Board, having given due consideration to all of the reports supplied it, reaffirms its denial of claimant's request to withdraw, cancel and hold for naught its order of July 11, 1979 which referred the above entitled matter to its Hearings Division to be heard on a consolidated basis with WCB Case Nos. 79-5013, 79-5014 and 79-5015.

ORDER

The request made on August 31, 1979 by the State Accident Insurance Fund that the Board set aside its Own Motion Order Referring For Hearing, dated July 11, 1979, is hereby denied.

WCB CASE NO. 78-4179 September 19, 1979

ROBERT L. KORTER, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Gearin, Landis & Aebi, Defense Attys.
Request for Reiew by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks review by the Board of the Referee's order which remanded claimant's claim to it for payment of compensation, as provided by law, until the claim is closed pursuant to ORS 656.268; directed it to pay claimant compensation for temporary total disability from April 17 through May 11, 1978 and additional compensation equal to 25% of such compensation for temporary total disability as a penalty; to pay claimant's attorney a fee of $200; the order also directed the employer to recalculate the rate claimant was paid temporary total disability after adding the sum of $150 per month to his salary, and to pay claimant's attorney $3,000, in addition to the $200 fee previously awarded claimant's attorney.

The issues before the Referee and the Board are compensability and the correct wage upon which claimant's compensation for temporary total disability should be calculated.

Claimant is 44 years old and has two years of college plus specialized technical training. He was employed by the employer in October 1975 as a safety and health claims consultant. It was understood by claimant that he was to be furnished a company car as a part of his salary and that he could use it for his personal use.

The Referee found that during a span of approximately four years the employer's personnel, apparently in their Portland office, had expanded from 11 to 150 people and that many changes were made and new units of departments and, in some cases, new departments created. About mid-year of 1977 claimant started to feel uncertain of his position with the employer. He alleged that when things were going well he was told to head up a certain unit, but when things were not he was told he didn't have any authority to do anything about it. In early 1978 he was accused of not working hard enough and was advised that there had been written complaints received about his work, although neither a memo nor any letter was ever showed to him.

In June 1977 claimant went on a vacation. When he returned his entire work area had been changed and he had been moved to a small office, lost his secretary, and was told that he had a new supervisor. This information was given to him by the new supervisor. Claimant ordered new business cards because his job title had been changed but there was a delay in getting them printed and apparently no one had the courtesy to discuss the matter with claimant.

Claimant became very upset and was seen by various physicians because he felt he was on the verge of having a heart attack. One of the doctors believed that it was a vasovagal reaction which another doctor interpreted as a psychophysiological reaction.

In April 1978 claimant's symptomatology suddenly increased and his condition was diagnosed by his treating psychiatrist as an acute adjustment reaction of adult life with agitation, depression and psychophysiological manifestations. His treating physician, Dr. Summers, expressed his opinion that claimant's current symptoms had a direct relationship to his employment.

Claimant has not worked since April 17, 1978. On May 10, 1978 he filed a claim and received a check for temporary total disability on May 23 which paid him from May 11 to May 24, 1978. Payments for temporary total disability were timely made up until June 16, 1978 when the employer denied the claim.

The Referee found that the claimant had feelings of anxiety and depression, that he had difficulty sleeping and was unable to concentrate. He found that claimant was constantly pre-occupied with thoughts regarding his job, according to the history he related to Dr. Summers in May 1978. The Referee concluded that when claimant had returned from his vacation in 1977 and found the situation substantially changed he was advised by the new supervisor that the new situation was going to remain and that claimant could either accept it or resign.

The Referee also found at the time claimant was hired he was told that the company automobile which was for his use would be considered as part of his salary. Claimant contended that the value of the car which he used was equal to $150 a month. The employer did not agree that the use of the car was a part of claimant's salary but did agree that its value was equal to $150 a month.

The Referee concluded that claimant was credible and that although other persons might not have reacted the way claimant did under the circumstances claimant did so react. The fact that claimant might have had a pre-existing tendency of moments of anxiety or depression does not preclude him from his entitlement to compensation because the employer accepts the employee as he is.

The Referee determined that the opinion expressed by Dr. Parvaresh, a psychiatrist, could not be given any weight because some of the conclusions he reached were based upon matters not in evidence. He concluded that claimant had fully met his burden of proving that his psychiatric condition was compensable. He also concluded that the sum of $150 should be included in his salary for the purposes of calculating the correct rate of compensation for temporary total disability.

The Board, on de novo review, finds that claimant has failed to establish a medical causal relationship between his work activities and his current symptoms. Although Dr. Summers, claimant's treating physician, had diagnosed acute adjustment reaction of adult life with agitation, depression and physiopsychological manifestations and expressed his opinion that such symptoms had a direct relationship to his employment, he also stated that he had no way of knowing whether or not claimant's allegations were true. In one of his chart notes Dr. Summers commented: ". . . would consider this to be job related (but not necessarily caused by job)".

Claimant is contending that his job situation was such that it produced a compensable psychological disease. There is no evidence claimant has ever sustained a physical injury to his person on the job, therefore, the rulings handed down by the Court in Pattitucci v. Boise Cascade Corporation, 8 Or App 503 (1972), and Hargins v. SAIF, 34 Or App 311 (1978), do not apply. In Hargins the Court said:

> "To be compensable, it is not necessary that the neurosis be caused by claimant's industrial injury. It is enough that the neurosis is now exaggerated to a degree which would not have occurred but for her injury."

ORS 656.802 provides that the worker be exposed or subjected to a disease during the worker's period of employment, that he is not otherwise exposed to in everyday life. Claimant alleges that in his case he was exposed to a work environment that was completely intolerable and that the anxiety and stress he experienced within that environment was unique and something that he was never exposed to in the course of his everyday living. Claimant had been promoted on more than one occasion and received two pay increases and would have been entitled to a third increase had he remained on the job.

The evidence indicates that claimant was apparently dissatisfied with the way the employer dealt with him in relationship to the reorganization of the claim department and that he was not told why the reorganization was necessary and was not given the official title he felt he was entitled to have.

Dr. Parvaresh examined claimant and felt that claimant created his own problems; he stated that he could not truly answer the question of whether the current problems which claimant had were caused by his working environment.

Claimant had prior problems with stress and anxiety, he also had hypoglycemia and mild diabetes. When examined by Dr. Saddoris on September 7, 1977 claimant was found to have, among other things, reactive hypoglycemia and hypothyroidism and Dr. Saddoris stated that claimant exhibited signs of fatigue, weakness and depression which were classic symptoms for the organic conditions.

The Board concludes that the Referee erroneously found claimant's claim to be compensable. The Board finds that, although the claim was ultimately denied on June 16, 1978 and compensation for temporary total disability was paid from May 11 through the date of the denial, nevertheless, claimant was entitled to receive compensation from April 17, the day last worked, to June 16, 1978, the date of denial, and that the failure by the employer to pay claimant any compensation until May 23 constitutes unreasonable delay which subjects the employer to penalties and payment of attorney's fees.

The Board agrees with the conclusion reached by the Referee that the $150 should be included in the calculation of the rate claimant should be paid temporary total disability benefits.

ORDER

The order of the Referee, dated January 10, 1979, is modified.

The denial by the employer and its carrier, dated June 16, 1978, is approved.

The employer is not required to pay the sum of $3,000 to claimant's attorney as and for a reasonable attorney's fee.

The balance of the Referee's order is affirmed.

SAIF CLAIM NO. SC 395830 September 19, 1979

DONALD NOTT, CLAIMANT
Myrick, Coulter, Seagraves & Myrick,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 20, 1979 the Board received, by and through his attorney, a request for it to exercise its own motion jurisdiction pursuant to ORS 656.278(1) and reopen his claim for an industrial injury suffered on September 18, 1972. Claimant's claim was initially closed by a Determination Order dated February 2, 1973 which granted claimant compensation for temporary total disability only. Claimant's aggravation rights have expired.

The petition for own motion relief recites that claimant also suffered an industrial injury on December 31, 1976 (SAIF Claim No. PD 202595) which was accepted and closed on March 16, 1977. Claimant also filed a claim on October 7, 1977 for another industrial injury (Claim No. WE 11404). All three of the injuries were to claimant's back. The petition recites that the medical records of the 1976 and 1977 injuries refer to the original injury as the cause of claimant's current complaints and need for medical care and treatment.

Attached to the petition were the claim for the September 1972 injury, the medical reports relating thereto and also medical reports relating to examinations of claimant by various doctors in 1978.

On August 27, 1979 the State Accident Insurance Fund was informed by the Board that claimant had requested the own motion relief and was asked to advise the Board of its position thereto. The request had indicated that copies of the petition and the supporting documentation had been furnished to the Fund previously.

On August 29, 1979 the Fund responded, stating that it found nothing in the medical reports submitted in support of the petition for own motion relief which related claimant's present problems to his 1972 injury; furthermore, that there had been two injuries to claimant's back after the 1972 injury and, based upon the present medical information, the Fund would oppose reopening of the claim.

The Board, after reviewing the medicals furnished, finds that, by admission of the claimant in his petition, there were at least two intervening incidents for which claimant still has rights. Also, the only medical report which relates claimant's present condition to the 1972 injury is the report from Dr. Campagna, based upon his June 27, 1978 examination of claimant. It states that: "the relationship of the present symptoms to the 1972 injury is undetermined at this time."

The Board concludes that the claimant has failed to show that his present condition is directly related to his 1972 injury and that it represents a worsening of said injury since the last arrangement and award of compensation. Therefore, the claimant's request for own motion relief received by the Board on August 20, 1979 should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-1741 September 19, 1979

JAMES OHLIG, CLIAMANT
Burton J. Fallgren, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Order

On August 31, 1979 the Board entered its Order on Review in the above entitled matter. This order set aside the carrier's denial, orally made at the hearing, of responsibility for claimant's back problem and remanded claimant's claim for that problem to the employer and its carrier to be accepted and for the payment of compensation, as provided by law, commencing January 10, 1975 and until the claim is closed pursuant to ORS 656.268. It awarded claimant additional compensation equal to 25% of the compensation due him from December 20, 1977 to August 25, 1978 as a penalty for unreasonable delay in the payment of compensation. It also affirmed the Determination Order dated February 28, 1977 which related solely to compensation awarded for loss of claimant's right foot and awarded claimant a reasonable attorney's fee of $1,000 for prevailing on a rejected claim at both the hearing and Board review levels, payable by the employer and its carrier.

On September 6, 1979 the Board received from the employer/carrier, by and through one of their attorneys, a Motion to Reconsider the aforesaid Order on Review. The motion stated that penalties were improperly assessed and should be rescinded; that if claimant's back condition was found to be related to the industrial injury, then both the back condition and the right foot condition, as related conditions, should have been remanded to the carrier for closure, and finally that claimant had failed to meet his burden of proving by a preponderance of the evidence that his back condition was related to the industrial injury.

The Board concludes, after reading the brief filed in behalf of the employer/carrier in support of the aforesaid allegations, that it will be in the best interest of all parties concerned to grant the motion, set aside its order of August 31, 1979 and allow claimant, by and through his attorney, to file his brief in response to the motion. Claimant shall have 20 days from the date of this order within which to file his brief.

ORDER

The Order on Review, entered in the above entitled matter on August 30, 1979, is hereby set aside and this matter shall be held in abeyance until such time as the Board receives claimant's brief in response to the employer/carrier's brief and is able to give full consideration to the arguments presented both in behalf and against said Motion for Reconsideration. At that time the Board will enter its Order on Review from which either party shall be entitled to appeal pursuant to ORS 656.298.

WCB CASE NO. 78-7667 September 19, 1979

GARY L. PIKE, CLAIMANT
John C. DeWenter, Claimant's Atty.
J. W. McCracken, Jr., Defense Atty.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks Board review of the Referee's order which granted claimant an award of 60° for 40% loss function of his left forearm and an award of 15° for 10% loss function of his right forearm. These awards were in lieu of the award made by the Determination Order, dated September 6, 1978.

Claimant was employed by Weyerhaeuser as a forklift operator and on January 9, 1978 lifting created problems with his hands.

On January 16, 1978 Dr. Schachner, an orthopedic surgeon, had reported that he felt claimant, on a clinical basis, had a classic carpal tunnel syndrome, bilaterally, and to rule out that it was not traumatically induced as a result of claimant's work history as a laborer, he intended upon claimant's admission to the hospital for decompression of his right carpal tunnel also to do a diabetic as well as rheumatoid panel. On January 18 Dr. Schachner performed a right carpal tunnel decompression and on February 15, 1978 he performed a left carpal tunnel decompression, along with a ganglion resection from the left thumb.

Claimant was released for work on April 24, 1978.

On June 26, 1978 Dr. Schachner stated that he believed claimant was physically fit to operate a power steering lift truck, however, claimant was complaining of some swelling at the base of his thumb which he was unable to demonstrate to the doctor.

On August 2, 1978 Dr. Schachner reported that claimant offered no complaints compatible with his prior symptoms of carpal tunnel syndrome; he had full range of wrist motion and there were no objective physical findings remaining in evidence. Dr. Schachner was unable to explain claimant's subjective complaints and felt that claimant's condition was stationary and the claim could be closed.

On September 6, 1978 a Determination Order awarded claimant compensation for time loss and 7.5° for 5% loss function of the left forearm.

Claimant was seen by Dr. McNabb who, on October 2, 1978, referred claimant to Dr. Freeman with the following note: "Severe tendinitis To see orthopedic surgeon No work til [sic] then". Dr. Freeman examined claimant on October 9, 1978 and reported to Dr. McNabb that he had ruled out ulnar neuropathy, tendinitis and thoracic outlet syndrome, left upper extremity. Claimant could continue on light duty.

On November 18, 1978 Dr. Freeman was unable to explain claimant's symptoms nor could he find any neurological defect and he sent claimant to see Dr. Karasek, a neurosurgeon, who also was unable to find anything wrong with claimant. He mentioned nothing about tendinitis. Dr. Schachner, who had performed the two surgeries and had treated claimant from January 1978 to August 1978, had never mentioned anything about tendinitis. Claimant was released to work on November 8, 1978.

On April 11, 1979 a Second Determination Order awarded claimant additional compensation for time loss but no additional compensation for permanent partial disability.

On April 16, the day before the hearing, Dr. McNabb advised the employer that it was his opinion that claimant had tendinitis, at least, of the left forearm, and, by history, of the right forearm which seemed to be aggravated by heavy lifting and repeated gripping, using his hands. He felt claimant would be employable if that type of repetitive work was eliminated. Two days later, Dr. McNabb wrote claimant's attorney, stating that when he saw claimant on April 18, it was his assessment that claimant had flexor tendon swelling and pain mid-forearm and recurrent tendinitis, seemingly relating to cutting wood. Claimant testified he had numbness in the palm of the left hand and base of the thumb and fingertips. His left wrist swells.

Claimant testified he had been getting firewood for his folks for two months on the weekends which includes using a 15-pound chainsaw, an axe, he loads wood and splits it. Claimant does yardwork and used a posthole digger to build a fence.

The nurse for Weyerhaeuser testified, using her chart notes, that between June 27 and December 6, 1978 she checked claimant's arms for swelling once to twice a shift every other day or so and never observed any swelling.

The Referee found that claimant's wrists became painful intermittently, that the left forearm was worse than the right forearm and that there was loss of grip resulting in inability to curl more than 60 pounds of weight. Prior to the injury claimant had been able to do ten curls with 120 pounds. He found that claimant could engage in activities only with an allowance for frequent interruptions to rest. He found that claimant no longer played the guitar but he is able to carry his rifle and hunt deer. A recent episode in which claimant attempted to haul a dead deer 200 feet out of a steep canyon caused him pain and swelling in the left wrist.

The Referee found that claimant was able to take a job in the mill if offered but that it would cause him problems to return to a job as heavy as his previous job driving the forklift and tying down loads. Claimant has applied for unemployment compensation benefits and, in doing so, has stated in writing that he is willing and able to work.

The employer states that the tendinitis was caused by the wood chopping episode and that claimant's claim was confined to his carpal tunnel syndrome. The Referee found it appropriate to regard evidence of loss of use and function present before April 14, 1979, the date of the wood chopping incident, as relevant in assessing permanent loss of use resulting from the compensable injury for which claimant filed his claim on January 23, 1978. He stated that no attempt would be made to sort out what results from tendinitis or the ganglion cyst or to rule on the compensability of either.

He found that the witnesses testifying in claimant's behalf were credible and that their testimony indicated that claimant has had longstanding difficulty with his wrists, particularly the left one.

Based upon the evidence, the Referee concluded claimant had suffered disability to both of his wrists through loss of motion, loss of grip strength, minor loss of sensation in the left arm and moderate loss of reserve capacity. He increased claimant's award for loss function of his left arm from 5% to 40% and granted claimant an additional award of 10% for loss function of his right forearm.

The Board, on de novo review, finds that the medical evidence does not justify an award equal to 40% of the maximum for the left forearm. The award which the Referee granted claimant for loss function of his right forearm represents a proper assessment of the loss function of that scheduled member.

Claimant contends that he has substantial loss of motion, however, Dr. Schachner, in his closing examination of August 2, 1978, stated that claimant had full range of wrist motion. It is true that Dr. McNabb diagnosed tendinitis but the two specialists to whom Dr. McNabb referred claimant failed to support this diagnosis.

Based upon the medical reports from Dr. Schachner, who performed the two surgeries and treated claimant for approximately eight months, Dr. Freeman and Dr. Karasek, the Board concludes that claimant retains 80% use of his left forearm and would be adequately compensated by an award of 20% for the loss function of that arm. The award of 10% for the right forearm is adequate.

ORDER

The order of the Referee, dated June 7, 1979, is modified.

Claimant is awarded 30° of a maximum of 150° for 20% loss function of the left forearm. This award is in lieu of the award granted claimant for loss function of his left arm by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-4872 September 19, 1979

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

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which approved the denial by the State Accident Insurance Fund on June 7, 1978 of claimant's claim for a left hip problem.

In August 1977 claimant and her husband were employed as the managers of the Frontier Motel and, as such, were responsible for maintenance and housekeeping. On September 11, 1977 claimant and a maid were cleaning a room at the motel and, as they were leaving, claimant fell down two or three stairs onto asphalt pavement, landing on her back and twisting her left leg. Claimant's husband, who was working nearby, heard claimant scream and ran over and found her lying on the ground. Both he and the maid helped claimant get onto her feet and she was immediately taken to the Veteran's Administration Hospital where she gave a history of falling down several stairs and hurting her left hip. X-rays revealed no abnormalities; the diagnosis was a small muscle tear. Claimant was advised to rest and was given a prescription for Tylenol III. According to the testimony of the bookkeeper for the motel and the maid, claimant did not work for approximately three days after the accident and, in addition, the bookkeeper testified that for approximately a week after the accident claimant was "packing herself in ice".

From September 11, 1977 until March 28, 1978 claimant was seen on several occasions at the Veteran's Hospital regarding episodes of epigastric pain, bilateral flank pain with left spine tenderness, vomiting and diarrhea. The diagnosis was made of viral gastroenteritis. She was also seen at the hospital suffering abdominal pain radiating into her lower back and occasional discomfort in her left hip. On March 28, 1978 claimant was still complaining of left hip pain which she related, by history, to her fall of September 1977. On that day, while claimant was waiting in line to check into the orthopedic clinic, she felt lightheaded and, according to the Referee, passed out. Claimant gave a history of falling that morning and injuring her left leg and hip and, according to the Referee, thought that "the fall at the clinic had injured it worse".

On April 6, 1978 claimant was seen by Dr. O'Shea who in turn referred claimant to Dr. Vessely, an orthopedist. Dr. O'Shea advised claimant to fill out a Form 801 which claimant did and signed on April 7, 1978. She stated thereon that her left hip and back complaints were related to the fall she had had on September 10 or 11, 1977. Claimant was examined by Dr. Vessely on April 12, 1978 and she related her problems to an on-the-job injury of September 11, 1977. Dr. Vessely believed claimant had a greater trochanteric bursitis which he could not state was related to an injury but thought it was actually a condition developing with aging and deterioration.

Claimant continued working at the Frontier Motel until the end of April 1978 when she moved to Florida for two months. While in Florida she saw Dr. Kerr on May 4, 1978 complaining of low back pain radiating to her left lower extremity which she related to the September 11, 1977 accident. Dr. Kerr's original impression was that of lumbar radiculitis involving the left paracentral area and mild osteoarthritis of the lumbar spine, pre-existing claimant's accident of September 1977. He gave claimant medication and instructions for back exercises. Dr. Kerr planned to hospitalize claimant if she did not improve with conservative treatment. In May claimant wrote several letters to the Fund relating to the acceptance of her claim which the Fund stated it was investigating.

On June 7, 1978 the Fund denied claimant's claim for left hip problems on the grounds that there was insufficient evidence that an injury occurred while claimant was employed at the Frontier Motel or that the condition for which she sought medical care was a direct result of her work activity and, furthermore, that claimant had not filed a claim within 30 days as required by statute.

Claimant was last seen by Dr. Kerr on June 12, 1978. Claimant left Florida and moved to Alabama and then to Indiana and finally moved back to Portland and has lived there since.

Upon her return to Portland claimant was seen by Dr. Duff and Dr. Crawford and was examined by the doctors at the University of Oregon Health Sciences Center. All of the medical evaluations made after claimant's return to Oregon were based upon claimant's history of her September 11, 1977 fall. Dr. Duff, who examined claimant in December 1978, found that she had mild to moderate disability and related it to her work injury. He said it would probably preclude claimant from any type of work requiring lifting, bending or prolonged sitting.

The Referee found that since claimant filed her claim in April 1978 she has consistently related her back problems to the September 11, 1977 incident and that the evidence does not support a finding that they are attributable to this incident. The Referee did not doubt that claimant fell or had some incident on that date, but found no evidence that claimant had sustained any type of permanent damage as a result thereof.

The Referee found it was not until April 1978 that claimant really began to have back problems; the various problems for which she was seen at the VA Hospital apparently, in the opinion of the Referee, were not work related and the back problem was attributed by Dr. Vessely to bursitis. The doctors who later examined claimant attributed claimant's back problems to the September 11, 1977 incident primarily basing their opinion on the history which claimant related to them and which was found by Dr. Vessely to be not too accurate.

The Referee found that claimant's testimony with regard to the September 11, 1977 incident differed from that of the eye witness, the maid, whom she found more credible than claimant. Because of such inconsistencies and the fact that claimant had been diagnosed as a hysterical personality who sought frequent medical attention, the Referee distrusted her testimony that she had continued back and leg problems from September 11, 1977 forward. The Referee concluded claimant had failed to carry her burden of establishing by a preponderance of the evidence that she had sustained a compensable injury.

The Referee further found that the Fund had been prejudiced by claimant's not filing a timely claim because claimant had moved from Oregon and the Fund could no longer have her timely examined by a doctor of its choice, and "because the employer had moved from the state of Oregon". The Referee cited Satterfield v. SCD, 1 Or App 525 (1970).

The Board, on de novo review, finds that claimant did suffer a compensable injury to her left hip on September 11, 1977 when she fell while working for the Frontier Motel. The Board further finds that although claimant had not personally filed a notice of her claim within 30 days after the September 11, 1977 accident, her claim is not barred because her employer, Frontier Motel, had knowledge of the injury and, furthermore, there was no prejudice to the Fund or the employer as a result of her failure to receive timely notice. Mr. Parrett, one of the partners who owned the motel, had an office at the motel and handled the day-to-day operations of the motel itself. According to the testimony of claimant's husband on the day after the injury, he informed Mr. Parrett of claimant's accident and of the fact that she had been taken to the hospital. This testimony is corroborated by the testimony of the bookkeeper of the motel who further testified that between September 11, 1977 and April 7, 1978 she regularly had conversation with Mr. Parrett concerning claimant's back and hip condition and had advised him that claimant was having a great deal of difficulty moving around.

Claimant also contended that the Fund and the employer had not been prejudiced by any lack of timely notice. The Board finds this contention well taken. The Referee cited the ruling of the Court of Appeals in Satterfield. In that case, the Court ruled that the employer had the burden of establishing that any late filing of a claim for workers' compensation was prejudicial and that since the employer had offered no evidence in support of its claim that it had been prejudiced by claimant's untimely filing, claimant's failure to file notice within 30 days was excused pursuant to ORS 656.265(4).

The Board finds that in this case the Fund has offered no evidence that it has been prejudiced by any untimely filing. Also, inasmuch as both the Fund and the Referee were of the opinion that claimant's injury was not compensable it is reasonable to believe that claimant had good cause prior to April 1978 for being uncertain as to the compensability of her accident and therefore her actions in not filing notice prior to that date was not unreasonable. Wilson v. SAIF, 3 Or App 573.

With respect to compensability of claimant's injury, the Board finds that she has proven by a preponderance of the medical evidence that her low back, hip and left leg symptoms were significantly contributed to by her accident on September 11, 1977. The Referee had found claimant's testimony was not credible based on the fact that Dr. Vessely had found claimant's medical history was inaccurate and that claimant's testimony regarding the accident of September 11, 1977 was inconsistent. The Board finds that Dr. Vessely in his report stated that, "It is quite difficult to get a complete accurate medical history. . . . I feel that she started her treatment at the VA, she should continue there, as they have followed her from the beginning. I do not have any of these records at this time." Claimant contends that it is difficult to understand how Dr. Vessely could determine that claimant's medical history was inaccurate when he did not even possess any of her prior medical reports. The Board agrees.

Both claimant and her husband testified that claimant had fallen on her back after tripping on some steps and that this incident occurred on September 11, 1977. The only testimony to the contrary was given by the maid who stated that claimant had fallen on the steps but she had not fallen to the ground and landed on her back. The Board takes note of the fact that the maid was released from work approximately one month after the accident occurred as a result of an action taken by claimant's husband on behalf of the owner of the motel.

Dr. Kerr, in a report dated December 6, 1978, stated that the fall which claimant had on September 11, 1977 could have caused a herniated disc resulting in her present symptom of radiculitis involving the lower left extremity and that it was, therefore, medically probable that her fall which she described on September 11, 1977 could have produced her present symptoms.

Dr. Duff, in his report of December 26, 1978, based on his neurological findings, concluded:

> "Lumbar disc injury, secondary to work injury of September 11, 1977.
>
> "This lady does have early neurologic findings and quite persistent pain, which would indicate a chronic disc injury, although probably not a true disc rupture."

The accuracy of these two opinions was confirmed by a myelogram performed at the University of Oregon Health Sciences Center which revealed evidence of disc protrusion at the L5-S1 level and midline with a narrowing of the L5-S1 disc space.

The Board concludes that claimant has suffered a compensable injury and that her claim, therefore, should be remanded to the Fund to be accepted. The Board further concludes that the Fund has not been prejudiced by claimant's failure to file a claim for her September 11, 1977 injury until April 7, 1978.

ORDER

The order of the Referee, dated April 9, 1979, is reversed.

Claimant's claim for a compensable injury sustained on September 11, 1977 is hereby remanded to the employer and its carrier to be accepted and for the payment of compensation, as provided by law, commencing on September 11, 1977 and until claimant's claim is closed pursuant to the provisions of ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee for his services both at the hearing before the Referee and at Board review a sum of $1,200, payable by the employer and its carrier.

WCB CASE NO. 78-7640 September 19, 1979

DOREEN V. STINER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-reqeust by the SAIF

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which awarded her compensation equal to 80° for 25% unscheduled low back disability. Claimant contends she is entitled to a larger award.

Claimant was a 35-year-old registered nurse when she injured her back while assisting a patient at the Oregon City Hospital on November 13, 1975. Claimant has a substantial history of prior back problems which required surgery. She originally injured her low back in 1971 in a non-industrial accident. Back surgeries were performed at L4-5 and L5-S1 in July 1971 and again in February 1972. On May 14, 1974 claimant reinjured her low back and surgery was again performed at the same levels. This was an industrial accident and the claim was accepted and ultimately closed with an award of 144° for 45% unscheduled low back disability.

As a result of claimant's injury on November 13, 1975 additional back surgery was performed on July 1, 1976, September 7, 1976 and November 4, 1977.

Claimant testified that she had recently started working as a medications nurse in a nursing home. She works one day a week and her duties require that she measure, distribute and chart medications, check on patients due treatment, change dressings and take blood pressure. The only lifting involved is carrying the tray of the medications she distributed. She testified that standing increased her back symptoms and her pain was much more constant and covered a wider area then it had prior to her 1975 injury.

The Referee found that although claimant's first injury was not compensable, the disability resulting from that injury was significant and he estimated it to have been in the range of 25% to 30%. With respect to her second injury claimant had been awarded 45% of the maximum for unscheduled disability and therefore the Referee concluded that claimant had 70% to 75% disability prior to her November 13, 1975 injury. As a result of that injury she was awarded 32° for 10% unscheduled back disability by a Determination Order dated June 4, 1976. A Second Determination Order dated September 12, 1978 did not increase the award for permanent partial disability.

Claimant contends her disability has been significantly increased by her 1975 injury but she does not contend that she is permanently and totally disabled.

The Referee found that five surgeries to the same area of a worker's body would produce a significant physical impairment even if the area was otherwise healthy and asymptomatic. He found that two laminectomies and a facet rhizotomy were required as a result of the November 13, 1975 injury and that, furthermore, none of the surgeries seemed to produce more than a temporary relief of claimant's symptoms. The Referee found this to be strong evidence of the psychological component prolonging claimant's symptoms and impeding her recovery.

The Referee found that the medical evidence indicated claimant was physically able to engage in modified nursing activities with certain limitations, at least initially, on either the number of hours worked or the number of days worked. Claimant has a high school education and is a registered nurse and her intelligence was estimated to be in the high-normal range although her adaptability to other types of employment is unknown. Claimant's motivation to return to work was questioned, however, she has returned to work and this, to a large extent, refutes the assertion that claimant is not well motivated.

Based upon all the evidence, together with a comparison of claimant's condition prior to her injury of November 13, 1975 and her present condition, and consideration of her prior awards, the Referee concluded claimant was entitled to an award equal to 25% of the maximum for unscheduled disability resulting from her November 13, 1975 injury.

The Board, on de novo review, finds that the Referee erred in taking into consideration the previous award of 144° which represented 45% of the maximum for unscheduled disability and was granted claimant for her industrial injury sustained in 1974.

ORS 656.214(5) provides that unscheduled disability shall be determined by the extent of the disability compared to the worker before such injury and without such disability. The Referee correctly stated this but also took into consideration claimant's prior awards. What claimant has been awarded for prior injuries cannot be considered, however, the residuals of such prior injuries, if any, can be taken into account in determining what claimant was able to do prior to the injury upon which the present award was made and comparing that ability to what claimant can now do. ORS 656.222 does not apply to unscheduled disabilities, only to scheduled disabilities. Green v. SIAC, 197 OR 160 (1953).

The Board finds that claimant has suffered substantial loss of wage earning capacity as a result of her November 13, 1975 industrial injury. Although she is still able to work as a nurse it is on a very limited basis. Prior to the 1975 industrial injury claimant had some limitations, e.g., she could work only four days a week and was unable to work in the emergency room surgery for more than 30 minutes and she was not allowed to assist patients being moved from a stretcher to a Gurney or from a Gurney to the operating table. Her duties primarily were supervisory. Nevertheless, these limitations were substantially less than the present limitations and the availability of such jobs as claimant presently has may not be plentiful.

The Board finds that claimant has suffered much more than 25% loss of her wage earning capacity as a result of the November 1975 industrial injury and concludes that to adequately compensate her for the loss of wage earning capacity she is entitled to an award of compensation equal to 160° which would be 50% of the maximum allowable by statute. This is an increase of 25% over the award granted by the Referee and an increase of 40% over the award granted by the first Determination Order.

ORDER

The order of the Referee, dated February 26, 1979, is modified.

Claimant is awarded 160° of a maximum of 320° for 50% unscheduled low back disability. This award is in lieu of all previous awards granted claimant for permanent partial disability resulting from her November 13, 1975 industrial injury.

In all other respects the order of the Referee is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum equal to 25% of the increased compensation for permanent partial disability granted claimant by this order, payable out of said compensation as paid, to a maximum of $3,000.

SAIF CLAIM NO. RC 333574 September 19, 1979

JAMES E. SUTHERLAND, CLAIMANT
Myrick, Coulter, Seagraves & Myrick,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 17, 1979 the Board received from claimant, by and through his counsel, a petition for the Board to exercise its own motion jurisdiction pursuant to ORS 656.278(1) and reopen his claim for an industrial injury sustained on October 15, 1971. Claimant's claim was accepted and closed initially on February 25, 1975. Claimant's aggravation right have expired.

The petition was accompanied by medical reports from Dr. James E. Dunn II and Dr. Roy Lichtenstein.

On August 27, 1979 the State Accident Insurance Fund was advised by the Board of the request for own motion relief and asked to respond within 20 days. On August 29, 1979 the Fund responded, stating that the reports from Dr. Dunn and Dr. Lichtenstein indicated that the only treatment recommended by either doctor at the present time was a course of transcutaneous stimulation which could be provided under the provisions of ORS 656.245 without the necessity of reopening the claim.

The Board, after reviewing the medical reports, finds no evidence therein that claimant will sustain any loss of time from work as a result of the recommended treatments and concludes that it is not necessary to reopen the claim because claimant can be afforded the necessary treatment pursuant to ORS 656.245. Therefore, the claimant's petition for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-5787 September 21, 1979

JAMES ELSEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Cosgrave & Kester, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the order of the Referee which granted claimant an award of 45% loss of the left hand.

Claimant has been employed by Oregon Steel Mills for 24 years. On January 11, 1977 he was working as a switch conductor when a motor on the switch engine was running away with itself. He climbed a ladder, reached in to grab the compressor release and a fan blade hit his glove and cut off his left index and long fingers.

Claimant was hospitalized where Dr. Waldrum performed surgery consisting of wound revision, debridement and suturing.

Dr. Button examined claimant on October 14, 1977. He diagnosed traumatic amputation of the left ring and long fingers, middle phalangeal levels and painful amputation stump with digital neuroma, left long finger.

On October 20, 1977 Dr. Button performed surgery for excision of the neuroma.

On November 29, 1977 Dr. Button reported claimant's condition was stationary. Claimant was dissatisfied with the November 29, 1977 surgery performed by Dr. Nathan. Claimant requested surgery to provide more soft tissue coverage for the stump of the long finger. Dr. Button rejected the request for more surgery as unrealistic. He rated claimant's impairment of the left index finger at 70% or 18% loss of the hand and left long finger as 60% or 12% of the hand, for a combined loss function of the hand of 30%.

Claimant was released for regular work on January 16, 1978.

On January 17, 1978 Dr. Nathan reported claimant's long finger had excellent healing. He had full function at the proximal interphalangeal joint and as a result, demonstrated increased functional use. Upon examination of March 29, 1978 Dr. Nathan reported claimant could make a full fist and had excellent strength of the digits. He opined claimant's condition was stationary with impairment of the left index finger of 70% or 17.5% of the hand, left long finger 60% or 12% of the hand, for a combined loss of 29.5% hand function.

On June 23, 1978 a Determination Order granted claimant an award of 30% loss of the left hand.

Claimant has returned to his regular job and has missed no time due to his hand injury. Claimant testified at the hearing he cannot put a screw in a hole, cold weather causes pain in the fingers and they go numb. He has trouble with buttons. His fingers are sensitive.

Dr. Nathan testified at the hearing that claimant's loss of strength, grip and sensitivity were considered and included in his rating. He testified he did not rate loss of opposition because that relates only to the thumb. He stated he based his rating on both subjective and objective findings.

The Referee found that adding loss of grip, loss of strength and sensitivity, claimant was entitled to a larger award. He granted him an additional award of 15% for a total award of 45% loss of the left hand.

The Board, on de novo review, finds based on Dr. Nathan's testimony he did include loss of grip, strength and sensitivity in reaching his impairment rating and that claimant was adequately compensated for his loss of function of his left hand by the award of 30%. The Board concludes the Determination Order of June 23, 1978 was proper.

ORDER

The order of the Referee, dated February 6, 1979, is reversed.

The Determination Order, of June 23, 1978, is affirmed.

WCB CASE NO. 78-9178 September 21, 1979

THOMAS HILSABECK, CLAIMANT
David R. Vandenberg, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks review by the Board of the Referee's order which granted claimant additional compensation equal to 192° for 60% unscheduled permanent disability. Claimant had previously been awarded 30° for 20% loss function of his left leg by a Determination Order dated April 13, 1976. The Fund contends that the award was excessive.

Claimant was a 39-year-old painter when, on August 15, 1975, a ladder skidded out from under him and caused him to fall approximately 22 feet. Most of the injuries claimant suffered have resolved with exception of a continuous problem claimant has had with his left leg and pain in his left hip extending into the buttocks and low back.

At the age of four claimant had poliomyelitis which paralyzed his entire right side. Fortunately, through treatment, most of the disability resulting from this disease has been relieved. Claimant does have a residual problem of weakness of the right leg, however, which required surgical fusion of his right ankle when he was eighteen years old.

Claimant testified that because of the impairment of his right leg, his left leg had been required to bear the major load of supporting his body and also to assist him from rising from a crouched position and to climb up and down stairs. He stated that he had sufficiently compensated for the right leg disability to the exent that he walks

without a limp and was able to do "everything" prior to his injury on August 15, 1975. This testimony is borne out by the fact that claimant went through basic training in the Army and served two years.

The claimant has a 10th grade education, he quit school at 16 to become a painter and was engaged in that occupation up until the 1975 injury. He testified that the injury to his left leg has diminished about 50% of the strength that he had in it prior to the injury. He said he has continuing pain in the back of the thigh of the left leg which feels as if the leg were bruised. The intermittent pain in his left hip which extended into the low back and the left buttocks was worsened by activity. He is unable to walk on an uneven terrain because of inability to keep his balance and his walking tolerance is limited to two to three blocks on a flat surface. He states he does not have the strength to push up from a squatting position and is unable to stand on his feet for a full eight-hour work day; also, extended sitting induces numbness in his left leg. Claimant uses a cane.

The Fund attempted to impeach claimant's credibility by offering evidence that claimant had received a bad conduct discharge from the Army for burglary and that he had also been jailed for theft in 1973. The Referee was not persuaded that claimant's credibility was destroyed as to the effects of his injury. The injury, on August 15, 1975, was quite traumatic and the Referee found it was not surprising that claimant has a substantial residual disability as a result thereof. The psychologist who examined claimant in January 1975, Dr. Vizzard, referred to him as having been arrested on more than three occasions, "usually for acts (such as the stealing of an airplane) which were performed out of a youthful daring that had been fueled by too much alcohol consumption". The Referee found there were other factors that were persuasive concerning the validity of claimant's testimony concerning the level of his physical capacity resulting from the injury.

At the time of the injury claimant was making $8 an hour and the present union scale for painters is more than $11 an hour. At the present time claimant is living on welfare. The Referee felt that if claimant were malingering or exaggerating he would not have limited his complaints to his leg and hip condition. With the type of accident that claimant sustained, he probably could have placed greater emphasis on his low back injury and upper bodily injuries.

The Referee was convinced that claimant's failure to obtain work was the result of his physical injury, compounded with the general discouragement and inability to organize his life to obtain alternative employment.

Claimant has received vocational assistance in the nature of retraining to be employed as a cook but was disqualified from completing this program because he found that he could not remain on his feet for a full day's work. Claimant also received on-the-job training for six months as an automobile body repairman. Claimant testified that the owner of the shop was his cousin and he was permitted to sit and stand at his option and rest as much as he needed. He said that five months passed before he was supplied with any tools and that he never received a "porta-power" which was a necessary tool for the straightening of autobodies. He felt he learned enough from the on-the-job program that if he had a porta-power tool, he could perform body repair work. However, he was not able to stay on his feet for eight hours and other employers apparently were not interested in hiring a person with that limitation. The evidence indicates that claimant made a rather limited attempt to secure work as a body repairman. He has also made some frequent contacts with the State Employment Service and checked the want ads in the newspaper.

In 1976, a Vocational Rehabilitation counselor, commenting on claimant's motivation stated that claimant appeared work oriented, but his tentative vocational plans were very unrealistic. Later this counselor stated that claimant was dependable, a factor which would enhance his employability, however, he lacked skills for direct placement.

Dr. Laubengayer, an orthopedist, has been claimant's principle treating physician since 1976. In January 1976 he reported that claimant had bursitis of the left greater trochanter which made it impossible for him to bear full weight on his left leg. He stated that in all probability this was the result of a blow to the left hip sustained at the time of his industrial injury.

Dr. Holm, a medical examiner at the Callahan Center, stated in his discharge summary, dated February 6, 1976, that vocational guidance and counseling was indicated. Claimant would need to be retrained if he unable to be replaced in a modified program in the painting profession.

Claimant was advised to avoid high climbing and heavy industrial type painting. Dr. Holm felt claimant was handicapped for heavy work because of his polio residual. Prolonged repetitive lifting or carrying of weights over 25 pounds probably should be avoided. However, claimant should have no problem with work requiring sitting or a moderate degree of walking or standing.

The Referee found that the medical evidence was persuasive that claimant had sustained a substantial loss of wage earning capacity by reason of an unscheduled disability. He based this primarily on the opinions expressed by Dr. Laubengayer and, taking into consideration claimant's age, education, intelligence, narrow range of work experience and loss of ability to return to his lifetime work as a painter, although considering the possibility that he would be able to make a living as a painting contractor, with limited physical participation in the work on his own part, and the possibility that he might be able to find employment as an automobile body repairman if a proper job could be found for him within his physical limitations, the Referee concluded claimant had sustained loss of wage earning capacity equal to 60%.

The Referee found that the award made by the Determination Order of April 13, 1976 with respect to claimant's separate scheduled disability was adequate.

The Board, on de novo review, finds claimant has little, if any, motivation to return to work. His credibility is suspect and most of the reports from Dr. Laubengayer are based upon a history of complaints related to him by claimant. The opinions expressed in Dr. Laubengayer's reports do not support a finding that claimant has lost 60% of his wage earning capacity.

Dr. Holm, in his report of February 6, 1976, indicated that there were many different types of work which claimant could continue to do; obviously, there would be some limitations placed upon his work activities but most of them would be as a result of his scheduled injury.

The Board concludes that the Referee's award of 192° for 60% unscheduled disability is not justified and that claimant would be adequately compensated for his loss of wage earning capacity by an award of 64° which represents 20% of the maximum for unscheduled disability.

Insofar as the scheduled disability is concerned, the Board agrees with the Referee that claimant has been adequately compensated by the award of 30° for 20% loss function of the left leg which was granted by the Determination Order of April 13, 1976.

ORDER

The order of the Referee, dated April 27, 1979, is modified.

Claimant is awarded 64° of a maximum of 320° for 20% unscheduled back disability. This is in lieu of the award of compensation for unscheduled disability made by the Referee's order which in all other respects is affirmed.

The Determination Order of April 13, 1976 whereby claimant was awarded 30° for 20% loss function of the left leg and compensation for temporary total disability is affirmed.

SAIF CLAIM NO. HC 410227 September 21, 1979

EDWARD L. LEACH, CLAIMANT
Dana R. Taylor, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his back on November 7, 1972 while lifting a water heater. He was employed by Stark Plumbing and Heating whose carrier was the State Accident Insurance Fund. The claim was accepted and closed on August 24, 1973 with an award of compensation equal to 80° for 25% unscheduled low back disability. Subsequently, this award was increased, after a hearing, to 128° for 40% unscheduled low back disability by a Referee's order dated February 1, 1974. This was the date of the last award or arrangement of compensation. Claimant's aggravation rights have expired.

On April 9, 1979 claimant, by and through his attorney, requested the Board to reopen his claim pursuant to its own motion jurisdiction. The request was supported by a report from Dr. Kayser, dated August 7, 1978.

The Fund responded to claimant's request, stating that it opposed the reopening of the claim. However, the Board, after fully considering the medical evidence, concluded that the claim should be reopened and, on May 8, 1979, it issued its Own Motion Order. This order directed the Fund to commence payment of compensation, as provided by law, on November 13, 1978, the date claimant was hospitalized and to continue payment of temporary total disability until the claim was closed pursuant to ORS 656.278, less time worked. The order also granted claimant's attorney as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted by the order, payable out of said compensation as paid, not to exceed $750.

Claimant continued to receive conservative treatment from Dr. Kayser and his condition is now medically stationary. The Fund has requested a closing evaluation and the Evaluation Division of the Workers' Compenation Department, having reviewed the medical reports, recommends that claimant be paid compensation for temporary total disability from November 13, 1978 through July 18, 1979 but no additional compensation for permanent partial disability.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from November 13, 1978 through July 18, 1979, less time worked.

Claimant's attorney, by the Board's Own Motion Order of May 8, 1979, has already been allowed to be paid as a reasonable attorney's fee a sum equal to 25% of the compensation for temporary total disability that claimant shall receive, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO 78-1531 September 21, 1979

VERNON MICHAEL, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the order of the Referee which awarded claimant compensation for permanent total disability.

Claimant, 52 years of age, was employed by D. R. Johnson Lumber Company, as a yarder operator and on January 5, 1972 he slipped on the yarder and fell backwards onto his tailbone. Dr. Fax initially diagnosed crush superior 1st vertebra.

Claimant came under the care of Dr. Harper; x-rays revealed 30% compression fracture of T12 and questionable fracture of T11. By August 1972 Dr. Harper diagnosed compression fracture of L1. Treatment was conservative.

In October 1972 Dr. Woclieyer examined claimant and at that time the L1 fracture was partially healed.

Dr. Harper felt in November 1972 that claimant's time off work was excessive and he had released him for work on September 26.

Claimant worked on November 8, 9 and 19, 1972 and quit at that time due to severe pain in his legs. A myelogram taken on March 5, 1973 showed a shallow defect at L4-5.

Claimant was examined by Dr. Hockey and on September 18, 1973 he performed a lumbar laminectomy of L4-5. In April 1974 Dr. Hockey reported claimant did not seem anxious to return to work. Claimant had good range of back motion and he released him for work on May 6, 1974.

A Determination Order of May 14, 1974 granted claimant 64° for 20% unscheduled back disability. After issuance of this Determination Order Dr. Hockey reported claimant could not return to heavy work.

Claimant was next examined by Dr. Matthews on August 15, 1974 and diagnosed degenerative disc disorder of the lumbar spine. The doctor felt that the increased symptoms were somewhat peculiar, but found nothing on examination to eliminate claimant from light activity.

In September 1974 claimant was enrolled at the Disability Prevention Division and the physical diagnoses were the same. Claimant underwent a psychological evaluation by Dr. Perkins which indicated claimant had an eighth grade education with principal occupation most of his adult life in the logging industry. Claimant's I.Q. was dull normal and he was functionally illiterate. Dr. Mason, on the discharge summary, indicates claimant should not have a spinal fusion. He must avoid lifting, bending and twisting. His condition was medically stationary. Total disability was rated as mild to mildly moderate at the most.

Dr. Dunn was seen next and he recommended a myelogram; Dr. Wilson concurred.

Dr. Kilgore, a psychiatrist, evaluated claimant on January 14, 1975 and diagnosed psychoneurotic disorder; chronic and severe hysterical type with depression and hypochondriacal features. Claimant had a basic schizoid personality. It was felt he was a poor surgical risk. Dr. Kilgore opined that claimant's emotional difficulties were aggravated by the industrial injury. Claimant also had secondary gain factors.

On January 24, 1975 Dr. Dunn performed an L4-5 laminectomy and foraminotomy and fusion and on the same date Dr. Wilson performed decompression surgery at L4-5 and a fusion.

Claimant appealed the Determination Order and, after a hearing, an Opinion and Order by Referee McCullough, dated January 28, 1975, remanded the claim to the Fund to be accepted as an aggravation.

By January 1976 claimant's complaints were the same. In April 1976 he underwent another myelogram which was normal.

In November 1976 Dr. Wilson reported that x-rays showed a malfusion of C5. On February 23, 1977 Dr. Dunn performed a cervical fusion. On July 11, 1977 Dr. Dunn reported he was not aware of any neck problem until November 1976 but felt that it was reasonable that the Fund was responsible.

On December 10, 1977 claimant was examined by the Orthopaedic Consultants who noted claimant was drawing social security benefits. They felt his condition was medically stationary and that he was precluded from his regular occupation but could be gainfully employed and recommended job placement. Total loss of function was mildly moderate to the back and mild of the neck. Dr. Dunn subsequently concurred.

A Second Determination Order of February 21, 1978 granted claimant an additional award of 80° for a total award of 45% unscheduled disability.

In August 1978 claimant was enrolled at the Pain Clinic. The diagnosis was chronic low back pain radiating into the right leg, muscular headaches and depression. While enrolled claimant was evaluated psychologically by Dr. Newman. His diagnosis was compensation secondary gain factors significant with relief from responsibilities and financial insecurity; psychophysiological musculoskeletal disorder moderate, depression, mild to moderate, economic security it was felt, rested on continued disability posing definite obstacles to vocational rehabilitation, and poor motivation for return to work or retraining.

In December 1978 Dr. Dunn reported he felt claimant was permanently and totally disabled.

Claimant testified he called two places for a job since this injury and told them about his surgeries and admitted that he expected them to refuse him employment, which they did.

A vocational counselor report in evidence indicates that training claimant was unfeasible.

The Referee found Dr. Dunn found claimant was permanently and totally disabled and the vocational counselor felt training was unfeasible and he was persuaded that claimant comes under the odd-lot doctrine and is permanently and totally disabled.

The Board, on de novo review, finds that the preponderance of the medical evidence does not support disability to the extent of permanent total. The medical evidence indicates that claimant is capable of light work and claimant appears to be motivated only to return to the heavy work which is the limit of his work experience. Claimant has not shown any effort to seek employment or retraining to something within his physical and mental capabilities which is required under the worker's compensation law.

The Board concludes that claimant is entitled to an award of 75% unscheduled disability to compensate him for his loss of wage earning capacity.

ORDER

The order of the Referee, dated May 21, 1979, is modified.

Claimant is hereby granted an award of 240° for 75% of the maximum of 320° for his unscheduled back disability. This award is in lieu of all prior awards granted to claimant. The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-6449 September 21, 1979

PATRICIA OLSON, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
Dennis VavRosky, Defense Atty.
Request for Review by Claimant
Cross-request by Employer

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which granted her 128° for 40% unscheduled left shoulder disability. Claimant contends the award is inadequate to compensate her for her loss of wage earning capacity. The employer cross-appeals review by the Board contending that the award granted by the Referee was excessive.

Claimant, 51 years of age, was employed by National Appliance Company as an assembler of medical laboratory equipment. Claimant had past problems of bursitis of her shoulders. On October 2, 1974 a rack fell on claimant at work striking her left arm and shoulder.

The original diagnosis by Dr. Johnson was contusions and abrasions. Claimant returned to work and had no medical attention again until 1976.

X-rays taken on August 4, 1976 revealed calcific tendinitis and mild degenerative joint disease of both shoulders. Dr. Waldram diagnosed bursitis.

On March 14, 1977 Dr. Schloss requested that claimant's claim be reopened. On March 23, 1977 Dr. Waldram performed shoulders manipulation while claimant was under anesthesia.

On May 10, 1977 claimant underwent surgery consisting of an acromioplasty and Dr. Waldram reported claimant's injury aggravated her shoulders and has continued.

Dr. Pasquesi reviewed claimant's medical reports and on May 23, 1977 reported that he felt that a blow on the left shoulder could aggravate bursitis or even cause bursitis.

Claimant's shoulder problems persisted. On October 10, 1977 Dr. Waldram re-examined her. The diagnosis was generalized bursitis with calcific bursitis left shoulder. Claimant's left shoulder was symptomatic and the right was asymptomatic. He anticipated a chronic degree of difficulty in that shoulder. He had advised claimant to cease work in March 1977 and indicated she was still disabled.

On February 15, 1978 Dr. Waldram found upon examination that claimant had abduction to 160° with pain. Her condition was considered stable and her work limitations were no overhead work and no repetitive activities with the left arm; there were no limitations placed on the right arm.

A Determination Order of August 16, 1978 granted claimant 80° for 25% unscheduled left shoulder disability.

In November 1978 claimant was hired as an on-call release receptionist at Kaiser Clinic and works 28-32 hours a week.

Claimant has two years of high school education and one year of comptometer training. She does have secretarial background and is precluded from her assembler job.

The Referee found, after considering claimant's age, education, work experience, training, trainability, mental capacity and physical limitations that she is precluded from a significant segment of the labor market and granted her an award of 128° for 40% unscheduled left shoulder disability.

The Board, on de novo review, finds that claimant's injury aggravated a pre-existing bursitis condition and that although she is precluded from her regular occupation as an assembler, claimant does have the background and training for a number of occupations. The Board concludes that, based on claimant's physical disability, the award of the Determination Order of 25% adequately compensates claimant for her loss of wage earning capacity.

ORDER

The order of the Referee, dated February 7, 1979, is reversed.

The Determination Order of August 16, 1978 is affirmed.

WCB CASE NO. 78-3534 September 21, 1979

ROBERT R. WAGY, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which approved the denial, dated April 21, 1978, of claimant's claim for an industrial injury to his low back sustained on February 28, 1978.

The issue before the Board is compensability.

On March 8, 1978 claimant signed a claim alleging that as a result of being taken off his job driving a 10-yard dump truck and put on as a driver of a 5-yard dump truck his back has caused him considerable pain. On the same day he filed a claim, claimant was seen by Dr. Bassinger who diagnosed a low back sprain.

On April 21, 1978 the Fund denied the claim, stating there was insufficient evidence that the alleged injury occurred during the course and scope of employment.

Claimant worked for the Linn County Road Department and his classification was maintenance man 4. This meant that he was qualified to operate heavy equipment and the 10-yard dump trucks. In the past claimant had operated a road grader but requested the Roadmaster to give him a greater variety of work assignments. Claimant was assigned to driving trucks but had been assigned to a 5-yard truck only infrequently prior to February 28, 1978. The basic difference between a 5-cubic-yard capacity dump truck and a 10-cubic-yard capacity dump truck is that the latter have air cushioned seats and, as described by claimant, ride like "sitting in a rocking chair", whereas the 5-yard trucks ride very rough and choppy. There does not seem to be very much dispute upon this distinction of the rideability of the two types of dump trucks.

Claimant has 24 years of service with the County Road Department and has acquired substantial seniority. He was somewhat upset that the was taken off the 10-yarders and given 5-yarders to drive. He advised his supervisor that he was unable to continue driving the smaller dump truck because it was causing him back problems. The supervisor said he was unable to assign claimant to the 10-yarder at that time because there were other men driving them; the road department had approximately 30 5-yarders and only four 10-yarders. During the noon hour of the same day that claimant talked to his supervisor, he advised the Roadmaster that he was unable to continue driving the 5-yarder because of his back problems and the Roadmaster suggested claimant take the rest of the day off as vacation time. Instead, claimant went to the emergency room of the Albany General Hospital where he was examined by the physician in attendance and subsequently referred to his own physician, Dr. Bassinger.

The Referee found that claimant had suffered a low back injury in 1954 for which he had had back surgery performed by Dr. Kimberley. Claimant denied any further back injuries or problems until February 27, 1978. Dr. Bassinger had treated claimant since 1965 and had seen him approximately 30 times between 1965 and March 1978. During that period of time claimant had never required treatment for low back problems.

The Referee found that when Dr. Bassinger first examined claimant on March 8, 1978 he indicated on his report that there were no objective findings of any back injury other than claimant's limitation of flexion which could be attributed to his 1954 fusion. He saw claimant twice during the month of March concerning claimant's low back pain but it was not until May 8 that he reported, "patient had become aware of some pain going down the right leg, specifically when mowing the lawn".

In July claimant advised the doctor that he had been aware for approximately one week of aching down the posterior aspects of both legs which was intermittent in nature. Dr. Bassinger testified that such pain would come from the L4-5 area but that the March x-rays indicated that the interspace "was well maintained and there was no narrowing".

Dr. Bassinger testified that if the L4-5 disc were herniated, as he suspected, he would either historically or objectively anticipate that there would be a nerve root problem of a minimum of four or five days. However, he believed that claimant's subjective complaints were due to the nerve root irritation as a result of his driving the 5-yard truck beginning on February 27, 1978.

Dr. Bassinger referred claimant to Dr. Throop, a neurologist, who found no neurological abnormality and stated he did not have enough evidence to make a diagnosis of radiculopathy. He did note that if claimant's symptoms became lateralized, then electrical studies should be performed.

The Referee found claimant to be a very poor historian. He thought that the basic problem with claimant was his dissatisfaction with the way he had been treated by the road department, to-wit: failure to give claimant any advantage because of his seniority when assignments were made for the driving of the 10-yarders.

The Referee concluded that claimant did not suffer a compensable injury and "merely utilized the claim process, in an overly-dramatic fashion, to obtain his medical excuse from driving the 5-yard trucks".

The Board, on de novo review, reverses the conclusion reached by the Referee. Dr. Bassinger's initial diagnosis was low back strain; at that time claimant was suffering from a chronic persisting aching of the lower lumbar area. Claimant had no history of any back problems between 1965 and 1978. This is verified by records of Dr. Bassinger who had seen claimant approximately 30 times between 1965 and March 1978.

Although Dr. Bassinger knew that there were no objective findings in his initial examination, nevertheless, he acknowledged that the lack of objective findings did not affect his diagnosis in any way. He prescribed medication for claimant and recommended that he cease driving the 5-yard trucks.

On September 26, 1978 Dr. Bassinger diagnosed claimant's condition as a nerve root irritation and stated that he felt it was a reasonable medical probability that the nerve root irritation in L-5 was a direct result of the accident that occurred subsequently to the driving of the 5-yard truck on February 27, 1978.

Dr. Throop examined claimant and found no neurological abnormality and said he could not make a diagnosis of a radiculopathy at that time. After reading Dr. Throop's report, Dr. Bassinger, on November 2, 1978, stated:

> "Doctor Throop was unable to verify my findings in reference to the discrepancy between the strength of dorsi flexion of the right and left lst toe. It is not uncommon to have changing or transient findings in reference to neurological examinations in the lower extremties [sic]. Such transient findings are usually on the basis of nerve root irritation such as occurrs from a spasm in the lower lumbar area that I believe was present in this patient."

The test for compensability as stated by the Court of Appeals in Briggs v. SAIF, 36 Or App 799 (1978), is:

> "If the industrial injury is a significant contributing factor to the existing disability, then claimant is entitled to compensation."

Dr. Bassinger, in his deposition at page 38, stated:

> "I think, historically and physically, I think that the accident or the stress that occurred on this patient's back in February of '78 was the most likely precipitating cause of the nerve root irritation that I note on the examination of 9/26/78."

There is no medical opinion which contradicts Dr. Bassinger's opinion that claimant's injuries were materially contributed to by his operation of the 5-yard dump truck in the latter part of February 1978.

The Board concludes that claimant has suffered a compensable injury and that his claim should be accepted and processed in accordance with the Workers' Compensation Act.

ORDER

The order of the Referee, dated March 29, 1979, is reversed.

Claimant's claim for an industrial injury sustained on February 28, 1978 is hereby remanded to the State Accident Insurance Fund to be accepted for the payment of compensation, as provided by law, commencing on February 28, 1978 and until closed pursuant to the provisions of ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review and also before the Referee at the hearing the sum of $1,200, payable by the State Accident Insurance Fund.

SAIF CLAIM NO. KC 120599 September 25, 1979

EDNA M. AICHELE, CLAIMANT
William A. Galbreath, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a nurse's aide, sustained a compensable injury on March 20, 1968 when she strained her chest muscles while lifting a patient. Claimant was employed at the time by Milton-Freewater Convalescent Hospital whose carrier was the State Accident Insurance Fund. The claim was accepted and closed by a Determination Order dated June 5, 1968 which awarded claimant compensation only for temporary total disability.

On May 4, 1971 a stipulation was approved which awarded claimant compensation equal to 48° for 15% unscheduled disability. This was the date of the last award or arrangement of compensation.

On March 14, 1977 claimant, by and through her attorney, requested the Board reopen her claim exercising its own motion jurisdiction; the Board did so by its Own Motion Order, dated January 17, 1978, which directed the Fund to commence payment of compensation, as provided by law, on March 26, 1976 and to continue payment until the claim was closed pursuant to ORS 656.278, less time worked.

On March 27, 1978 claimant had removal of the right rib through a transthoracic approach with subsequent atelectasis of the right lung which was treated with suction. Claimant was able to get out of bed shortly after surgery, however she developed chest complication and bed rest was prescribed. Subsequently, claimant developed pain and swelling in the left leg and was seen by Dr. Saw, a vascular surgeon, who diagnosed bilateral lower extremity chronic venous insufficiency, superficial thrombophlebitis of the left leg. He treated her with anticoagulation therapy which gradually improved claimant's problems although she continued to have some pain and swelling in the left leg.

On July 11, 1979 claimant was examined by the Orthopaedic Consultants who stated that the thrombophlebitis of the left leg occurred while the thoracic outlet syndrome was being surgically treated and therefore it was distantly related to the injury because of the acceptance of the thoracic outlet syndrome as an industrial injury. They found no evidence at that time to suggest that venous stripping was required and felt claimant's condition was stationary. Claimant had reached maximum improvement for her injury and her claim could be closed without further treatment. They also stated claimant could return to her same occupation but could not do any lifting. The loss of function at the time of the examination was mild and this loss of function was secondary to the loss of function due to the remote injury.

The Fund requested closing evaluation. The Evaluation Division of the Workers' Compensation Department recommended that claimant's claim be closed with an award of compensation for temporary total disability from March 26, 1976, per Own Motion Order dated January 17, 1978, through July 11, 1979, less time worked and with an additional award of 80° for 25% unscheduled right shoulder disability.

The Board concurs with these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from March 26, 1976 through July 11, 1979, less time worked, and compensation equal to 80° of a maximum of 320° for 25% unscheduled right shoulder disability. These awards are in addition to all previous awards claimant has received as a result of her March 20, 1968 industrial injury.

WCB CASE NO. 78-7555 September 25, 1979

RON ALLBEE, CLAIMANT
James M. Pippin, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests Board review of the Referee's order which set aside the Fund's denial, dated September 13, 1977, and ordered claimant's claim for low back injuries sustained on January 3, 1978 to be accepted for the payment of compensation, as provided by law, until closed pursuant to ORS 656.268. Claimant's attorney was awarded as a reasonable attorney's fee the sum of $1,000.

The sole issue is compensability.

Claimant, a 48-year-old office manager and insurance claims handler for the employer, alleged he sustained an injury to his low back on January 3, 1978 when he slipped and fell on ice in the parking lot adjoining the employer's premises. Originally, the claim was accepted and benefits were paid to claimant, however, on September 13, 1978, the Fund issued its denial, stating in part, that it had information which led it to believe that the claimant's condition did not arise out of or in the course of his employment.

The event of January 3, 1978 apparently was unwitnessed. January 3, 1978 was a very snowy and icey day, according to the unrebutted testimony of claimant, and driving conditions were extremely hazardous. Claimant, at that time, lived in Dayton, which is 25 miles southwest of Portland. He drove to Newburg, bought a set of tire chains and put them in the car. He then drove to the employer's premises in northeast Portland, arriving about 1:00 p.m. He went upstairs to his office and found it was empty; apparently, none of the other employees had been been able to get to work. Claimant made some phone calls, went downstairs and intended to put chains on his tires.

Claimant testified he slipped and fell on the ice in the parking lot, injuring his head and back. He phoned a nearby service station, requesting that somebody be sent out to put chains on his tires. The manager responded and drove the car to the service station where he put on the chains. After claimant had fallen, he was helped into the building by two men who later could neither be identified nor located although they apparently were from the Marine recruiting office located in the same building as the employer's offices.

On the afternoon of January 3, Dr. Saunders from McMinnville examined claimant and diagnosed a concussion. The history he took of the injury was as follows: "Fell, hitting back of head at work. Slipped on ice in a parking lot at his place of employment". The Referee found this history was credible and supported by claimant's check in payment of the tire chains, his receipt from the service station for the installing of the chains on his tires, Dr. Saunders' report and the numerous statements given by the manager of the service station.

The Referee concluded that there was only one question of fact which must be decided to determine compensability of this claim, namely, did claimant fall on the parking lot or on the street outside the building?

The Fund had one of its investigators talk to the manager of the service station which claimant had called and, according to the Referee, an undated and unsigned report indicated, in part, that: "Witness said he was sitting across the street from claimant and saw claimant fall". This report of an unknown investigator for the Fund which was dated August 29, 1978 further states that: "Mr. Hollingsworth [manager of the service station] then went to the scene in a tow truck and as he was turning around in preparation to tow the Allbee vehicle, he saw Mr. Allbee walking on the street where he slipped and fell".

The Referee was not disposed to give much credence to this evidence offered by the Fund. He found it clear that the assorted versions of what happened established only that the manager of the service station didn't pay much attention to what had happened on January 3 and that his recollection was very hazy by May 4, 1978 when he reportedly stated to an investigator for the Fund, "God, its been so long I don't remember now".

The Referee found that the failure of the Fund to give satisfactory explanation for the delay in interviewing the manager of the service station made him disinclined to give it much weight.

The Referee concluded that claimant's testimony as to the fall having occurred in the employer's parking lot was, accordingly, unrefuted and being inherently credible should be accepted. The Referee concluded further that the fall having occurred in the employer's parking lot, the last element of compensability had been established.

The Board, on de novo review, reverses the Referee's finding that claimant suffered a compensable claim. The actual accident itself was not witnessed, however, the manager of the service station who responded to claimant's call to come and place chains on his tires testified that when he arrived at the scene in his tow truck and was preparing to tow the claimant's car away for the purpose of placing the chains on the tires, he observed claimant walking on the street and at that time claimant slipped and fell. The claimant testified that he slipped on ice in a parking lot at the place of his employment. We have two diametrically opposed versions of what happened. The manager of the service station had no reason to falsify his testimony. The claimant did.

The Board does not feel that the delay on the part of the Fund in denying responsibility for claimant's condition plays any relevant part in this matter.

The Board also finds that it is very questionable that claimant was in the course and scope of his employment at the time of his alleged incident.

ORDER

The order of the Referee, dated April 13, 1979, is reversed.

The denial of the Fund, dated September 13, 1978, is affirmed.

WCB CASE NO. 78-2900 September 25, 1979
WCB CASE NO. 78-3401

CLIFFORD BROWN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-request by the SAIF

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee granting him an award of 48° for 15% unscheduled left eye disability and affirming the Determination Order of March 27, 1978 which awarded time loss only for an injury of November 1976. The Fund cross-appeals and asks review by the Board of that portion of the Referee's order which granted claimant an unscheduled disability award.

Claimant, who was 60 years old at the time of the hearing, was employed by the Lincoln County School District as a custodian. On September 5, 1975 he was helping to clean ovens. Some oven cleaner and grease splashed into his left eye. Claimant was treated by Dr. Jahnke.

In February 1976 Dr. Jahnke reported that claimant's lower left eyelid was inflammed significantly when he was seen in January of 1976 and he treated claimant with ointment.

Claimant was released to return to regular work on March 2, 1976.

In July 1976 Dr. Patter reported claimant's injury caused sporadic irritation to the eye. It caused him extreme discomfort with the wearing of soft contact lenses which are necessary for vision correction.

Claimant has worn glasses since the age of seven and he had cataract surgery on the right eye in 1973 and on the left in 1975.

On November 17, 1976, while doing his regular custodial job, claimant had taken out his contacts and was walking up some steps and missed a step and slipped, banging his head on a wall. At that time he saw light flashes.

Dr. Jahnke reported on April 6, 1977 that claimant's eyelid injury of September 5, 1975 was aggravated by chemicals and petroleum products. Claimant must avoid such exposures. Dr. Jahnke indicated he knew that claimant's right eye had a detachment of the retina surgery which Dr. Meyers repaired in May 1976 and he was concerned about another detachment occurring after claimant's November 1976 fall. The doctor felt claimant must not bump or jar his head and claimant could work with these precautions.

Dr. Jahnke found claimant's condition medically stationary on August 19, 1977. In April 1978 he added a further restriction on claimant of no heavy lifting.

On March 27, 1978 a Determination Order was issued on the September 5, 1975 injury which granted claimant 5° for 5% loss of vision of the left eye. On the same date a Determination Order was issued on the November 17, 1976 injury and granted claimant compensation for temporary total disability only.

Claimant, who was 60 years old at the time of the hearing, was employed by the Lincoln County School District as a custodian. On September 5, 1975 he was helping to clean ovens. Some oven cleaner and grease splashed into his left eye. Claimant was treated by Dr. Jahnke.

In February 1976 Dr. Jahnke reported that claimant's lower left eyelid was inflammed significantly when he was seen in January of 1976 and he treated claimant with ointment.

Claimant was released to return to regular work on March 2, 1976.

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Claimant has worn glasses since the age of seven and he had cataract surgery on the right eye in 1973 and on the left in 1975.

On November 17, 1976, while doing his regular custodial job, claimant had taken out his contacts and was walking up some steps and missed a step and slipped, banging his head on a wall. At that time he saw light flashes.

Dr. Jahnke reported on April 6, 1977 that claimant's eyelid injury of September 5, 1975 was aggravated by chemicals and petroleum products. Claimant must avoid such exposures. Dr. Jahnke indicated he knew that claimant's right eye had a detachment of the retina surgery which Dr. Meyers repaired in May 1976 and he was concerned about another detachment occurring after claimant's November 1976 fall. The doctor felt claimant must not bump or jar his head and claimant could work with these precautions.

Dr. Jahnke found claimant's condition medically stationary on August 19, 1977. In April 1978 he added a further restriction on claimant of no heavy lifting.

On March 27, 1978 a Determination Order was issued on the September 5, 1975 injury which granted claimant 5° for 5% loss of vision of the left eye. On the same date a Determination Order was issued on the November 17, 1976 injury and granted claimant compensation for temporary total disability only.

The Fund had claimant examined by Dr. Johnson in December 1978. Dr. Johnson opined that the November 1976 injury did not detach the retina but detachment could occur in the future as the result of injury. This possibility was not related to the compensable injury but was related to the earlier cataract surgery.

The Referee found that the evidence indicated claimant must now avoid chemicals and fumes and therefore has suffered a loss of wage earning capacity. He granted him an award of 48° for 15% unscheduled left eye disability for the September 5, 1975 industrial injury. He further affirmed the Determination Order's award of no permanent disability from the November 9, 1976 injury.

The Board, on de novo review, finds claimant suffered no loss of wage earning capacity from the November 9, 1976 injury and concurs with the Referee's affirmance of that Determination Order.

The Board further finds that because of claimant's September 5, 1975 industrial injury he is now precluded from his custodial work, which was his regular occupation, and is therefore, entitled to an award of 80° for 25% unscheduled left eye disability from the September 5, 1975 industrial injury.

ORDER

The order of the Referee, dated January 15, 1979, and as amended on February 8, 1979, is hereby modified.

Claimant is granted an award of 80° for 25% unscheduled left eye disability. This award is in lieu of all prior awards and pursuant to ORS 656.214(5).

Claimant's attorney is hereby granted an award of 25% of the increased compensation granted to claimant by this order, not to exceed $3,000.

WCB CASE NO. 78-3450 September 25, 1979

REGINA GRANGER, CLAIMANT
Velure & Heysell, Claimant's Attys.
Blackhurst, Hornecker, Hassen & Brian, Claimant's Attys.
John Eads, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which found the wording of the employer's denial to be sufficient and affirmed that denial of responsibility.

Claimant was a legal secretary and receptionist for Mr. Brian of the law firm Blackhurst, Hornecker, Hassen and Brian. Claimant alleges she experienced premature labor caused by the stressful work environment.

Claimant testified in February 1978 she was six months pregnant and planned on working until mid-March as the baby was due in late April.

Claimant's duties as secretary/receptionist was to greet clients, answer phones, typing, filing and dictation. The work was extensive as was Mr. Brian's practice in the field of litigation. Also during this time frame, claimant assisted in the training of a new girl which put added stress on her.

Claimant testified her work involved a lot of deadline typing, depositions to arrange for and just prior to February 22 a big trial was coming up which required jury instruction and note preparation.

Claimant had a routine doctor's appointment on February 3, 1978 with her physician, Dr. Palamara. On that examination he noted claimant's cervix was changing and he was concerned about premature labor. He advised claimant to have increased bed rest.

When claimant returned to work she advised Mr. Brian of the doctor's advice to her and he arranged for claimant to take 15 minute rests in the library, once in the morning and once in the afternoon.

Claimant's next appointment with Dr. Palamara was on February 22 and he reported that he found the cervix had changed some more. He advised claimant that she must only work one-half days.

Claimant testified she returned to work on February 23 and told Mr. Brian what her doctor advised but Mr. Brian made no comment. So claimant worked February 24 and 25, each 8 hour days.

On the following Monday, February 27, 1978, Mr. Brian told claimant at noon that she could commence half days. Claimant was finishing up her work around 12:30 when she started her premature labor. Claimant filed an 801 on March 15, 1978. The carrier denied the claim on March 23, 1978.

Claimant was hospitalized and the premature labor process was stopped and claimant finally delivered her baby on April 4, 1978, two weeks premature.

On May 30, 1978 Dr. Palamar opined that he could not say claimant's work caused premature labor but perhaps if she had been able to stop work completely at an earlier time, he may have been able to prevent the hospitalization.

On September 25, 1978 Dr. Benson, a professor at the University of Oregon Medical School, and an expert who wrote a physicians' handbook on obstetrics, report, after reviewing the medical records, that medical experience supports the observation that if activity is strictly limited patients with the threat of untimely cervical dilation usually will not go into early labor. All things considered, he believed that claimant's onset of premature labor was employment related.

The wording of the denial indicates the carrier's grounds for denying responsibility for claimant's claim was based on the fact that her condition did not arise out of and in the course of her employment.

The Referee found the wording of the denial was sufficient and adequate and also found that claimant's hospitalization of February 27, 1978 was not caused by a condition which arose out of nor in the course of her employment. He affirmed that denial.

The Board, on de novo review, concurs with the conclusions reached by the Referee.

ORDER

The order of the Referee, dated December 8, 1978, is affirmed.

WCB CASE NO. 78-7625 September 25, 1979

AGNES V. GRINER, CLAIMANT
S. David Eaves, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which found the employer to be a non-complying employer for the period July 1, 1978 through August 14, 1978 and upheld the Fund's denial of claimant's claim for an industrial injury suffered on August 5, 1978 while working for the non-complying employer. The order remanded the claim to the Fund with directions to pay claimant compensation for temporary total disability on the basis of a 40-hour week, including all past temporary total disability compensation paid to claimant and all future compensation for temporary total disability to be paid to claimant. The order directed the non-complying employer, pursuant to the provisions of ORS 656.054, to reimburse all money paid by the Fund to claimant for temporary total disability and granted claimant's attorney a reasonable attorney's fee payable out of the compensation for temporary total disability to a maximum of $500.

There was no dispute as to the non-complying status of the employer at the time of the injury. The issues were failure to pay compensation for temporary total disability at the proper rate and penalties and attorney's fees for the denial.

Claimant suffered an injury on August 5, 1978 while working as a waitress for the employer. No Form 801 was filed by claimant, however, a physician's initial report of industrial injury or occupational disease was filed with the State Accident Insurance Fund signed by the claimant. The Fund interpreted this as a request for hearing and issued a denial letter on the basis that the employer was, at the time of the alleged injury, a non-complying employer.

Upon receipt of the Fund's denial letter, claimant's attorney established that the employer was non-complying and subsequently a Form 801 was filed and the employer declared non-complying. Thereafter, the matter was referred to the Fund and it resumed payment of compensation.

The Fund paid compensation for temporary total disability on the assumption that claimant was regularly employed for two days per week. Claimant contends that she worked a 40-hour week, not a 16-hour week.

The Referee found that claimant had worked for the employer since January 1977 and had worked an average of about 32 hours a week although she had been regularly scheduled to work 40 hours per week. In April 1978 claimant became sick and lost time from work until June 1978. In June she returned to work and told her employer she would prefer that her daughter work her shift and that she would fill in when needed. Claimant continued to work through June and July. The records indicated claimant worked two to three days per week averaging approximately two days a week. On August 4, 1978 claimant testified that the employer told her she would return to work on a regular basis. Claimant stated that she was scheduled to work for the next six days, three on that work week and the first three days on the following work week. The work week of the employer runs from Sunday to Saturday.

The Referee found, according to the testimony of claimant and her two daughters, one of which worked with claimant, that claimant started to work on Thursday, August 4, 1978 and was to work Thursday, Friday, Saturday and then scheduled to resume work Sunday, Monday, and Tuesday of the following week. Claimant only worked six hours on Thursday, August 4, although she testified she had been scheduled to work the full eight hours. Claimant returned to work at 10 p.m. the following day and at 12:45 suffered her industrial injury.

The employer testified that claimant was definitely scheduled to work Thursday, Friday and probably was scheduled to work Saturday and possibly Sunday. The employer did not know about Monday; she doubted that claimant would work Tuesday because the employer normally did not work people six days a week because of overtime. The employer also testified that it was her understanding that claimant's regular shift was to be handled by claimant's daughter until she returned to school in September and that until that time claimant would work part time only. She did not recall any conversation with claimant relating to putting claimant back on a regular five-day, 40-hour work week just prior to the industrial injury.

The Referee found that with respect to the denial of claimant's claim, that letter indicated the employer was a non-complying employer and therefore it had no choice but to deny coverage. Claimant contends this forced her to obtain a lawyer to determine if she had any legal rights and therefore the Fund should pay her attorney's fee.

The Referee found that the denial letter possibly should have been more explicit and explained what claimant's rights were with respect to a situation involving a non-complying employer, but he found nothing inherently wrong with the letter of denial. He concluded the Fund had a right to deny at that point because it was not furnishing the employer coverage. He found no basis for penalties or attorney's fees based on the Fund's original denial.

When the Fund did commence paying compensation on receipt of the non-complying order from the Compliance Division of the Workers' Compensation Department, the Referee was of the opinion, based upon the evidence, that claimant was on a full 40-hour week and was working such schedule at the time of her injury. He concluded that time loss benefits should have been paid to claimant based on a 40-hour week rather than a 16-hour week which was the basis upon which the Fund relied.

The Referee found no misconduct on the part of the Fund because of its failure to pay compensation on a 40-hour week. The claimant, by and through her attorney, requested that the benefits be increased but the Referee found that there was no requirement that a formal denial of such request be made by the Fund. The original claim had been accepted and processed and the Referee concluded that under the circumstances the Fund was acting in good faith and certainly had reasonable grounds at that time to pay claimant on the basis of two days a week based upon the information apparently obtained from the non-complying employer. The Referee did not feel that under all the circumstances involved that an attorney's fee should come from any source other than the increased compensation granted claimant; it was not the responsibility either of the Fund or the non-complying employer.

The Board, on de novo review, agrees with the Referee's conclusion that the Fund had a right to deny claimant's claim when it did because at the time of the industrial injury it was not furnishing Workers' Compensation coverage to the employer. As soon as it received the non-complying order from the Compliance Division, it commenced paying.

The next question is whether or not claimant was working a full 40-hour week at the time of her industrial injury. The Referee found that she was. The Board finds that the employer's work week commenced on Sunday and concluded on Saturday. At the time of the injury, on August 4, 1978, claimant had been working, on an average, two days a week.

Claimant attempts to show that she was actually working 40 hours a week although to do so she had to carry over from the latter part of one week into the first part of the following week. Under the work-week system set up by the employer, this was not possible. Assuming that claimant had worked Thursday, Friday and Saturday and then worked Sunday, Monday and Tuesday. This would give claimant a total of 48 hours, however, only 24 hours could be alloted to the one week and 24 hours to the following week.

The Board concludes that the evidence is quite clear that claimant, at the time of her injury, was working a 16-hour week and that the Fund properly paid claimant benefits for her time loss on that basis. Therefore, the portion of the Referee's order which directed the Fund to pay claimant compensation for temporary total disability on the basis of a 40-hour week must be reversed. The Board agrees with the balance of the Referee's order, although the Referee failed to include in the order portion a paragraph stating that the Fund's original denial was approved.

ORDER

The order of the Referee, dated April 12, 1979, is modified to read as follows:

The proposed and final notice in this matter issued against Mary J. Sanders, doing business as Mary's Chili Bowl, declaring her a non-complying employer for the period of July 1, 1978 through August 14, 1978, is not disputed and Mary J. Sanders, doing business as Mary's Chili Bowl, is declared to be a non-complying employer during that period.

The letter of denial by the Fund dated September 6, 1978 is approved.

The rate of compensation for temporary total disability paid claimant which is based on a 16-hour week is the proper rate. The Fund shall be reimbursed for compensation paid claimant for temporary total disability by the non-complying employer pursuant to the provisions of ORS 656.054.

Inasmuch as there has been no increase in the compensation for temporary total disability payable to claimant, claimant's attorney is entitled to no attorney's fee.

WCB CASE NO. 78-9058 September 25, 1979

KENNETH HOLLIN, CLAIMANT
Winslow & Alway, Claimant's Attys.
Bruce A. Bottini, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson, Phillips and McCallister.

The employer seeks review by the Board of the Referee's order which set aside its denial of claimant's claim and remanded said claim to it for acceptance and payment of compensation as provided by law.

The sole issue is compensability.

Claimant was a 29-year-old corn husker who was injured in the course of his employment on October 2, 1978 when a fellow-employee intentionally hit him in the left side fracturing a rib and causing a contusion of the kidney. The claim was denied by the carrier on November 7, 1978.

The Referee found that there was no fight; claimant neither struck nor attempted to strike the fellow-employee nor was he the aggressor in any way. Apparently, shortly before the incident claimant had told another employee that his assailant had attempted suicide some months earlier. Claimant had passed this same information on to another person earlier and his assailant had threatened claimant with bodily harm if he did not cease speaking of the matter. After the threat, the two employees attempted to avoid each other as much as possible. The assailant was only 17 or 18 years old and was under psychiatric treatment.

The Referee found that all the contacts between claimant and his assailant occurred on the job; there was no personal relationship. At the time of the incident, both claimant and his assailant were in their assigned work areas doing their work.

The Referee found the critical question to be whether there had been sufficient contacts between the injury and the employment to meet the "arising out of and in the course of employment" test. He stated that although the two parts of the test were conjunctive, that case law has generally established that where facts are strong in establishing one of the elements, less evidence is required to establish the other element in proving compensability. The Referee found there was no question but that the injury arose in the course of the employment. It was on the premises and during work hours and the parties involved were in their assigned areas performing their regular work. He further found that to meet the "arising out of" test the employment need not be the sole cause or even the primary cause of the injury. It was sufficient if the employment materially contributed to the risk.

The Referee concluded in this case the claimant's assailant had warned a foreman and had clearly requested that he not be assigned to the same area where claimant was working, however, the employer chose to ignore the warning of a probable problem and placed the assailant, who was young and unstable, very near to claimant and thereby materially contributed to the risk of the injury.

The Referee further concluded that this knowledge by the employer, the fact that both claimant and his assailant were employees, that claimant was not the aggressor, and the fact that the incident occurred during regular work, provided a stronger connection between the employment and the injury than is found in the cases wherein compensation has been denied. He held the claim to be compensable.

The majority of the Board, on de novo review, reverses the conclusion of the Referee. It is not questioned that the incident arose in the course of the employment; the evidence establishes that clearly. However, the only reason for the assault was a personal matter between claimant and his assailant and had nothing to do with claimant's work.

It is well established that to find a claim compensable the injury must be accidental and it must arise out of and in the course and scope of the employment. The Board does not agree with the Referee's statement that where one element of the "arising out of and in the course of" employment test is strongly established, less is required of the second element to result in a finding of compensability. In this case, the evidence does not demonstrate that the "arising out of" element of compensability has been satisfied. This element concerns the employment's contribution to the injury. The Supreme Court in Blair v. SIAC, 133 Or 450 (1930) stated as part of its opinion that:

". . . for a personal injury to arise out of and in the course of the employment, there must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be a causal connection between the employment and the injury which had its origin in the risk connected with the employment, and flowed from that source as a rational and natural consequence . . .".

The majority of the Board finds no evidence to establish causal connection between claimant's injury and his employment. The origin of the risk was not connected with his work at the cannery, the claimant's assailant did not strike claimant because of a dispute over the manner or method of work or because of anything which was connected with their employment. He hit claimant solely because he resented claimant's gossiping to others about a matter which he felt was nobody else's business. The nature of the dispute between claimant and the assailant was entirely personal and not related to claimant's employment or work activities. Therefore the injury did not arise out of claimant's employment.

ORDER

The order of the Referee, dated May 3, 1979, is reversed.

The denial of claimant's claim by the employer and its carrier on November 7, 1978 is approved.

Board Member Phillips dissents as follows:

I respectfully dissent from the opinion of the majority of the Board and would affirm and adopt the Opinion and Order of the Referee in regard to compensation.

In respect to the attorney fee which the carrier categorized as "improper", I would agree and would award a fee of $650 at the hearing level and $250 at the Board review level.

WCB CASE NO. 78-8172 September 25, 1979

PHILIP C. RIDDLE, CLAIMANT
Litchfield, Macpherson, Carstens & Gillis, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which awarded claimant 112° for 35% unscheduled disability.

The only issue before the Referee and the Board is extent of claimant's permanent partial disability.

Claimant was a 27-year-old stacker when he injured his back on February 23, 1977 while lifting rose redi-plant boxes. The injury was diagnosed as a lumbosacral strain and some functional overlay was noted.

Claimant has had no surgery, all of his treatment has been conservative and the claim was closed by a Determination Order, dated August 22, 1978, whereby claimant was granted compensation for temporary total disability and 48° for unscheduled low back disability. This Determination Order was amended by a Determination Order, dated September 6, 1978, only insofar as the first Determination Order related to the award of temporary total disability.

Claimant complained at the hearing of limitation of motion of his back and chronic back pain radiating into both hips, primarily into his left leg. He stated that the pain was increased by activities. Claimant testified that he is unable to perform duties which require prolonged standing, repetitive bending or stooping, prolonged sitting or driving, heavy lifting and strenuous physical activities.

Claimant was seen by the staff at Callahan Center and it felt that he had a capacity for moderate work and rated his vocational impairment due to physical disability as "mildly moderate". They rated his extrinsic psychological disability as "moderate".

Dr. Pasquesi examined claimant and rated his impairment for loss of flexion of 30° as 3%, he rated claimant's pain syndrome in the moderate to severe category equivalent to 15% of the whole man. He stated that the combined impairment was 17% of the whole man.

The physicians at the Orthopaedic Consultants reported that they did not feel claimant could continue his occupation as a stacker and rated his loss of function of his back as mild.

Dr. Schmidt, an osteopathic physician, was claimant's treating physician. He judged claimant's impairment to be " . . . more likely fifty percent impaired rather than fifteen percent . . .".

Claimant is 29 years old and has a tenth grade education. He was in an on-the-job training program under the Vocational Rehabilitation Department and received training as an appliance technician. He has no other formal schooling or special skills and his primary occupation has been that of a commercial fisherman. When claimant was not engaged in commercial fishing, he worked as a stacker for the employer.

After his injury claimant worked for McCammon Appliance Service. This apparently was the on-the-job training program previously referred to. Claimant quit this job because he was unable to physically carry out the duties which involved heavy lifting. Since he terminated claimant has performed odd jobs on an intermittent basis doing such things as painting and scraping boats, baiting crab pots and playing a guitar in a musical band. He has made several attempts to look for regular work but has had no success.

The Referee found the lay testimony to be credible and, based upon a finding that claimant's injury had resulted in limitations which eliminate claimant's participation in certain work activities, especially heavy work, concluded that claimant was entitled to an increased award of compensation.

After considering claimant's chronic symptoms and residuals, his age, mental state, education, training and experience, the Referee awarded claimant compensation equal to 35% which represents an increase of 20% over the award granted by the Determination Order.

The Board, on de novo review, finds that claimant's treatment has been conservative, he has not required any surgery and the evidence indicates that there are many types of employment within claimant's physical and mental capabilities in which he could engage on a regular basis. The claimant is only 29 years old and, with the exception of Dr. Schmidt, all of the physicians who have examined and/or treated claimant have rated his impairment as mild.

The Board concludes that to adequately compensate claimant for his loss of wage earning capacity resulting from the industrial injury of February 23, 1977 he should be awarded compensation equal to 80° which represents 25% of the maximum allowable by statute for unscheduled disability.

ORDER

The order of the Referee, dated May 21, 1979, is modified.

Claimant is awarded 80° of a maximum of 320° for 25% unscheduled back disability. This award is in lieu of the award for permanent partial disability granted by the Determination Order dated August 22, 1978 and the award for permanent partial disability granted by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 77-1434 September 25, 1979

MARGARITO TREVINO, CLAIMANT
Schwenn, Bradley & Batchelor,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, Phillips and McCallister.

The employer seeks review by the Board of the Referee's order, as amended, which found claimant to be entitled to compensation for permanent total disability, as provided by law, payable from the date of termination of compensation for temporary total disability with credit allowed for payments made on the award for permanent partial disability.

There were two issues presented to the Referee at the hearing. One was whether claimant's conditions of hypertension and intercranial lesions including his vision problems were related to his industrial injury. The Referee found that they were not. The second issue was the extent of claimant's disability. The Referee found he was permanently and totally disabled.

Claimant suffered a compensable injury on October 29, 1975 while employed as a press operator at Tektronix. He was 47 years old at the time of the injury which was caused when the back of the stool upon which he was sitting came loose, causing claimant to fall backwards landing on his hip and back on the concrete floor. Claimant had worked for the employer for approximately 10 years prior to the injury. He sought medical treatment from his family doctor who diagnosed lumbar sprain, myofascitis and musculoskeletal pain. On November 21, 1975 claimant returned to work but experienced back pain while lifting a die.

Claimant then came under the care of Dr. Nelson who hospitalized claimant after diagnosing acute lumbar strain. On February 3, 1976 Dr. Nash, a neurosurgeon, commenced taking medical care of claimant. He reported that claimant complained of low back and left testicular pain, numbness in the left posterior thigh, calf and dorsum of the left toe, and the turning out of the left foot when he walked. He felt these were symptoms of preforaminal compressive neuropathy at L5 on the left. He also said that claimant had abdominal complaints which appeared to be a ventral hernia. He referred claimant to Dr. Awe, a surgeon.

Dr. Awe reported on March 2, 1976 that when he first examined claimant on January 7, 1976 claimant had stated that he sustained an incisional hernia after falling off the stool on October 29. Dr. Awe felt that it was possible that claimant had developed this hernia as a result of the injury. On March 4, 1976 claimant had surgical repair of the hernia. Dr. Awe reported that claimant had also undergone a resection of a gastric ulcer some years previous and had done very well until the injury of October 29 ripped his incision and left claimant with a large incision of the hernia in addition to his back injury.

The Orthopaedic Consultants examined claimant on April 14, 1976 and noted in their report that claimant had a cholecystectomy in 1968. He also had a duodenal ulcer in 1970 and a year later developed intestinal obstruction, secondary to the ulcer and had a subtotal gastrectomy. After this operation complications set in in the nature of an acute pancreatitis which required further surgery to correct the fistula in the duodenum. They found that about this time claimant commenced to have headaches and failing vision. It was discovered that claimant had a papilledema and he underwent a lumboperitoneal shunt which is still in place.

The physicians at the Orthopaedic Consultants assumed that claimant had a pseudotumor cerebri, a condition caused by a cerebral edema, marked by raised intracranial pressure with headache, nausea, vomiting and papilledema without neurological signs except an occasional 6-nerve palsy. They noted with interest that claimant stated he recently had begun to have headaches again and transcient episodes of partial blindness which would last 10 minutes or less. They felt that the shunt operation was the explanation for claimant's previous laminectomy.

In addition, the doctors at the Orthopaedic Consultants found claimant to be obese with mild hypertension, anxiety tension state, and some functional overlay. Probable left sideache neuropathy, pseudotumor cerebri by history and draining abdominal surgical wound. They did not feel claimant

was medically stationary and recommended a psychological evaluation prior to a myelogram and possible surgery. It was also recommended that claimant's other neurological conditions be re-evaluated because of his recurrent headaches and periods of partial blindness.

Claimant was examined in May 1976 by Dr. Fleming and Dr. Hickman, both clinical psychologists, who found claimant functioned within the normal range of intellectual ability with non-verbal materials; borderline with verbal materials and was functionally illiterate. Claimant works carefully and accurately but has no outstanding skills. They felt that claimant was strongly motivated but was experiencing a rather severe schizophrenic reaction. They concluded their report with a statement that if claimant could return to gainful employment his psychopathology could be expected to decrease notably.

A myelogram performed on June 28, 1976 indicated a spinal nerve root defect at the L4-5 interspace on the left but Dr. Nash did not feel that claimant's overall physical and emotional status was such that he would be a good candidate for surgery. He did not think claimant would be capable of productive employment and he returned him to the care of his family physician.

Claimant was again examined by the Orthopaedic Consultants on January 12, 1977. They felt that based upon the October 29, 1975 injury that claimant's condition was medically stationary and stated that because of the fact that treatment was virtually impossible because of claimant's other problems, there was no reason not to close his claim at that time. Claimant's intracranial problems as well as his overweight problem made treatment of his cronic low back strain very difficult, if not impossible, to manage. They stated that claimant could not return to his former occupation, with or without limitations, or to any other type of employment at the present time, but that this was only partially due to his industrial injury. It was largely due to his intracranial problem and his hypertension, both complicated by his obesity and neither of which were related to his industrial injury. They rated his disability to the low back in the range of moderate at the time of the examination but only mildly moderate due to the industrial injury. Dr. Nash agreed with this conclusion.

On February 22, 1977 the carrier denied responsibility for claimant's problems resulting from hypertension or cranial lesions, including papilledema.

On March 30, 1977 Dr. Kloos, a neurosurgeon, who had been a member of the panel from the Orthopaedic Consultants on the last examination of claimant, reported that claimant could return to work with the following restrictions: he could stand or walk 4-6 hours in an eight-hour work shift; he could sit 3-5 hours in an eight-hour work shift; he could lift 10-20 pounds occasionally and use his hands for repetitive simple grasping, pushing, pulling and fine manipulation. He stated that claimant could use his feet for repetitive movement, e.g., operating foot controls, but he could not bend and could only occasionally squat or climb.

On April 28, 1977 Dr. Kiest, an orthopedic surgeon, reported that claimant presented an extremely complex problem in multiple diseases, sites and sources of pathology. He felt it was extremely unlikely that even in the event that someone could magically eliminate his low back and left leg symptoms that claimant could be returned to his former job. The fall which occurred on October 29, 1975 certainly was not beneficial to claimant but it was not the primary cause of his present lack of functioning. He felt that the multiple medical problems and degenerative processes rather than the industrial injury were the prime cause of his present disability. He felt that claimant's condition was medically stationary and that while he did not believe that claimant could return to work, he felt that the accident was only a small part of claimant's overall disability.

On June 9, 1977 a Determination Order awarded claimant 64° for 20% unscheduled low back disability.

After the claim closure, claimant was hospitalized from June 28 to July 1, 1978; at that time he was complaining of increased blurring of vision and weakness on the left with difficulty walking. Dr. Paxton felt that instead of an active papilledema claimant had chronic gliosis and venous pulsations were present. He did not believe that a shunt revision was necessary and he felt that the mass in the back was a probable herniated muscle which did not require surgery

In November 1977 claimant underwent surgery for an incisional herniorrhaphy performed by Dr. Awe. After this surgery Dr. Awe reported that claimant's first hernia repair had not held and, therefore, it was necessary to do the second surgical repair. The second surgery was related to the original hernia.

The Referee found that claimant was 50 years old, has a third grade education and is functionally illiterate. He is a Mexican-American and speaks English with some difficulty. His work experience prior to coming to Oregon was essentially field work in agriculture. When he came to Oregon he worked in the fields and for the Valley Migrant League where he assisted migrant workers in finding employment. Thereafter he worked for Tektronix for approximately 10 years as a utility man, janitor and plastic molder. At the time of the industrial injury claimant said he weighed between 265 and 270 pounds. After his injury he went on a diet with the Medical Diet Service and testified that at the present time he weighs between 185 and 190 pounds. His current symptoms consist of low back and left leg pain and because of the leg problems claimant states he loses his balance and it is necessary for him to use a cane to avoid this. He also has double vision and does not attempt to drive a car or walk alone.

The Referee concluded that claimant's conditions of hypertension and intracranial lesions including his visual problems were not related to his industrial injury. They all pre-existed the injury and the medical evidence indicates that such conditions were not caused by nor related to the industrial injury.

On the question of claimant's extent of permanent disability, the Referee found that claimant had numerous problems which pre-existed his industrial injury and which have disabled him at various times in the past. These problems have prevented surgical repair of the disc problem which was the result of claimant's industrial injury. She found that the psychological evidence indicated claimant was experiencing moderately severe to severe psychological problems which were at least moderately related to his industrial injury.

Although Dr. Kiest had stated that claimant could not return to his former occupation and that the main reason that he could not was not caused by his industrial injury, he did say that claimant had permanent impairment of the

lumbar spine and that the industrial injury was a small part of claimant's overall disability. Dr. Nash, claimant's treating physician, expressed his opinion that claimant was not capable of productive employment and that his back injury was a significant contributing factor to his existing disability.

The Referee concluded that pursuant to ORS 656.206(1)(a) pre-existing disabilities could be considered in the case of permanent total disability and, taking into consideration all of the evidence in the record, including claimant's age, education, work experience, mental ability, psychological condition, pre-existing disabilities and physical limitations she concluded that he was permanently and totally disabled from performing any work at a gainful and suitable occupation.

The majority of the Board, on de novo review, finds that claimant is not permanently and totally disabled. Claimant's back problem, which was the result of the industrial accident, caused permanent partial disability in the mildly moderate range; claimant is capable of using his hands for repetitive grasping, fine manipulation, or pushing or pulling. He is also able to sit for 3-5 hours a day and to stand or walk for 4-6 hours a day. He can do an activity if he is allowed to frequently switch positions from standing, sitting and walking.

Claimant has not returned to work since the incident of November 21, 1975 when he was attempting to lift a rather heavy die at work. Claimant has retired from the employment of the employer and is receiving his retirement benefits. The evidence indicates he has not looked for any work for at least a year prior to the hearing.

A fellow-employee testified that the employer had a job available for claimant which he could do with all of the restrictions placed upon his work activity by the doctors who have treated and/or examined him. All claimant would be required to do was hold a cutting tool which weighed six ounces and cut plastic material weighing a total of 4 to 6 ounces and separate plastic parts from a mold. The job could be done totally by feel without any use of vision and claimant could sit or stand as he chose and would be allowed to take frequent breaks to walk around or lie down in the first aid station if required. At the present time the employer has other employees with back problems who work under the same conditions and the evidence indicates that claimant would earn the same rate of pay as he earned in his previous job. According to Dr. Nash, claimant could perform the work.

ORS 656.206(3) provides that:

> "The worker has the burden of proving permanent total disability status and must establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment."

The Board concludes that claimant has not done this and therefore he cannot be considered as a statutory permanent total and the effects of his pre-existing non-work-related disabilities cannot be taken into consideration in determining his loss of wage earning capacity.

Claimant's loss of wage earning capacity must be determined by comparing claimant's ability to work before the industrial injury and without the disability resulting therefrom with his present ability to work.

The majority of the Board finds that claimant lacks motivation to return to work and that the employer has indicated it would provide claimant with employment which would be within claimant's physical and mental capabilities and claimant would be paid the same rate of pay which he received prior to his injury. Apparently, claimant was not interested as he made no attempt to return and perform this job for the employer. Additionally, the Callahan Center had evaluated claimant and determined that he was capable of being employed as a clerk yet claimant did not seek any such type of employment. He did not avail himself of any of the assistance which could have been furnished to him by the Field Services Division of the Workers' Compensation Department.

The majority of the Board concludes that claimant has failed to meet his burden of proving that he is incapable of regularly performing any work at a gainful and suitable occupation.

The majority of the Board feels that claimant has suffered a substantial loss of wage earning capacity as the result of the October 29, 1975 industrial injury. After considering claimant's physical impairment which is in the mildly moderate range, his age, his work background and his limited education and potential for retraining, but also considering the fact that an actual job exists for claimant which he is capable of performing, concludes that claimant would be adequately compensated for his loss of wage earning capacity as a result of the industrial injury by an award of 192° which represents 60% of the maximum allowable for an unscheduled disability.

The majority of the Board agrees with the Referee's conclusion that the partial denial issued by the carrier on February 22, 1977 denying responsibility for claimant's conditions of hypertension and intracranial lesions including visual problems was proper inasmuch as the evidence indicated that such conditions were not caused nor aggravated by the industrial injury. Most of these conditions pre-existed the injury, the visual problem apparently worsened after the injury but not because of it.

ORDER

The order of the Referee, dated March 16, 1979, is modified.

Claimant is awarded 192° of a maximum of 320°, for 60% unscheduled low back disability. This award is in lieu of the award for permanent total disability, as provided by statute, payable from the date of termination of temporary total disability granted by the Referee's order which in all other respects is affirmed.

The carrier is allowed to make such appropriate adjustments in the payment of compensation to the claimant as shall be necessary.

Board Member Phillips dissents as follows:

I respectfully dissent from the majority opinion of the Board which granted the claimant permanent partial disability to the extent of 60% of the maximum.

I would affirm and adopt the well-reasoned opinion of the Referee, a copy of which is attached hereto, and find the claimant to be permanently and totally disabled within the meaning of the law.

SAIF CLAIM NO. A 564720 September 28, 1979

SYBIL M. AIKEN, CLAIMANT
Gatti, Ward & Gatti, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 31, 1978, claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an industrial injury sustained on January 29, 1956. Claimant's claim has been closed and her aggravation rights have expired.

The Fund, after an examination of claimant by the Orthopaedic Consultants, indicated it felt claimant had been properly compensated for this injury but it would continue to pay for related medical expenses pursuant to ORS 656.245.

The Board found that the conflicting medical evidence before it made it difficult to make a decision on claimant's claim. By an order, dated November 22, 1978, the Board referred claimant's request to its Hearings Division with instructions to hold a hearing and determine whether claimant's present condition was related to her 1956 industrial injury and, if so, whether it represented a worsening of such condition since the last arrangement or award of compensation.

A hearing was held on June 25, 1979 by Referee McSwain, who found, based upon the lay testimony and the medical evidence, that claimant's condition had worsened since the last arrangement or award of compensation and this worsening was a result of the spinal fusion which was required by claimant's 1956 industrial injury. He recommended claimant's claim be reopened.

The Board, after thorough consideration of the transcript of the proceedings, the medical evidence and the Referee's recommendation, concurs in the findings of the Referee and would affirm and adopt these findings, a copy of which are attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation to which claimant is entitled commencing on the date of this order and until closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 78-7948 September 28, 1979

DEL BEASLEY, CLAIMANT
Lively & Wiswall, Claimant's Attys.
Flinn & Brown, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the order of the Referee which dismissed claimant's request for hearing. Claimant contends he is entitled to further medical care and compensation for temporary total disability and that his claim was prematurely closed.

Claimant was employed by Kingsford Company as a stacker-baler and on July 13, 1978 injured his low back stacking 50-pound bags of charcoal.

On that date Dr. Carter examined claimant who, the doctor felt, had an acute anxiety attack and was hyperventilating and felt claimant's problems were functional overlay. Dr. Carter did diagnose acute back strain.

Claimant sought out Dr. Glubka, a chiropractor, on July 14, 1978 who diagnosed lumbar subluxation and strain with possible disc involvement and aggravation of chronic cervical and thoracic strain. Claimant had chiropractic adjustments.

Claimant had come to Oregon as a fugitive from justice and on August 5, 1978 he was arrested by the Springfield police. While jailed in that city claimant was examined by Dr. Freedman. Claimant was released to the California authorities on August 21 and made complaints of aches and pains but did not mention he had a back injury. Claimant was released from prison on October 24, 1978.

After this injury claimant did go to work for Murphy Logging driving skidder,but was fired two days later.

Upon claimant's release from prison in California he came under the care of another chiropractor, Dr. Jensen.

Dr. Glubka's report of August 29, 1978 tells of claimant's arrest and indicated that at that time his condition was unresolved and he was still symptomatic. Claimant needed further medical care and treatment.

A Determination Order of September 21, 1978 granted claimant compensation for temporary total disability only to August 23, 1978.

In October 1978 Dr. Jensen diagnosed low back and right leg pain and commenced giving claimant treatment three times a week.

On November 28, 1978 Dr. Jensen reported claimant's condition was not medically stationary but he was improving. He felt claimant was unable to work but anticipated a return to work soon.

Claimant contends he was never found medically stationary or released to work by his physician and therefore is entitled to compensation for temporary total disability commencing on August 23.

The Referee found claimant had been habitually untruthful and the doctor's opinions were based upon subjective complaints and concluded that the Determination Order was proper and dismissed the hearing.

The Board, on de novo review, finds that claimant's contentions are correct. The medical evidence indicates that at no time had claimant's treating physician ever declared claimant to be medically stationary or was he released for work. To the contrary, Dr. Glubka's report of August 29 makes this quite clear. Therefore, the Board concludes that the issuance of the Determination Order of September 21, 1978 was premature and should be set aside and claimant is entitled to compensation for temporary total disability until his claim is properly closed under ORS 656.268.

ORDER

The order of the Referee, dated February 9, 1979, is reversed.

The Determination Order of September 21, 1978 is hereby set aside.

Claimant is granted compensation for temporary total disability commencing August 23, 1978 and until the claim is closed pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, not to exceed the sum of $750.

SAIF CLAIM NO. ZA 365987 September 28, 1979

JOHN H. ELWELL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 1, 1979 claimant requested the Fund to reopen his claim for an injury sustained on June 20, 1961. His aggravation rights have expired. Claimant sustained multiple injuries, however, the one with which this request is concerned is the fracture of the orbit of the left eye. Claimant saw Dr. Betts with complaints of a vertical problem. Dr. Betts felt the muscle involved in the injury was now causing more problems and he recommended surgical exploration to see if there was a problem with the muscle itself. He requested that claimant's claim be reopened for this procedure.

Dr. Waldman, on September 5, 1979, indicated claimant has been suffering from diplopia since his injury, however, this has been improved with special glasses. Claimant must now tilt his head down and to the left in order to obtain a single image. Dr. Waldman recommended trying new glasses first to attempt to correct this problem; if this was not successful, surgery would be necessary to correct the imbalance due to claimant's weakened right superior oblique muscle.

The Fund forwarded claimant's request together with all pertinent documents to the Board on September 17, 1979, stating it would not oppose the reopening of claimant's claim.

The Board, after thoroughly considering the medical reports before it, concludes that claimant's claim should be reopened as of the date he enters the hospital for the recommended surgical procedure and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-3795 September 28, 1979

GEORGE L'ESPERANCE, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson, Phillips and McCallister.

Claimant seeks Board review of the Referee's order which dismissed his request for hearing based on the fact that claimant is presently enrolled in an authorized vocational rehabilitation program and no purpose would be served by trying the case until he terminates said program and another Determination Order is issued.

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

ORDER

The order of the Referee, dated February 7, 1979, is affirmed.

Board Member Phillips dissents as follows:

I respectfully dissent from the opinion of the majority of the Board which affirmed the Referee's action in dismissing claimant's request for a hearing on a Determination Order because the claimant was in a vocational rehabilitation program at the time the scheduled hearing was to have been held.

Viewed from the position of interpreting statute, this decision is in direct conflict with ORS 656.283 and denies the claimant his statutory right.

Viewed from the standpoint of pragmatism, this decision may deny the claimant the payment of some portions of his permanent partial disability entitlement while he awaits action on the part of the Workers' Compensation Department either before he is enrolled in a vocational rehabilitation program or on completion of that program and before a redetermination is made.

I find the decision of the Referee denies the claimant his statutory right and defies the intent of the legislature and would remand the case to the Referee to take evidence and issue an Opinion and Order on the extent of disability.

CLAIM NO. VC 63787 September 28, 1979

OLLIE GEORGE LOWERY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Moiton Determination

Claimant suffered a compensable injury to his left hip on March 13, 1967 while employed by Willamette National Lumber Company. His claim was accepted and initially closed by an order dated December 22, 1969 whereby claimant was awarded compensation equal to 35% of the left leg. Claimant's aggravation rights have expired.

On December 14, 1978 Dr. Rockey, on orthopedic surgeon who had done an open reduction and pin placement in 1967 after claimant had fractured his left hip, advised the Fund that the present condition of claimant was directly related to the industrial injury of March 13, 1967.

The Board, after reviewing all of the medicals which included the statement of Dr. Rockey, that claimant's condition had greatly improved since the surgery which would indicate it must have been worse than it was at the time of the 1967 surgery and that it was directly related to the 1967 injury, ordered the claim to be reopened for the payment of compensation, as provided by law, commencing on November 4, 1977 until the claim was closed pursuant to the provisions of ORS 656.278, less any time worked, by an order dated January 12, 1979.

During the intervening years between 1967 and 1979 claimant intermittently sought medical treatment but was unable to find any satisfactory solution. Claimant limped badly and finally after referral to Dr. Cronk, an orthopedic surgeon, in September 1978 it was recommended that claimant have a total hip replacement. A Charnley-Mueller total hip prosthesis, acetabular and femoral, was inserted on October 3, 1978.

On July 25, 1979 Dr. Cronk stated that claimant was doing very well with respect to the surgery performed and he thought his condition should be considered medically stationary inasmuch as further diagnostic intervention and treatment was probably not going to be required for his hip. He stated that he felt claimant was permanently impaired with respect to his hip and should not engage in any prolonged standing, walking, running or heavy labor because of the presence of the hip arthroplasty.

On August 20, 1979 the Fund asked for a closing evaluation.

Because of the surgery, claimant's impairment must now be considered in the unscheduled area and the Evaluation Division found that the claimant had been required to dispose of his cattle which he had been raising because he had to eliminate all heavy lifting and that his life style had been changed extremely. Due to the complexities of the case and the lack of information, claimant was invited for an interview with the Evaluation Team. As a result of the interview and what little information was contained in the records, the Evaluation Division recommended that claimant receive no additional award for his left leg but that he be granted an award of compensation equal to 35% of an arm for his unscheduled disability; this would be equal to 67.2° for his loss of wage earning capacity. They also recommended claimant be awarded compensation for temporary total disability from November 4, 1977 through June 4, 1979.

The Board feels that claimant has not been adequately compensated for his loss of wage earning capacity. He is almost 58 years old and the doctor has advised him that he cannot engage in any type of work which requires significant physical ability. After comparing claimant's condition at the present time to his condition in 1969 when his claim was closed, the Board concludes that claimant is entitled to an award of compensation equal to 75% of an arm for his unscheduled disability.

The Board concurs with the recommendation of no additional award for claimant's left leg disability but additional compensation for temporary total disability.

ORDER

Claimant is awarded compensation for temporary total disability from November 4, 1977 through June 4, 1979, less time worked and to compensation equal to 75% of an arm for unscheduled disability. This award for unscheduled disability is in addition to the previous award claimant received for a scheduled disability on December 22, 1969.

WCB CASE NO. 78-8803 September 28, 1979

LLOYD L. METCALF, CLAIMANT
Douglas L. Minson, Claimant's Atty.
David Horne, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review of that portion of the Referee's order which awarded claimant additional compensation for temporary total disability from February 5, 1978 to April 20, 1978, less time worked. Claimant contends that he is entitled to compensation for temporary total disability beyond April 20, 1978.

Claimant was a 48-year-old carpenter when he sustained an injury to his mid-back on November 21, 1977 while moving timber. Initially, claimant was examined and/or treated by Dr. Unger and Dr. Struckman. Later he consulted Dr. A. J. Johnson, a chiropractor who thereafter became claimant's treating physician.

On April 26, 1978 Dr. Struckman, an orthopedic surgeon, expressed his opinion that claimant would not benefit from further active treatment. On August 31, 1978 Dr. Azavedo, at the Callahan Center, declared that claimant was medically stationary. In October 1978 Dr. Rosenbaum concurred.

Based upon Dr. Rosenbaum's report that claimant was medically stationary and that he was in agreement with the reports of Dr. Azavedo and Dr. Struckman, a Determination Order was entered on October 20, 1978 which awarded claimant compensation for temporary total disability from November 21, 1977 through February 5, 1978. On November 24, 1978 a Determination Order on Reconsideration awarded claimant, in addition to the compensation for temporary total disability previously awarded, an award of 16° for 5% unscheduled mid-back disability.

The Referee found no objective medical evidence that claimant's condition had improved subsequent to April 1978 nor any medical evidence that claimant's condition was medically stationary on February 5, 1978. On February 2, 1978 Dr. Struckman had stated that claimant's back condition was not medically stationary and he repeated this opinion one week later. In fact, it was not until April 26, 1978 that Dr. Struckman felt that claimant could not benefit from any further active treatment and not until July 26, 1978 that the doctors at Callahan Center found claimant to be medically stationary.

Although Dr. Johnson must be considered as claimant's treating physician, it was not until two weeks after claimant had been found to be medically stationary by the physicians at the Callahan Center that claimant first consulted Dr. Johnson.

The Referee found that since Dr. Johnson had not seen claimant at the time the other physicians declared claimant to be medically stationary, there was no evidence that claimant's condition was not medically stationary at least by July 26, 1978.

Based on the evidence, the Referee concluded that claimant became medically stationary on April 20, 1978 and awarded him additional compensation for temporary total disability from February 5, 1978 to April 20, 1978. He also increased claimant's award for his mid-back disability from 16° to 48° for a total of 15% of the maximum for that disability.

The Board, on de novo review, finds that this case contains several conflicting medical opinions relating to when claimant's condition became medically stationary. After reviewing the medical evidence, it becomes apparent that he was not medically stationary on February 5, 1978 nor was he medically stationary on April 20, 1978, the date Dr. Struckman reported that he did not think any further treatment was going to be very beneficial to claimant. This report was contradicted by Dr. Struckman's brief report of May 15, 1978 in which he states "Lloyd L. Metcalf has been unable to work since April 19, 1978. . . ." The most reliable medical evidence indicates that claimant was medically stationary on July 26, 1978. This is based on the opinion expressed by Dr. Azavedo at the Callahan Center; an opinion which was concurred in by Dr. Rosenbaum.

Claimant's contention that he was not medically stationary until the date of the reconsidered Determination Order of November 24, 1978 is not supported by the weight of the medical evidence.

ORDER

The order of the Referee, dated March 28, 1979, is modified.

Claimant is awarded compensation for temporary total disability from February 5, 1978 to July 26, 1978. This award of compensation for temporary total disability is in addition to the award of compensation for temporary total disability granted by the Determination Order dated October 20, 1978 and affirmed by the reconsidered Determination Order of November 24, 1978.

In all other respects the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $750.

CLAIM NO. D53-118028 September 28, 1979

FRED L. MONROE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Own Motion Determination

Claimant sustained a compensable injury to his eye on June 26, 1967 while working for Farber and Pickett Contractors, Inc. Claimant was washing and cleaning a wheel bearing which exploded and hit his right eye, producing a loss of vision due to a dislocated lens. Complications set in and ultimately the claim was closed by a Determination Order dated January 26, 1968 whereby claimant was awarded 100% loss of vision of the right eye.

On March 13, 1978 claimant underwent surgery consisting of an intracapsular cataract extraction with vitreous aspiration and peripheral iridectomy of the right eye. At the present time no indication of success as far as claimant's visual recovery in the operated eye has been established, however, it is not necessary because claimant has already been awarded 100% loss of vision after evaluation was made in conformance with ORS 656.214(2).

Originally, the carrier, Employer's Insurance of Wausau, agreed to pay medical bills for the surgery but stated it found no basis for reopening claimant's claim at that time for the payment of time loss benefits.

Claimant, by and through his attorney, had requested the Board to exercise its own motion jurisdiction and reopen his claim for the June 26, 1967 injury and the Board, after giving consideration to all of the evidence presented, including the medical reports from Dr. Robert Page who performed the surgery, concluded that claimant's claim should be reopened as of March 13, 1978 and that compensation for temporary total disability should be paid until the claim was closed pursuant to the provisions of ORS 656.278.

The carrier requested a hearing on the award made by the Board on its own motion, but later withdrew its request and asked that the Evaluation Division of the Workers' Compensation Department make a closing evaluation of claimant's present condition.

The Evaluation Division recommended to the Board that claimant's claim be closed with an award of compensation for temporary total disability from March 13, 1978 through March 26, 1978; no award of compensation for permanent partial disability was recommended.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from March 13, 1978 through March 26, 1978. This compensation is in addition to any previous compensation awarded claimant as a result of his June 26, 1976 industrial injury.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of June 5, 1979.

SAIF CLAIM NO. PC 98035 September 28, 1979

ELSON PUTMAN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Moiton Determination

Claimant suffered a compensable injury to his lower back on September 29, 1967 while working for Crawford Logging. The claim was accepted and initially closed on May 20, 1968 with no award for permanent partial disability. On February 3, 1972 the claim was reopened and claimant had back surgery. On November 29, 1973 a Determination Order granted claimant 64° for 20% unscheduled low back disability. Claimant's aggravation rights have expired.

The claim was voluntarily reopened by the Fund to allow claimant to have a repeat laminectomy and spinal fusion on June 25, 1974. Claimant returned to work in January 1975 and the claim was closed, pursuant to ORS 656.278, by a Board's Own Motion Determination, dated July 5, 1975, which granted claimant an additional award of 20% for unscheduled low back disability.

Claimant's condition continued to worsen and on February 17, 1977 he was examined by Dr. Luce who performed a third laminectomy on February 24, 1977. The Fund had voluntarily reopened the claim for this surgery. Claimant's recovery was not successful and on March 14, 1978 a bilateral L4-5 laminectomy, foraminotomy and L4-5 left discectomy were performed by Dr. Dunn and Dr. Bolton did a one-level fusion. On June 25, 1974 Dr. Bolton had performed a two-level lumbar fusion.

Claimant's recovery was uneventful although he did have some periodic flare-ups with increased activity. He was able to return to his regular job on January 8, 1979 (at the time of his injury in 1967 claimant was working as a faller and bucker, however, as a result of the 1972 surgery, claimant, when he returned to work, worked regularly as a chip truck driver).

On June 21, 1979 claimant's treating physician felt claimant's condition was stationary and that the results of the surgery had been good and the fusion was well-healed. Claimant had little or no leg pain and was working full time. However, in the opinion of claimant's doctor, claimant would have difficulty in returning to gainful work if it were not for the fact that he was familiar with his work and with his employer.

A closing evaluation was requested and the Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from February 17, 1977 through January 7, 1979, less time worked, and temporary partial disability from January 8, 1979 through June 21, 1979. They recommended no additional award for permanent partial disability in excess of that previously granted.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from February 17, 1977 through January 7, 1979, less time worked and compensation for temporary partial disability from January 8, 1979 through June 21, 1979.

These awards are in addition to any previous awards claimant has received as a result of his September 29, 1969 industrial injury.

WCB CASE NO. 78-8695 September 28, 1979

DONALD L. RAYMER, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

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

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

ORDER

The order of the Referee, dated April 10, 1979, is affirmed.

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

Board Member McCallister dissents as follows:

I respectfully dissent from the majority opinion and find Dr. Kloster's opinion more persuasive.

The hospital admission records indicate claimant entered the hospital at 10 a.m. with acute chest pain; he gave the history of feeling well until two hours prior to admission. Subsequently, the hospital emzymes studies placed the occurence of the myocardial infarction sometime around 6 a.m.

Dr. Griswold based his opinion on the finding that claimant's work activity was of a substantial nature contributing to the development of the acute myocardial infarction.

Dr. Kloster felt that claimant's work activity on May 4, was not exertive enough nor stressful enough to cause a myocardial infarction, and I agree.

Dr. Kloster further felt that claimant had several high risk factors and that the myocardial infarction was the result of the natural progression of the claimant's underlying coronary artery disease which, in his opinion, would have occurred regardless of work activities.

The actual work activities claimant performed on May 4 were not particularly exertive or stressful and at the time of the occurence of the myocardial infarction claimant was not, in fact, even working. Therefore, Dr. Kloster's opinion carries the greatest weight in conjunction with the history leading up to the myocardial infarction in my opinion and I would reverse the order of the Referee.

WCB CASE NO. 77-3430 September 28, 1979

BERNETTA ROLL, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the order of the Referee which remanded claimant's claim for foot and ankle injuries of May 1, 1977, October 18, 1977 and January 19, 1978 to it for acceptance and the payment of medical bills and compensation and the payment to claimant's attorney of $900 as a reasonable attorney's fee.

Claimant was employed as a messenger of Waterway Terminals Company and on April 28, 1976 sustained a compensable injury to her back while loading bags of briquets into a truck. The claim was closed by a Determination Order of April 26, 1977 with an award of 48° for 15% unscheduled back disability.

Claimant experienced her first fall on May 1, 1977 as she was starting up the steps to her house and her left foot gave way and she injured her left ankle.

Dr. Keist reported to the Fund that he saw claimant on May 4 and she had moderate swelling of the left ankle and he placed her in a walking cast. Dr. Keist felt there was probably no connection between claimant's fall and her back condition, but he couldn't prove it or disprove it. He felt that based on claimant's history to him there was a relationship but based on objective findings there was none.

Claimant came under the care of Dr. Valley, a chiropractor who had treated her back condition on October 3, 1977.

Claimant experienced her second fall while walking to her car after a pool tournament and fell, injuring her right ankle.

Claimant was evaluated at the Disability Prevention Division on December 27, 1977 and Dr. Johnson, a psychologist, found her moderately emotionally disturbed. The Disability Prevention Division's diagnosis was strain, chronic lumbar muscles and ligaments superimposed on posterior sway back configuration with weak abdominal muscles and increased lumbar lordosis.

On January 18, 1978, again while walking to her car, claimant fell and broke her left ankle.

A report of Dr. Johnson, dated February 13, 1978, indicates that claimant did break her ankle while participating in the Disability Prevention Division program.

When Dr. Valley saw claimant on February 18 she had a heavy cast on her left foot. Dr. Valley felt claimant fell due to the weakness in her low back and some loss of feeling in the legs. He felt that both injuries to her left and right ankles were caused by this. His treatment was palliative only.

Dr. Van Osdel reported that claimant fractured her left ankle away from the Callahan Center and the injury was not industrially related.

In March 1978 claimant commenced schooling in accounting under the auspices of the Vocational Rehabilitation Division and she will complete the program in December 1979.

Dr. Valley testified at the hearing that the injuries of May 1977, October 1977 and January 1978 were caused by claimant's low back problem with pressure on the sciatic nerve.

The Referee found that the Fund paid no medical bills and issued no denial and, in fact, only denied at the hearing. The Referee indicated that prior to the industrial injury to claimant's back she had had no problems of her legs giving way and he concluded that the falls claimant has taken are compensably related to her low back condition. He remanded the claim for acceptance and payment of medical bills by the Fund.

The Board, on de novo review, finds no relationship of claimant's back condition and the giving way and falling that claimant has experienced, on the basis of failure of proof.

The Orthopaedic Consultants found muscle strength in the legs, thighs normal with no give way weakness; Dr. Keist found no relationship of the back condition to the falls; Dr. Van Osdel also found ankle fractures not industrially related. Only Dr. Valley gives the necessary causal relationship of claimant's back condition to her falls.

The Board further finds no claims for claimant's left and right foot were in evidence nor was there evidentiary proof of medical bills having been submitted to the Fund or medical verification of a causal relationship nor did the Fund deny until the hearing responsibility for these conditions.

The Board concludes claimant has failed to carry her burden of proving compensability for her ankle/foot conditions of May 1977, October 1977 and January 1978.

ORDER

The order of the Referee, dated February 8, 1979, is reversed.

The oral denial by the Fund is hereby upheld.

Chairman Wilson dissents as follows:

The Referee carefully analyzed and discussed the medical evidence and logically concluded that the injuries to claimant's foot and ankles are related to the industrial injury to the low back.

In my opinion, the order of the Referee should be affirmed and adopted by the Board. A copy of that Opinion and Order is attached hereto and made a part hereof.

WCB CASE NO. 78-4204 September 28, 1979

PHILLIP E. SCHIEFFELE, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which set aside its denial, dated January 4, 1979, of claimant's claim for aggravation and remanded said claim to it to be accepted and for the payment of compensation, as provided by law; directed it pay claimant a penalty equal to 25% of all compensation for temporary total disability accrued and unpaid on January 4, 1979, the date of the denial, and awarded claimant's attorney a fee of $1,000.

The issue before the Board is the compensability of claimant's claim for aggravation of an August 13, 1974 industrial injury.

Claimant, at the time of the hearing, was a 65-year-old unemployed iron worker. He had worked as an iron worker for 38 years until he suffered a compensable injury on August 13, 1974 when he fell from a truck which he was unloading and suffered multiple rib fractures on the right and a compression fracture at D-12.

Claimant's treating doctor for that injury was Dr. Eisendorf who, in his closing evaluation of claimant, diagnosed residuals from a compression fracture at D-12 and pre-existing dorsal lumbar spondylitis, extensive, with traumatic aggravation.

On December 3, 1975 a Determination Order closed the claim with an award of compensation equal to 80° for 25% unscheduled back disability. This was the date of the last award or arrangement of compensation.

In June 1975 claimant obtained a job as a tool checker and worked at this job until January 1977 when he was forced to quit when his symptoms had increased. Claimant has not worked since January 1977. Claimant has obtained his retirement pension and is on social security but contends that if it were not for his industrial injury he would still be working.

On March 7, 1977 letters and medical reports were sent to the Fund regarding claimant's condition. The Referee found that though the letters and medical reports were not always clearly worded, any doubt that the Fund might have had about whether claimant was filing a claim for aggravation was removed when it received a letter from claimant's attorney, dated June 2, 1978, which stated:

> "Therefore, and concurrently with this request, you are advised that a claim for aggrevation [sic] is hereby filed and that a request for hearing has also been filed."

The Fund still did not accept the claim and on January 4, 1979, seven months after this letter had been received, it denied the claim.

Dr. Eisendorf continued to treat claimant and, on March 2, 1977, stated that claimant had substantial pain at the fracture site. He felt the claim should be reopened for further treatment because claimant might have more degenerative change in the area and consideration should be given to revising his rating as he very likely had more permanent partial disability than was first believed.

On November 10, 1977 Dr. Eisendorf again wrote to the Fund and indicated that claimant's back symptoms were slowly but progressively giving him more difficulty. He stated that although his compression fracture had healed well, he thought that most of the symptoms claimant had were on the basis of progressive degenerative spondylitis in this area. He felt his condition was stationary and that no further treatment was contemplated.

On July 11, 1978 he said: " . . . patient has had intermittent dorsal lumbar back pain and mainly dorsal back pain and more recently the pain has become more severe and required Empl [sic] #3 for relief. This gives him partial but not adequate relief, and his symptoms have become worse. . . . It is hereby requested that his claim be re-opened for further treatment".

Finally, on December 18, 1978, Dr. Eisendorf again evaluated claimant's condition and stated that claimant had told him he had not worked since January 1977 although there was plenty of work available for him but he was physically unable to do such work because of his back disability.

On April 12, 1977 Dr. Harwood, medical consultant for the Fund, had reported that claimant's current problems were not related to his August 13, 1974 injury. He felt it was unlikely that a compression fracture would be giving claimant trouble two-and-a-half years after it had happened and more likely that the degenerative changes of the lumbar spine were growing progressively worse because of aging.

The Referee found that the evidence was clear that claimant's back condition had worsened since the last date of arrangement or award of compensation, but there was some uncertainty as to what caused the worsening. Dr. Eisendorf, as early as June 20, 1975, had diagnosed a residual traumatic spondylitis but since then his position changed from time to time. Some of his reports indicated the claimant's present condition was due to a progression of degenerative changes in claimant's spine and some state that it was due to the injury. The last report from Dr. Eisendorf indicated that it was due to the injury. The Referee found this to be consistent with the concept that the the trauma lit up an underlying condition that had not previously disabled claimant and was also compatible with the history of the accident.

The Referee concluded that the claimant's claim of aggravation which was supported by medical verification of his inability to work as a result of the worsened condition must be accepted by the Fund and compensation, as provided by law, paid therefor.

The next issue to be determined by the Referee was when should the first installment of compensation be paid claimant. ORS 656.273(6) requires that the first installment of compensation should be paid no later than the 14th day after the subject employer has notice or knowledge of the medically verified inability to work resulting from the worsened condition. The Referee found that Dr. Eisendorf gave the required medical verification in his letter to the Fund, dated December 18, 1978, and that the Fund denied the claim on January 4, 1979, 15 days later, without having paid claimant any compensation for temporary total disability.

The Referee stated he would give no consideration to a penalty for failure to pay compensation within 14 days of notice, because the offense was inconsequential in this particular claim. However, he did impose a penalty because the Fund failed to satisfactorily explain why it took more than half a year to deny claimant's claim of aggravation. The Referee was not sure whether Dr. Eisendorf's report of March 2, 1977, suggesting a claim reopening be considered as a claim for aggravation, or whether the claim was deemed perfected by the letter from claimant's attorney dated June 2, 1978 which the Fund received on June 6 was the date of the aggravation but it was neither accepted nor denied within 60 days as required by ORS 656.262(5) and a penalty for delay in denying the claim pursuant to 656.262(8) is appropriate if the delay was unreasonable.

The Referee concluded that claimant was entitled to a penalty based on all compensation for temporary total disability that had accrued and was unpaid at the date of the denial.

The Board, on de novo review, agrees that the denial by the Fund on January 4, 1979 of claimant's claim for aggravation should be set aside. However, it is the responsibility of the Referee to establish the date claimant's condition worsened. In this case, apparently, the Referee left it up to the parties involved to establish that date. He states that Dr. Eisendorf gave the proper medical verification in his letter dated December 18, 1978 and then later states that possibly Dr. Eisendorf's report of March 2, 1977 could be considered as a claim for aggravation or perhaps the letter written by claimant's attorney dated June 2, 1978.

He assessed the penalty which the Board agrees should have been assessed but he does not establish a commencement date for the payment of compensation. If the Referee does not have sufficient information to make a determination of the date of the aggravation, he must request the parties involved to supply him with such information.

In this case, the Board finds that the date of aggravation was established by Dr. Eisendorf's letter, dated July 11, 1978, and the Fund should have paid claimant compensation for temporary total disability from that date and until it actually denied claimant's claim for aggravation.

ORDER

The order of the Referee, dated February 20, 1979, is modified.

The denial issued by the State Accident Insurance Fund on January 4, 1979 of claimant's claim for aggravation is hereby set aside and the claim is remanded to the Fund for acceptance and for the payment of compensation, as provided by law, commencing on July 11, 1978, and until the claim is closed pursuant to the provisions of ORS 656.268.

The Fund shall pay claimant additional compensation equal to 25% of the compensation due and unpaid to claimant from July 11, 1978 to January 4, 1979.

In all other respects the Referee's order is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review $350 payable by the Fund.

WCB CASE NO. 79-7722 September 28, 1979

RICHARD A. WARE, CLAIMANT
Colley & Johnson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 21, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his request for an injury sustained on November 3, 1972 to his low back. Claimant's claim was initially closed on June 11, 1973 and his aggravation rights have expired. Claimant has been awarded, as of the present time, compensation equal to 55% unscheduled low back disability.

Attached to claimant's petition were several documents relating to the processing of his claim. A letter from Dr. Martens, dated August 7, 1979, indicated claimant had lost his job because of his back pain.

Claimant feels his present condition is either the result of his 1972 industrial injury, at which time the Fund was the carrier, or of a new injury and the responsibility of the present carrier, Employee Benefits Insurance Company.

Claimant has submitted a claim to EBI and a request for hearing is pending before the Hearings Division. Claimant desires to have determined who is responsible for his present condition; he believes he is entitled to continuing benefits.

The Board, on August 27, 1979, requested the claimant to furnish it with medical evidence commenting on his current condition and attempting to relate it to either the original injury or to his most recent one while employed by Jones Drilling Company, Inc. Subsequently, the Board received a report from Dr. Martens, dated September 4, 1979, indicating claimant had not mentioned to him that he had sustained a new injury, although claimant did note that he helps the women lift things at work. Dr. Martens felt claimant's current condition was attributable to his original injury sustained in 1972.

The Board, after thoroughly considering the evidence before it, concludes that it would be in the best interest of the parties to remand this matter to its Hearings Division for a determination of whether claimant has suffered a new injury or an aggravation of his 1972 industrial injury.

Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board. If he finds that claimant's present condition is the result of his 1972 injury and represents a worsening thereof he shall so recommend to the Board, and enter an order denying claimant's 1979 claim. Otherwise, he shall recommend to the Board that the request for own motion relief be denied and enter an Opinion and Order remanding claimant's new injury claim to the carrier for acceptance and payment of compensation.

WCB CASE NO. 78-6390 September 28, 1979

VERNON F. WEED, CLAIMANT
John W. Smallmon, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks review by the Board of the Referee's order which denied claimant's request of an award for permanent total disability and dismissed the matter.

The issue is compensability of claimant's claim for aggravation. Claimant's condition is medically stationary and the claim can be considered as a "dry aggravation".

At the time of the hearing claimant was a 55-year-old painter and drywall taper. He has an eighth grade education. On November 2, 1970 he suffered a compensable injury to his low back when he lifted a 5-gallon pail of water and slipped on a wet floor. The injury was diagnosed as "myositis-acute-strain lumbar spine" and "acute strain of the lumbo-sacral area". It was also thought that claimant might have a "chronic scoliosis" and "moderate degeneration of the lumbar spine".

Claimant did not require surgery but was treated conservatively and his claim was initially closed on August 14, 1972 by a Determination Order which awarded claimant compensation equal to 32° for 10% unscheduled low back disability.

On January 23, 1973 claimant was examined by Dr. Platner, an orthopedic surgeon practicing in Walla Walla, Washington, who requested that the claim be reopened so that he might perform a myelogram to determine if claimant needed surgery. His diagnosis was a ruptured lower lumbar intervertebral disc with nerve root irritation. He stated in his report that claimant was totally disabled and had been so for over two years or from the time of his accident, November 2, 1970. On April 26, 1973 a myelogram revealed a probable defect at the L4-5 level on the left. On July 9, 1973 Dr. Platner advised the carrier that he still felt claimant needed surgery but would like another opinion.

On July 20, 1973 Dr. Lahiri, a neurologist practicing in Richland, Washington, evaluated claimant. He concluded that claimant would be a very unsatisfactory candidate for surgery. Although claimant might be helped minimally with the pain in his low back from a lumbo-sacral fusion, Dr. Lahiri felt from his experience that such workers as claimant, rarely, if ever, go back to useful or gainful employment if they have no clear corroboration between the physical and investigative procedures and this is particularly so if there happens to be a certain amount of psychiatric overlay. His opinion was that claimant's physical condition was no different at the time of this examination than it was in April 1972 when he was discharged from the Disability Prevention Center (Callahan Center). Dr. Platner still insisted on surgery, however, a psychological report by Dr. Shafer, a clinical psychologist, and a consultation report from Dr. Grossenbacher indicated that because of claimant's previous psychiatric problems surgery should not be done.

On July 22, 1974 Dr. Platner reported that he no longer recommended surgical treatment but stated that claimant would not be able to return to his previous occupation or, as far as he knew, to any other type of work in which he had experience and therefore he is totally and permanently disabled.

On September 27, 1974 the Second Determination Order was issued whereby claimant was awarded 320° for 100% unscheduled low back disability. This award was in addition to the award previously granted claimant by the Determination Order, dated August 14, 1972.

Claimant continued to see Dr. Platner and also Dr. Lahiri. On November 27, 1978 Dr. Platner expressed his opinion that claimant was totally and permanently disabled, considering all of his problems, including his neck, entire back, pancreatitis, and upper extremity neuromuscular problem.

At the hearing claimant testified that his legs were worse now than they had been in September 1974; also, he stated that he fell down more than he had previously and that his arms were worse, e.g., they become numb and cause him to drop things. He said that his left arm hurt constantly and the right arm periodically. Claimant said that his legs gave way because of weakness and that this had started "years ago". Both claimant and his wife testified that he was unable to work in 1974 and cannot work now.

The Referee found no issue of outstanding unpaid medical bills, nor the need for additional medical care. The only matter to be determined was whether claimant was entitled to an award for permanent total disability. Claimant claims that his symptomatology was worse than it was in 1974 when his claim was last closed. The employer and its carrier argue that unscheduled disability awards are based on loss of earning capacity and there is no evidence that claimant's earning capacity has changed since September 1974, the date of his last award and arrangement of compensation.

On July 7, 1978 the carrier denied responsibility for claimant's aggravation claim, stating there was not sufficient medical evidence to show that his condition had worsened since the Determination Order dated September 27, 1974.

The Referee found that Dr. Platner, on February 13, 1973, had reported that claimant was totally disabled and had been since the injury sustained on November 2, 1970. Again on July 22, 1974 Dr. Platner reported claimant was unable to do any type of work and finally on November 27, 1978 he stated claimant was permanently and totally disabled, considering all of his problems which he enumerate in his report.

Dr. Lahiri, a neurologist, expressed his opinion on July 23, 1978 that claimant's condition at the time he examined him was pretty much the same as it was in 1970. On February 27, 1979 Dr. Platner stated that claimant's employability had not changed since September 1974, "because he was totally and permanently disabled at that time".

The Referee, after considering all the evidence, concluded that claimant's loss of earning capacity had not changed since the Determination Order of September 27, 1974, therefore, the denial of claimant's claim of aggravation was proper.

The Board, on de novo review, agrees with the conclusion reached by the Referee that the denial by the carrier on July 7, 1978 was a proper denial, but does not base its conclusion on the evidence that there has been no change in claimant's wage earning capacity.

The Board finds that claimant is not entitled to an award for permanent total disability based upon the medical evidence in the record. Dr. Platner has consistently stated that claimant is permanently and totally disabled, however, his statements include his opinion that claimant has been permanently and totally disabled since November 2, 1970. It is difficult to reconcile Dr. Platner's statements with a finding that claimant's condition is worse now than it was on September 27, 1974 when he was awarded 100% unscheduled low back disability.

All of the doctors who have examined and/or treated claimant both before September 27, 1974 and after that date have concluded that there has been no change in his condition.

ORDER

The order of the Referee, dated March 16, 1979, is affirmed.

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